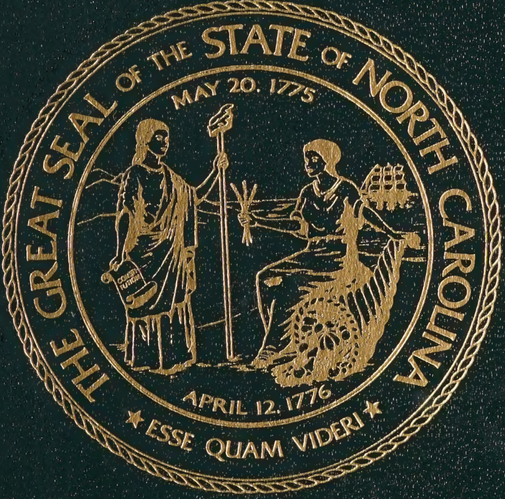
GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED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GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED

Volume 11

Chapters 87 Through 96

Prepared Under the Supervision of
The Department of Justice
of the State of North Carolina
by
The Editorial Staff of the Publisher

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Preface

This volume contains the general laws of a permanent nature enacted by the General Assembly through the 2007 Regular Session and 1^{st} Extra Session that are within Chapters 87 through 96, and brings to date the annotations included therein.

A majority of the Session Laws are made effective upon becoming law, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 60 days after the adjournment of the session" in which passed.

A ready reference index is included at the back of this volume. This index is intended to give the user a quick reference to larger bodies of statutes within this volume only. For detailed research on any subject, both within this volume and the General Statutes as a whole, see the General Index to the General Statutes.

Beginning with formal opinions issued by the North Carolina Attorney General on July 1, 1969, selected opinions which construe a specific statute are cited in the annotations to that statute. For a copy of an opinion or of its headnotes, write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

This recompiled volume has been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any suggestions they may have for improving the General Statutes to the Department, or to LexisNexis, Charlottesville, Virginia.

Roy Cooper
Attorney General

Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 2007 Regular Session and 1st Extra Session affecting Chapters 87 through 96 of the General Statutes.

Annotations:

This publication contains annotations taken from decisions of the North Carolina Supreme Court, decisions of the North Carolina Court of Appeals, and decisions of the appropriate federal courts posted through September 21, 2007. These cases will be printed in the following reporters:

South Eastern Reporter 2nd Series.
Federal Reporter 3rd Series.
Federal Supplement 2nd Series.
Federal Rules Decisions.
Bankruptcy Reports.
Supreme Court Reporter.

Additionally, annotations have been taken from the following sources:

North Carolina Law Review.
Wake Forest Law Review.
Campbell Law Review.
Duke Law Journal.
North Carolina Central Law Journal.
Opinions of the Attorney General.

User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included in Volume 1. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See Volume 1 for the complete User's Guide.

Abbreviations

(The abbreviations below are those found in the General Statutes that refer to prior codes.)

P.R.	Potter's Revisal (1821, 1827)
R.S.	Revised Statutes (1837)
R.C.	Revised Code (1854)
C.C.P.	Code of Civil Procedure (1868)
Code	Code (1883)
Rev.	Revisal of 1905
C.S.	Consolidated Statutes (1919, 1924)

STATE OF NORTH CAROLINA

Department of Justice

Raleigh, North Carolina

December 2007

I, Roy Cooper, Attorney General of North Carolina, do hereby certify that the foregoing 2007 Replacement Code to the General Statutes of North Carolina was prepared and published by LexisNexis under the supervision of the Department of Justice of the State of North Carolina.

Roy Cooper

Attorney General of North Carolina

Table of Contents

For complete listing of chapters set out in the North Carolina General Statutes, see the Table of Contents included in Volume 1.

VOLUME 11

- Chapter 87. Contractors, G.S. 87-1 to 87-114
  - Art. 1. General Contractors, G.S. 87-1 to 87-15.4
  - Art. 1A. Homeowners Recovery Fund, G.S. 87-15.5 to 87-15.9
  - Art. 2. Plumbing and Heating Contractors, G.S. 87-16 to 87-27.1
  - Art. 3. Tile Contractors [Repealed.]
  - Art. 4. Electrical Contractors, G.S. 87-39 to 87-51
  - Art. 5. Refrigeration Contractors, G.S. 87-52 to 87-64.1
  - Art. 6. Water Well Contractors [Repealed.]
  - Art. 7. North Carolina Well Construction Act, G.S. 87-83 to 87-98
  - Art. 7A. Well Contractors Certification, G.S. 87-98.1 to 87-99
  - Art. 8. Underground Damage Prevention, G.S. 87-100 to 87-114
- Chapter 88. Cosmetic Art [Repealed.]
- Chapter 88A. Electrolysis Practice Act, G.S. 88A-1 to 88A-23
- Chapter 88B. Cosmetic Art, G.S. 88B-1 to 88B-29
- Chapter 89. Engineering and Land Surveying [Recodified.]
- Chapter 89A. Landscape Architects, G.S. 89A-1 to 89A-8
- Chapter 89B. Foresters, G.S. 89B-1 to 89B-15
- Chapter 89C. Engineering and Land Surveying, G.S. 89C-1 to 89C-28
- Chapter 89D. Landscape Contractors, G.S. 89D-1 to 89D-10
- Chapter 89E. Geologists Licensing Act, G.S. 89E-1 to 89E-24
- Chapter 89F. North Carolina Soil Scientist Licensing Act, G.S. 89F-1 to 89F-25
- Chapter 90. Medicine and Allied Occupations, G.S. 90-1 to 90-701
  - Art. 1. Practice of Medicine, G.S. 90-1 to 90-21
  - Art. 1A. Treatment of Minors, G.S. 90-21.1 to 90-21.10
  - Art. 1B. Medical Malpractice Actions, G.S. 90-21.11 to 90-21.19
  - Art. 1C. Physicians and Hospital Reports, G.S. 90-21.20 to 91-21.21
  - Art. 1D. Peer Review, G.S. 90-21.22 to 90-21.23
  - Art. 1E. Certificate of Public Advantage, G.S. 90-21.24 to 90-21.40
  - Art. 1F. Psychotherapy Patient/Client Sexual Exploitation Act, G.S. 90-21.41 to 90-21.49
  - Art. 1G. Health Care Liability, G.S. 90-21.50 to 90-21.56
  - Art. 1H. Voluntary Arbitration of Negligent Health Care Claims, G.S. 90-21.60 to 90-21.69
  - Art. 2. Dentistry, G.S. 90-22 to 90-48.6
  - Art. 2A. Dental Peer Review Protection Act, G.S. 90-48.7 to 90-48.11
  - Art. 3. The Licensing of Mouth Hygienists to Teach and Practice Mouth Hygiene in Public Institutions [Repealed.]
  - Art. 4. Pharmacy [Repealed.]
  - Art. 4A. North Carolina Pharmacy Practice Act, G.S. 90-85.2 to 90-85.41
  - Art. 4B. Pharmacy Quality Assurance Protection Act, G.S. 90-85.45 to 90-85.47
  - Art. 5. North Carolina Controlled Substances Act, G.S. 90-86 to 90-113.8
  - Art. 5A. North Carolina Toxic Vapors Act, G.S. 90-113.8A to 90-113.19
  - Art. 5B. Drug Paraphernalia, G.S. 90-113.20 to 90-113.29
  - Art. 5C. North Carolina Substance Abuse Professional Practice Act, G.S. 90-113.30 to 90-113.47

Art. 5D. Control of Methamphetamine Precursors, G.S. 90-113.50 to 90-113.60
Art. 5E. North Carolina Controlled Substances Reporting System Act, G.S. 90-113.70 to 90-113.76
Art. 6. Optometry, G.S. 90-114 to 90-128
Art. 6A. Optometry Peer Review, G.S. 90-128.1 to 90-128.6
Art. 7. Osteopathy, G.S. 90-129 to 90-138
Art. 8. Chiropractic, G.S. 90-139 to 90-157.3
Art. 9. Nurse Practice Act [Recodified.]
Art. 9A. Nursing Practice Act, G.S. 90-171.19 to 90-171.49
Art. 9B. Information and Financial Assistance for Nursing Students and Inactive Nurses, G.S. 90-171.50 to 90-171.54
Art. 9C. Nurses Aides Registry Act, G.S. 90-171.55 to 90-171.59
Art. 9D. Nursing Scholars Program, G.S. 90-171.60 to 90-171.64
Art. 9E. Need-Based Nursing Scholarships, G.S. 90-171.65 to 90-171.69
Art. 9F. North Carolina Center for Nursing, G.S. 90-171.70 to 90-171.79
Art. 9G. Nurse Licensure Compact, G.S. 90-171.80 to 90-171.99
Art. 9H. Graduate Nurse Scholarship Program for Faculty Production, G.S. 90-171.100 to 90-171.101
Art. 10. Midwives [Repealed.]
Art. 10A. Practice of Midwifery, G.S. 90-178.1 to 90-178.7
Art. 11. Veterinarians, G.S. 90-179 to 90-187.15
Art. 12. Podiatrists [Recodified.]
Art. 12A. Podiatrists, G.S. 90-202.2 to 90-202.14
Art. 13. Embalmers and Funeral Directors [Recodified.]
Art. 13A. Practice of Funeral Service, G.S. 90-210.18 to 90-210.29B
Art. 13B. Funeral and Burial Trust Funds [Repealed.]
Art. 13C. Cremations [Recodified.]
Art. 13D. Preneed Funeral Funds, G.S. 90-210.60 to 90-210.79
Art. 13E. Mutual Burial Associations, G.S. 90-210.80 to 90-210.119
Art. 13F. Cremations, G.S. 90-210.120 to 90-210.135
Art. 14. Cadavers for Medical Schools [Repealed.]
Art. 14A. Bequest of Body or Part Thereof [Repealed.]
Art. 14B. Disposition of Unclaimed Bodies [Repealed.]
Art. 14C. Final Disposition or Transportation of Deceased Migrant Farm Workers and Their Dependents [Repealed.]
Art. 15. Autopsies [Repealed.]
Art. 15A. Uniform Anatomical Gift Act [Repealed.]
Art. 15B. Blood Banks, G.S. 90-220.12 to 90-220.14
Art. 16. Dental Hygiene Act, G.S. 90-221 to 90-233.1
Art. 17. Dispensing Opticians, G.S. 90-234 to 90-255.1
Art. 18. Physical Therapy [Recodified.]
Art. 18A. Psychology Practice Act, G.S. 90-270.1 to 90-270.23
Art. 18B. Physical Therapy, G.S. 90-270.24 to 90-270.44
Art. 18C. Marriage and Family Therapy Licensure, G.S. 90-270.45 to 90-270.64
Art. 18D. Occupational Therapy, G.S. 90-270.65 to 90-270.81
Art. 19. Sterilization Operations, G.S. 90-271 to 90-275
Art. 20. Nursing Home Administrator Act, G.S. 90-275.1 to 90-288.09
Art. 20A. Assisted Living Administrator Act, G.S. 90-288.10 to 90-288.20
Art. 21. Determination of Need for Medical Care Facilities [Repealed.]
Art. 22. Licensure Act for Speech and Language Pathologists and Audiologists, G.S. 90-292 to 90-319
Art. 23. Right to Natural Death; Brain Death, G.S. 90-320 to 90-328
Art. 24. Licensed Professional Counselors Act, G.S. 90-329 to 90-349
Art. 25. Dietetics/Nutrition, G.S. 90-350 to 90-379

Art. 26. Fee-Based Practicing Pastoral Counselors, G.S. 90-380 to 90-399
Art. 27. Referral Fees and Payment for Certain Solicitations Prohibited, G.S. 90-400 to 90-404
Art. 28. Self-Referrals by Health Care Providers, G.S. 90-405 to 90-409
Art. 29. Medical Records, G.S. 90-410 to 90-449
Art. 30. Practice of Acupuncture, G.S. 90-450 to 90-469
Art. 31. Institute of Medicine, G.S. 90-470 to 90-499
Art. 32. Employee Assistance Professionals, G.S. 90-500 to 90-514
Art. 33. Industrial Hygiene, G.S. 90-515 to 90-521
Art. 34. Athletic Trainers, G.S. 90-522 to 90-599
Art. 35. Accident-Trauma Victim Identification, G.S. 90-600 to 90-619
Art. 36. Massage and Bodywork Therapy Practice, G.S. 90-620 to 90-639
Art. 37. Health Care Practitioner Identification, G.S. 90-640 to 90-645
Art. 38. Respiratory Care Practice Act, G.S. 90-646 to 90-670
Art. 39. Safety Profession, G.S. 90-671 to 90-680
Art. 40. Perfusionist Licensure Act, G.S. 90-681 to 90-694
Art. 41. Pathology Services Billing, G.S. 90-701
Chapter 90A. Sanitarians and Water and Wastewater Treatment Facility Operators, G.S. 90A-1 to 90A-81
Art. 1. Sanitarians [Repealed.]
Art. 2. Certification of Water Treatment Facility Operators, G.S. 90A-20 to 90A-34
Art. 3. Certification of Water Pollution Control System Operators and Animal Waste Management System Operators, G.S. 90A-35 to 90A-49
Art. 4. Registrations of Sanitarians, G.S. 90A-50 to 90A-66
Art. 5. Certification of On-Site Wastewater Contractors and Inspectors, G.S. 90A-70 to 90A-81
Chapter 90B. Social Worker Certification and Licensure Act, G.S. 90B-1 to 90B-15
Chapter 90C. North Carolina Recreational Therapy Licensure Act, G.S. 90C-1 to 90C-19
Chapter 90D. Interpreters and Transliterators, G.S. 90D-1 to 90D-13
Chapter 91. Pawnbrokers [Repealed.]
Chapter 91A. Pawnbrokers Modernization Act of 1989, G.S. 91A-1 to 91A-14
Chapter 92. Photographers [Deleted.]
Chapter 93. Certified Public Accountants, G.S. 93-1 to 93-13
Chapter 93A. Real Estate License Law, G.S. 93A-1 to 93A-81
Art. 1. Real Estate Brokers and Salespersons, G.S. 93A-1 to 93A-15
Art. 2. Real Estate Recovery Fund, G.S. 93A-16 to 93A-31
Art. 3. Private Real Estate Schools, G.S. 93A-32 to 93A-38
Art. 4. Time Shares, G.S. 93A-39 to 93A-69
Art. 5. Real Estate Appraisers [Repealed.]
Chapter 93B. Occupational Licensing Boards, G.S. 93B-1 to 93B-16
Chapter 93C. Watchmakers [Repealed.]
Chapter 93D. North Carolina State Hearing Aid Dealers and Fitters Board, G.S. 93D-1 to 93D-16
Chapter 93E. North Carolina Appraisers Act, G.S. 93E-1-1 to 93E-1-14
Art. 1. Real Estate Appraiser, G.S. 93E-1-1 to 93E-1-14
Chapter 94. Apprenticeship, G.S. 94-1 to 94-11
Chapter 95. Department of Labor and Labor Regulations, G.S. 95-1 to 95-271
Art. 1. Department of Labor, G.S. 95-1 to 95-14
Art. 2. Maximum Working Hours [Recodified.]
Art. 2A. Wage and Hour Act, G.S. 95-25.1 to 95-25.25
Art. 3. Various Regulations, G.S. 95-26 to 95-31
Art. 4. Conciliation Service and Mediation of Labor Disputes, G.S. 95-32 to 95-36

Art. 4A. Voluntary Arbitration of Labor Disputes, G.S. 95-36.1 to 95-36.9
Art. 5. Regulation of Employment Agencies [Recodified.]
Art. 5A. Regulation of Private Personnel Services, G.S. 95-47.1 to 95-47.18
Art. 5B. Regulation of Job Listing Services, G.S. 95-47.19 to 95-47.32
Art. 6. Separate Toilets for Sexes [Repealed.]
Art. 7. Board of Boiler Rules and Bureau of Boiler Inspection [Repealed.]
Art. 7A. Uniform Boiler and Pressure Vessel Act, G.S. 95-69.8 to 95-69.20
Art. 8. Bureau of Labor for the Deaf [Repealed.]
Art. 9. Earnings of Employees in Interstate Commerce, G.S. 95-73 to 95-77
Art. 10. Declaration of Policy as to Labor Organizations, G.S. 95-78 to 95-84
Art. 11. Minimum Wage Act [Repealed.]
Art. 12. Units of Government and Labor Unions, Trade Unions, and Labor Organizations, and Public Employee Strikes, G.S. 95-97 to 95-100
Art. 13. Payments to or for Benefit of Labor Organizations, G.S. 95-101 to 95-104
Art. 14. Inspection Service Fees, G.S. 95-105 to 95-110
Art. 14A. Elevator Safety Act of North Carolina, G.S. 95-110.1 to 95-111
Art. 14B. Amusement Device Safety Act of North Carolina, G.S. 95-111.1 to 95-115
Art. 15. Passenger Tramway Safety, G.S. 95-116 to 95-125
Art. 16. Occupational Safety and Health Act of North Carolina, G.S. 95-126 to 95-160
Art. 17. The Uniform Wage Payment Law of North Carolina [Repealed.]
Art. 18. Identification of Toxic or Hazardous Substances, G.S. 95-173 to 95-221
Art. 19. Migrant Housing Act of North Carolina, G.S. 95-222 to 95-229.4
Art. 19A. Overhead High-Voltage Line Safety Act, G.S. 95-229.5 to 95-229.13
Art. 20. Controlled Substance Examination Regulation, G.S. 95-230 to 95-239
Art. 21. Retaliatory Employment Discrimination, G.S. 95-240 to 95-249
Art. 22. Safety and Health Programs and Committees, G.S. 95-250 to 95-259
Art. 23. Workplace Violence Prevention, G.S. 95-260 to 95-271
Chapter 96. Employment Security, G.S. 96-1 to 96-35
  Art. 1. Employment Security Commission, G.S. 96-1 to 96-7
  Art. 2. Unemployment Insurance Division, G.S. 96-8 to 96-19
  Art. 3. Employment Service Division, G.S. 96-20 to 96-29
  Art. 4. Job Training, Education, and Placement Information Management, G.S. 96-30 to 96-35

Chapter 87.

Contractors.

Article 1.

General Contractors.

Sec.
87-1. "General contractor" defined; exceptions.
87-1.1. Exception for licensees under Article 2 or 4.
87-1.2. Exception for specified Department of Transportation contractors.
87-2. Licensing Board; organization.
87-3. Members of Board to take oath.
87-4. First meeting of Board; officers; secretary-treasurer and assistants.
87-5. Seal of Board.
87-6. Meetings; notice; quorum.
87-7. Records of Board; disposition of funds.
87-8. Records; roster of licensed contractors; report to Governor.
87-9. Compliance with Federal Highway Act, etc.; contracts financed by federal road funds; contracts concerning water or waste water systems.
87-9.1. Ownership of real property; equipment; liability insurance.
87-10. Application for license; examination; certificate; renewal.
87-10.1. Licensing of nonresidents.
87-11. Revocation of license; charges of fraud, negligence, incompetency, etc.; hearing thereon; reissuance of certificate.
87-12. Certificate evidence of license.
87-13. Unauthorized practice of contracting; impersonating contractor; false certificate; giving false evidence to Board; penalties.
87-13.1. Board may seek injunctive relief.
87-14. Regulations as to issue of building permits.
87-15. Copy of Article included in specifications; bid not considered unless contractor licensed.
87-15.1. Reciprocity of licensing.
87-15.2. Public awareness program.
87-15.3. Identity of complaining party confidential.
87-15.4. Builder designations created.

Article 1A.

Homeowners Recovery Fund.

87-15.5. Definitions.
87-15.6. Homeowners Recovery Fund.
87-15.7. Fund administration.
87-15.8. Application for reimbursement.
87-15.9. Subrogation for reimbursement made.

Article 2.

Plumbing and Heating Contractors.

Sec.
87-16. Board of Examiners; appointment; term of office.
87-17. Removal, qualifications and compensation of members; allowance for expenses.
87-18. Organization meeting; officers; seal; rules; employment of personnel; acquire property.
87-19. Regular and special meetings; quorum.
87-20. Record of proceedings and register of applicants; reports.
87-21. Definitions; contractors licensed by Board; examination; posting license, etc.
87-22. License fee; expiration and renewal; reinstatement.
87-22.1. Examination fees; funds disbursed upon warrant of chairman and secretary-treasurer.
87-22.2. Licensing of nonresidents.
87-23. Revocation or suspension of license for cause.
87-24. Reissuance of revoked licenses; replacing lost or destroyed license.
87-25. Violations made misdemeanor; employees of licensees excepted.
87-25.1. Board may seek injunctive relief.
87-26. Corporations; partnerships; persons doing business under trade name.
87-27. License fees payable in advance; application of.
87-27.1. Public awareness program.

Article 3.

Tile Contractors.

87-28 through 87-38. [Repealed.]

Article 4.

Electrical Contractors.

87-39. Board of Examiners; appointment; terms; chairman; meetings; quorum; principal office; compensation; oath.
87-40. Secretary-treasurer.
87-41. Seal of Board.
87-41.1. Definitions.
87-42. Duties and powers of Board.
87-43. Electrical contracting defined; licenses.
87-43.1. Exceptions.
87-43.2. Issuance of license.
87-43.3. Classification of licenses.
87-43.4. Residential dwelling license.

Sec.
87-44. Fees; license term.
87-44.1. Continuing education courses required.
87-44.2. Licensing of nonresidents.
87-45. Funds.
87-46. Responsibility of licensee; nonliability of Board.
87-47. Penalties imposed by Board; enforcement procedures.
87-48. Penalty for violation of Article; powers of Board to enjoin violation.
87-49. No examination required of licensed contractors.
87-50. Reciprocity.
87-50.1. Public awareness program.
87-51. Severability of provisions.

Article 5.

Refrigeration Contractors.

87-52. State Board of Refrigeration Examiners; appointment; term of office.
87-53. Removal, qualifications and compensation of members; allowance for expenses.
87-54. Organization meeting; officers; seal; rules.
87-55. Regular and special meetings; quorum.
87-56. Record of proceedings and register of applicants; reports.
87-57. License required of persons, firms or corporations engaged in the refrigeration trade.
87-58. Definitions; contractors licensed by Board; examinations.
87-59. Revocation or suspension of license for cause.
87-60. Reissuance of revoked licenses; replacing lost or destroyed licenses.
87-61. Violations made misdemeanor; employees of licensees excepted.
87-61.1. Board may seek injunctive relief.
87-62. Only one person in partnership or corporation need have license.
87-63. License fees payable in advance; application of.
87-64. Examination and license fees; annual renewal.
87-64.1. Public awareness program.

Article 6.

Water Well Contractors.

87-65 through 87-82. [Repealed.]

Article 7.

North Carolina Well Construction Act.

87-83. Short title.
87-84. Findings and policy.
87-85. Definitions.
87-86. Scope.
Sec.
87-87. Authority to adopt rules, regulations, and procedures.
87-88. General standards and requirements.
87-89. Existing installations.
87-90. Rights of investigation, entry, access and inspection.
87-91. Notice of violation; remedial action order.
87-92. Hearings; appeals.
87-93. [Repealed.]
87-94. Civil penalties.
87-95. Injunctive relief.
87-96. Conflict with other laws.
87-97. (See Editor's note for effective date) Permitting, inspection, and testing of private drinking water wells.
87-98. Bernard Allen Memorial Emergency Drinking Water Fund.

Article 7A.

Well Contractors Certification.

87-98.1. Title.
87-98.2. Definitions.
87-98.3. Purpose.
87-98.4. Well contractor certification required; exemptions.
87-98.5. Types of certification; sole certification.
87-98.6. Well contractor qualifications and examination.
87-98.7. Issuance and renewal of certificates; temporary certification; refusal to issue a certificate.
87-98.8. Disciplinary actions.
87-98.9. Fees; Well Construction Fund.
87-98.10. Promotion of training.
87-98.11. Responsibilities of well contractors.
87-98.12. (Effective until September 1, 2010) Continuing education requirements; exemption.
87-98.12. (Effective September 1, 2010) Continuing education requirements.
87-98.13. Injunctive relief.
87-99. [Reserved.]

Article 8.

Underground Damage Prevention.

87-100. Short title.
87-101. Definitions.
87-102. Notice required prior to excavation.
87-103. Effect of permit on liability.
87-104. Requirements of person doing excavation.
87-105. Requirements of the person financially responsible for the excavation.
87-106. Exceptions.
87-107. Duties of the utility owners.
87-108. Absence of utility location.

Sec.
87-109. Recording requirements for associations.
87-110. Recording requirements for utility owners.
87-111. Recorded information filed with inspection departments.
87-112. Color-coding.
87-113. Notification required when damage done.
87-114. Homeowners.

Article 1.

General Contractors.

§ 87-1. "General contractor" defined; exceptions.

For the purpose of this Article any person or firm or corporation who for a fixed price, commission, fee, or wage, undertakes to bid upon or to construct or who undertakes to superintend or manage, on his own behalf or for any person, firm, or corporation that is not licensed as a general contractor pursuant to this Article, the construction of any building, highway, public utilities, grading or any improvement or structure where the cost of the undertaking is thirty thousand dollars ($30,000) or more, or undertakes to erect a North Carolina labeled manufactured modular building meeting the North Carolina State Building Code, shall be deemed to be a "general contractor" engaged in the business of general contracting in the State of North Carolina.

This section shall not apply to persons or firms or corporations furnishing or erecting industrial equipment, power plan equipment, radial brick chimneys, and monuments.

This section shall not apply to any person or firm or corporation who constructs or alters a building on land owned by that person, firm or corporation provided such building is intended solely for occupancy by that person and his family, firm, or corporation after completion; and provided further that, if such building is not occupied solely by such person and his family, firm, or corporation for at least 12 months following completion, it shall be presumed that the person, firm, or corporation did not intend such building solely for occupancy by that person and his family, firm, or corporation.

This section shall not apply to any person engaged in the business of farming who constructs or alters a building on land owned by that person and used in the business of farming, when such building is intended for use by that person after completion. (1925, c. 318, s. 1; 1931, c. 62, s. 1; 1937, c. 429, s. 1; 1949, c. 936; 1953, c. 810; 1971, c. 246, s. 1; 1975, c. 279, s. 1; 1981, c. 783, s. 1; 1989, c. 109, s. 1; c. 653, s. 1; 1991 (Reg. Sess., 1992), c. 840, s. 1.)

Local Modification. — New Hanover: 1983, c. 365.

Cross References. — As to Highway Fund and Highway Trust Fund Small Project Bidding, see G.S. 136-28.10.

Legal Periodicals. — For survey of 1981 property law, see 60 N.C.L. Rev. 1420 (1982).

For note discussing recovery by unlicensed general contractor in light of Brady v. Flughum, 309 N.C. 580, 308 S.E.2d 327 (1983), see 7 Campbell L. Rev. 199 (1984).

For comment, "Application of North Carolina's Contractor Licensing Statute to Parallel Prime Contractors," see 20 Wake Forest L. Rev. 717 (1984).

For survey of North Carolina construction law, see 21 Wake Forest L. Rev. 633 (1986).

For article, "North Carolina Construction Law Survey II," see 22 Wake Forest L. Rev. 481 (1987).

For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

CASE NOTES

I. General Consideration.
II. Unlicensed Contractors.
III. Subcontractors.

I. GENERAL CONSIDERATION.

Editor's Note. *— The cases below include those decided prior to the 1989 amendments to this section.*

The purpose of this Article is to protect the public from incompetent builders. Bryan Bldrs. Supply v. Midyette, 274 N.C. 264, 162 S.E.2d 507 (1968); Ar-Con Constr. Co. v. Anderson, 5 N.C. App. 12, 168 S.E.2d 18 (1969); Vogel v. Reed Supply Co., 277 N.C. 119, 177 S.E.2d 273 (1970); Holland v. Walden, 11 N.C. App. 281, 181 S.E.2d 197, cert. denied, 279 N.C. 349, 182 S.E.2d 581 (1971); Revis Sand & Stone, Inc. v. King, 49 N.C. App. 168, 270 S.E.2d 580 (1980); Barrett, Robert & Woods, Inc. v. Armi, 59 N.C. App. 134, 296 S.E.2d 10, cert. denied, 307 N.C. 269, 299 S.E.2d 214 (1982).

The express language of the licensing statute indicates that it is designed to insure competence within the construction industry. Brady v. Fulghum, 309 N.C. 580, 308 S.E.2d 327 (1983).

The purpose of this Article is to deter unlicensed persons from engaging in the construction business. Spears v. Walker, 75 N.C. App. 169, 330 S.E.2d 38 (1985).

Legislative Intent. — In enacting this Chapter, the legislature did not intend to authorize the recovery of amounts paid unlicensed contractors after the buildings in question had already been built, even though the contract would be unenforceable and illegal. Hawkins v. Holland, 97 N.C. App. 291, 388 S.E.2d 221 (1990).

Construction with G.S. 143-139.1. — G.S. 143-139.1 and 87-1, when read together, evidence an intent to exempt a general contractor who erects modular buildings from having a license if the surety bond requirement is met. Petty v. Owen, 140 N.C. App. 494, 537 S.E.2d 216 (2000).

The importance of deterring unlicensed persons from engaging in the construction business outweighs any harshness between the parties and precludes consideration for unjust enrichment. Ar-Con Constr. Co. v. Anderson, 5 N.C. App. 12, 168 S.E.2d 18 (1969).

For interpretation of this section, see Duke Univ. v. American Arbitration Ass'n, 64 N.C. App. 75, 306 S.E.2d 584, cert. denied, 309 N.C. 819, 310 S.E.2d 349 (1983).

Applicability of this Article is determined by the cost of the undertaking and not by the amount of any separate progress payment required by the contract. Ar-Con Constr. Co. v. Anderson, 5 N.C. App. 12, 168 S.E.2d 18 (1969).

A contractor is a general contractor if the cost of the undertaking exceeds the statutory limit. The cost of the undertaking is determinative. Fulton v. Rice, 12 N.C. App. 669, 184 S.E.2d 421 (1971); Phillips v. Parton, 59 N.C. App. 179, 296 S.E.2d 317 (1982), aff'd, 307 N.C. 694, 300 S.E.2d 387 (1983).

The cost of a building, which is usually the contract price, as opposed to the total completed cost, determines whether the $30,000 limit of this section has been violated and thus whether the contractor must be licensed. Revis Sand & Stone, Inc. v. King, 49 N.C. App. 168, 270 S.E.2d 580 (1980).

A person is a general contractor if the cost of the undertaking exceeds the statutory limit. Spears v. Walker, 75 N.C. App. 169, 330 S.E.2d 38 (1985).

A contractor engages in construction when he undertakes to build an entire building or improve an already existing building. Reliable Properties, Inc. v. McAllister, 77 N.C. App. 783, 336 S.E.2d 108 (1985), cert. denied, 316 N.C. 379, 342 S.E.2d 897 (1986).

Cost of Undertaking Is Contract Price. — In determining whether a contractor who undertakes to build a house is a "general contractor" the term "cost of undertaking" is construed as the contractor's contract price, not the total cost of the building. Fulton v. Rice, 12 N.C. App. 669, 184 S.E.2d 421 (1971); Revis Sand & Stone, Inc. v. King, 49 N.C. App. 168, 270 S.E.2d 580 (1980).

It is the cost of the undertaking by the purported contractor that controls. The contract price, or cost of the contractor's undertaking is not always the same as the total cost of the building. The owner's total cost of the building is not determinative of the contractor's status. Hickory Furn. Mart, Inc. v. Burns, 31 N.C. App. 626, 230 S.E.2d 609 (1976).

Cost of Undertaking Where Contractor Controls Purchases. — Builder, although not licensed as a general contractor, met the threshold criteria of this section, in that he exercised a substantial degree of control by his supervision of construction, his purchase of material, and his selection of material suppliers. And where his purchase of materials alone totalled over $29,000.00, and the fee for his services and supervision was $16,785.57, the threshold amount of $30,000 was well exceeded. Spears v. Walker, 75 N.C. App. 169, 330 S.E.2d 38 (1985), upholding summary judgment in defendants' favor on grounds that plaintiff was barred from recovery as a matter of law.

Common-law definition of a general contractor is irrelevant in deciding the question of whether a license is required. Florence Concrete Prods., Inc. v. North Carolina Licensing Bd., 113 N.C. App. 270, 437 S.E.2d 877 (1994), rev'd on other grounds, 341 N.C. 134, 459 S.E.2d 201 (1995).

Control Is Principal Distinguishing Characteristic Between Contractor and Subcontractor. — The principal characteristic distinguishing a general contractor from subcontractor or other party contracting with the owner with respect to a portion of the project, or a mere employee, is the degree of control to be exercised by the contractor over the construction of the entire project. Mill-Power Supply Co. v. CVM Assocs., 85 N.C. App. 455, 355 S.E.2d 245 (1987).

Principal characteristic of a general contractor, as opposed to a subcontractor or mere employee, is the degree of control to be exercised by the contractor over the construction of the entire project. Roberts v. Heffner, 51 N.C. App. 646, 277 S.E.2d 446 (1981).

The general contractor may be distinguished from a subcontractor or employee by the degree of control that he or she exercises over the entire project. Phillips v. Parton, 59 N.C. App. 179, 296 S.E.2d 317 (1982), aff'd, 307 N.C. 694, 300 S.E.2d 387 (1983).

Where one contracts with a landowner to undertake the construction of a house for the landowner at an agreed price of $30,000 or more, he is a "general contractor" and subject to the provisions of the licensing statute. Hickory Furn. Mart, Inc. v. Burns, 31 N.C. App. 626, 230 S.E.2d 609 (1976).

Genuine Issue of Material Fact as to Degree of Control. — Although plaintiff constructed an improvement under this section, a genuine issue of material fact existed as to whether, following the "control test," plaintiff exercised such a degree of control over the entire renovation project as to make plaintiff a general contractor under this section, requiring plaintiff to be licensed in order to bring an action for breach of contract. Mill-Power Supply Co. v. CVM Assocs., 85 N.C. App. 455, 355 S.E.2d 245 (1987).

Contractor Must Be Licensed at Time of Contracting and During Construction. — This Article clearly contemplates that a contractor should be licensed at the time of contracting and during the construction period. Barrett, Robert & Woods, Inc. v. Armi, 59 N.C. App. 134, 296 S.E.2d 10, cert. denied, 307 N.C. 269, 299 S.E.2d 214 (1982).

License May Be Used to Reveal Who Is Liable for Negligence. — Substantial evidence supported the allegation, in plaintiffs' negligence suit, that the defendant was the general contractor for the construction of their house where both the company owner and the company manager testified that defendant's general contractor's license was used to build the house although other evidence showed that he was never present but that they did all the work. Allen v. Roberts Constr. Co., 138 N.C. App. 557, 532 S.E.2d 534, 2000 N.C. App. LEXIS 783 (2000).

Building for Another on Builder's Land. — In an action seeking specific performance or money damages under a building contract, the trial court's conclusions that the defendants were unlicensed general contractors who had contracted to construct a dwelling for plaintiffs for a price in excess of $30,000 supported its judgment that defendants were barred from affirmatively asserting their claims under the contract, and there was no merit to defendants' contention that they should not be so barred because they contracted to build the dwelling on their own property, since a builder, who is unable or unwilling to obtain a general contractor's license from the State of North Carolina, should not be allowed to thwart the plain intent of this section by the artifice of contracting to build a residence for another on the builder's land. Roberts v. Heffner, 51 N.C. App. 646, 277 S.E.2d 446 (1981).

Grading. — Construed in the context of the language of this section and G.S. 87-10, the word "grading" connotes an activity which is a part of, or preparatory for, work properly termed "building and construction." C.C. Walker Grading & Hauling, Inc. v. S.R.F. Mgt. Corp., 311 N.C. 170, 316 S.E.2d 298 (1984).

"Improvement". — The term "improvement," as used in this section, connotes the performance of construction work and presupposes the prior existence of some structure to be improved. Vogel v. Reed Supply Co., 277 N.C. 119, 177 S.E.2d 273 (1970); C.C. Walker Grading & Hauling, Inc. v. S.R.F. Mgt. Corp., 311 N.C. 170, 316 S.E.2d 298 (1984); Daye v. Roberts, 89 N.C. App. 344, 365 S.E.2d 660 (1988).

As used with reference to land, the word "improvement" in this section presupposes the prior existence of the land itself. Vogel v. Reed Supply Co., 277 N.C. 119, 177 S.E.2d 273 (1970).

Adding Roof Constitutes "Improvement". — Plaintiff undertook to construct an "improvement" under this section by adding a roof over an existing structure. Mill-Power Supply Co. v. CVM Assocs., 85 N.C. App. 455, 355 S.E.2d 245 (1987).

Plaintiff's work on defendants' home, which had been damaged by fire, constituted an "improvement" under this section. Thus, plaintiff was a "general contractor," as defined by this section, and was required to be licensed by the North Carolina Licensing Board for General Contractors. Daye v. Roberts, 89

N.C. App. 344, 365 S.E.2d 660 (1988).

"Building" and "Structure". — The words "building" and "structure" in this section are synonymous. They agree in meaning but differ slightly in application. "Structure" retains more frequently than the other the sense of something constructed, often in a particular way. Vogel v. Reed Supply Co., 277 N.C. 119, 177 S.E.2d 273 (1970).

The words "building" and "structure" are strictly construed in context with the remainder of this section, and they do not embrace parts or segments of a building or structure. They exclude any meaning the legislature could have conveyed simply by adding the words "or any part thereof" following the word "structure." Vogel v. Reed Supply Co., 277 N.C. 119, 177 S.E.2d 273 (1970).

A building is defined as "an edifice . . . a structure"; and a structure is defined as "that which is built or constructed; an edifice or building of any kind." Vogel v. Reed Supply Co., 277 N.C. 119, 177 S.E.2d 273 (1970).

Customer May Not Waive Requirements of Statute. — The general contractors licensing statute does not authorize a person with whom an unlicensed contractor deals to waive the requirements of the statute, nor does it grant the unlicensed contractor immunity merely because he advises the customer that he is acting in violation of the statute. Ar-Con Constr. Co. v. Anderson, 5 N.C. App. 12, 168 S.E.2d 18 (1969).

The licensing statutes should not be used as a shield to avoid a just obligation owed to an innocent party. The courts will not impose penalties for the failure to comply with licensing requirements in addition to those specifically set out in the statute. Zickgraf Enters., Inc. v. Yonce, 63 N.C. App. 166, 303 S.E.2d 852 (1983).

Unregulated Parties to Illegal Contract May Enforce It. — Others not regulated by the licensing statutes passed for their protection do not act illegally in becoming parties to a contract illegally entered into by an unlicensed contractor. The policy underlying the licensing statutes would not be served by preventing enforcement by those for whose protection the statutes were passed. These parties may enforce the contract against the unlicensed contractor. Brady v. Fulghum, 309 N.C. 580, 308 S.E.2d 327 (1983).

Applied in R.B. Brunemann & Sons v. Duke Univ., 533 F. Supp. 365 (M.D.N.C. 1982); Key v. Floyd, 55 N.C. App. 467, 285 S.E.2d 864 (1982); Coats v. Jones, 309 N.C. 815, 309 S.E.2d 253 (1983); Harrell v. Clarke, 72 N.C. App. 516, 325 S.E.2d 33 (1985).

Cited in Hudspeth v. Bunzey, 35 N.C. App. 231, 241 S.E.2d 119 (1978); Turner v. Nicholson Properties, Inc., 80 N.C. App. 208, 341 S.E.2d 42 (1986); Dellinger v. Michal, 92 N.C. App. 744, 375 S.E.2d 698 (1989); Currin & Currin Constr., Inc. v. Lingerfelt, 158 N.C. App. 711, 582 S.E.2d 321 (2003).

II. UNLICENSED CONTRACTORS.

Licensure Is Prerequisite to Recovery from Owner. — In North Carolina, a person who contracts to construct a building or structure costing $30,000.00 or more, pursuant to this Chapter, must be licensed to recover from the owner for breach of contract or on the theory of quantum meruit. Mill-Power Supply Co. v. CVM Assocs., 85 N.C. App. 455, 355 S.E.2d 245 (1987).

Plaintiffs's claim for tortious interference with contract could not be maintained where, while there was no question that a contract for the construction of a hotel was signed by the plaintiff and defendant, at the time of the signing of the contract plaintiff was not a contractor licensed by the State of North Carolina, as required by this section, and the contract was, therefore, not valid. RCDI Constr. v. Spaceplan/Architecture, Planning & Interiors, P.A., 148 F. Supp. 2d 607 (W.D.N.C. 2001).

Denial of Recovery Effectuates Statutory Purpose. — Public policy considerations militate against permitting unlicensed general construction contractors to enforce their contracts. Denying the contractor the right to enforce his contract effectuates the statutory purpose and legislative intent of providing the public with optimum protection. Brady v. Fulghum, 309 N.C. 580, 308 S.E.2d 327 (1983).

Unlicensed Person May Not Recover for Owner's Breach of Contract. — When, in disregard of this Article, an unlicensed person contracts with an owner to erect a building costing more than the minimum sum specified in this section, he may not recover for the owner's breach of that contract. Bryan Bldrs. Supply v. Midyette, 274 N.C. 264, 162 S.E.2d 507 (1968); Vogel v. Reed Supply Co., 277 N.C. 119, 177 S.E.2d 273 (1970).

The general rule is that when an unlicensed person contracts with an owner to construct a building costing more than the minimum sum specified in the statute, he may not recover for the owner's breach of that contract. Coats v. Jones, 63 N.C. App. 151, 303 S.E.2d 655, aff'd, 309 N.C. 815, 309 S.E.2d 253 (1983).

When, in disregard of this protective statute, an unlicensed person contracts with an owner to erect a building costing more than the minimum sum specified in the statute, he may not recover for the owner's breach of that contract. This is true even though the statute does not expressly forbid such suits. Ar-Con Constr. Co. v. Anderson, 5 N.C. App. 12, 168 S.E.2d 18 (1969); Revis Sand & Stone, Inc. v. King, 49 N.C. App. 168, 270 S.E.2d 580 (1980).

The same rule which prevents an unlicensed person from recovering damages for the breach of a construction contract has generally been held also to deny recovery where the cause of action is based on quantum meruit or unjust enrichment. To deny an unlicensed person the right to recover damages for breach of the contract, which it was unlawful for him to make, but to allow him to recover the value of work and services furnished under that contract would defeat the legislative purpose of protecting the public from incompetent contractors. The importance of deterring unlicensed persons from engaging in the construction business outweighs any harshness between the parties and precludes consideration for unjust enrichment. Revis Sand & Stone, Inc. v. King, 49 N.C. App. 168, 270 S.E.2d 580 (1980).

An unlicensed person who, in disregard of this section, contracts with another to construct a building for the cost of $30,000 or more, may not affirmatively enforce the contract or recover for his services and materials supplied under the theory of quantum meruit or unjust enrichment. Roberts v. Heffner, 51 N.C. App. 646, 277 S.E.2d 446 (1981).

When an unlicensed person contracts with an owner to erect a building costing more than the minimum sum specified in this section, he may not recover for the owner's breach of the contract, nor may he recover the value of the work and services furnished under the contract on the theory of quantum meruit or unjust enrichment. Ar-Con Constr. Co. v. Anderson, 5 N.C. App. 12, 168 S.E.2d 18 (1969).

To deny any unlicensed person the right to recover damages for breach of the contract, which it was unlawful for him to make, but to allow him to recover the value of work and services furnished under that contract would defeat the legislative purpose of protecting the public from incompetent contractors. Ar-Con Constr. Co. v. Anderson, 5 N.C. App. 12, 168 S.E.2d 18 (1969).

One who violates the licensing requirements for general contractors may not recover on the contract nor may he recover under theories of quantum meruit or unjust enrichment. This policy, although a stringent one, has been considered imperative in light of the statutory purpose of this section to protect the public by deterring unlicensed persons from engaging in the construction business. Brady v. Fulghum, 62 N.C. App. 99, 302 S.E.2d 4, modified and aff'd, 309 N.C. 580, 308 S.E.2d 327 (1983).

Although the statute does not expressly preclude an unlicensed contractor's suit against an owner for breach of contract, the contractor may not recover on the contract or in quantum meruit when he has ignored the protective statute. Brady v. Fulghum, 309 N.C. 580, 308 S.E.2d 327 (1983).

There can be no substantial compliance with the licensing statutes, where an unlicensed contractor has illegally entered into a contract. Neither may the contractor recover for extras, additions or changes made during construction commenced pursuant to the contract. Such a contract is not, however, void. Brady v. Fulghum, 309 N.C. 580, 308 S.E.2d 327 (1983).

Unlicensed contractor may not maintain a counterclaim arising out of a construction contract in the owner's action against the contractor and his wife to recover the balance due on a promissory note which does not relate to the construction contract between the owners and the contractor. To allow an unlicensed contractor to maintain such a counterclaim would violate the public policy manifest in this section. Brock v. Day, 60 N.C. App. 266, 298 S.E.2d 745, cert. denied, 308 N.C. 190, 302 S.E.2d 242 (1983).

Doctrine of Substantial Compliance Is Rejected. — In recognition of the essential illegality of an unlicensed contractor's entering into a construction contract for which a license is required and in order to give full effect to the legislative intent to furnish protection to the public by strict licensing requirements, the Supreme Court of North Carolina rejects the doctrine of substantial compliance, cognizant that harsh consequences may sometimes fall on those who do contracting work without a license. Brady v. Fulghum, 309 N.C. 580, 308 S.E.2d 327 (1983).

Advising Customer of Violation Does Not Immunize Contractor. — The general contractors licensing statute does not grant the unlicensed contractor immunity merely because he advises the customer that he is acting in violation of the statute. Ar-Con Constr. Co. v. Anderson, 5 N.C. App. 12, 168 S.E.2d 18 (1969).

Expiration of License During Construction. — If a licensed contractor's license expires, for whatever reason, during construction, he may recover for only the work performed while he was duly licensed. If, in that situation, the contractor renews his license during construction, he may recover for work performed before expiration and after renewal. If, by virtue of these rules, harsh results fall upon unlicensed contractors who violate the statutes, the contractors themselves bear both the responsibility and the blame. Brady v. Fulghum, 309 N.C. 580, 308 S.E.2d 327 (1983).

Subsequent Procurement of License Does Not Validate Contract. — The existence of a license at the time the contract is signed is determinative and great weight is attached to the significant moment of the entrance of the parties into the relationship. Accordingly, a contract illegally entered into by an unlicensed general construction contractor is unenforceable by the contractor. It cannot be validated by the contractor's subsequent procurement of a license. Brady v. Fulghum, 309 N.C. 580, 308 S.E.2d 327 (1983).

Supervision of unlicensed contractor by licensed contractor does not constitute compliance with licensing requirements of this section. Sager v. W.M.C., Inc., 64 N.C. App. 546, 307 S.E.2d 585 (1983).

Recovery on Quantum Meruit Precluded. — The same rule which prevented an unlicensed contractor from recovering for breach of a construction contract also denied its recovery on the theory of quantum meruit. Joe Newton, Inc. v. Tull, 75 N.C. App. 325, 330 S.E.2d 664 (1985).

Where plaintiff engaged in renovation including the installation of new roofing, correction of dry rot, installation of new storm doors and windows, and the complete renovation of all apartment interiors, the renovation improved already existing buildings and constituted construction within the meaning of this section. And as plaintiff undertook to "superintend or manage" this construction without complying with the licensing requirements of G.S. 87-10, plaintiff was not entitled to recover from defendant on the contract or in quantum meruit. Reliable Properties, Inc. v. McAllister, 77 N.C. App. 783, 336 S.E.2d 108 (1985), cert. denied, 316 N.C. 379, 342 S.E.2d 897 (1986).

An unlicensed general contractor may not recover on a contract or in quantum meruit in this State. Daye v. Roberts, 89 N.C. App. 344, 365 S.E.2d 660 (1988).

Supervision of Construction by Licensed Employee When General Contractor Is Unlicensed. — Where record showed that plaintiff, although he was not licensed, acted as a general contractor in contracting to build defendants' house, at a cost exceeding $30,000, the order refusing to enforce plaintiff's contract and dismissing its claim against defendants was properly entered, even though the construction contracted for was supervised by its employee, a licensed general contractor. Hanover Realty, Inc. v. Flickinger, 87 N.C. App. 674, 362 S.E.2d 173 (1987).

Persons found to be subcontractors are not required to be licensed, and may sue the general contractor for breach of contract. Mill-Power Supply Co. v. CVM Assocs., 85 N.C. App. 455, 355 S.E.2d 245 (1987).

Corporation could not enforce its contract on the basis of the individual license of its president and sole shareholder. Joe Newton, Inc. v. Tull, 75 N.C. App. 325, 330 S.E.2d 664 (1985).

Plaintiff's lack of a general contractor's license was not a basis for denying its claim against defendants for breach of contract for construction of golf course, and the trial court was correct in denying defendants' motion for a directed verdict on this ground. Spivey & Self, Inc. v. Highview Farms, Inc., 110 N.C. App. 719, 431 S.E.2d 535, cert. denied, 334 N.C. 623, 435 S.E.2d 342 (1993).

"Owner's Exemption" for Joint Venturer. — Where plaintiff was acting as a joint venturer, it fit under the "owner's exemption" and was not acting as a general contractor under this section, and therefore is not subject to licensing under the statute. Paving Equip., Inc. v. Lake Providence Properties, Inc., 168 Bankr. 864 (Bankr. W.D.N.C. 1993), aff'd, 168 Bankr. 876 (W.D.N.C. 1994), aff'd, 51 F.3d 267 (4th Cir. 1995).

Failure to comply with the licensing statute does not destroy a partner's equity interest in a joint venture in which his capital contribution takes the form of construction and other services. Paving Equip., Inc. v. Lake Providence Properties, Inc., 168 Bankr. 876 (W.D.N.C. 1994), aff'd, 51 F.3d 267 (4th Cir. 1995).

Licensing Requirement Waived for Modular Builder with Surety Bond. — A person or entity who undertakes to erect a modular home need not be licensed if he meets the surety bond requirements. Petty v. Owen, 140 N.C. App. 494, 537 S.E.2d 216 (2000).

III. SUBCONTRACTORS.

Subcontractors Not Required to Be Licensed. — The legislature, by the use of the words "building," "improvement," and "structure," in this section, did not intend to require subcontractors who undertake to furnish labor and materials in excess of $20,000 (now $45,000) to construct integral parts of a large building complex to be licensed as general contractors. Vogel v. Reed Supply Co., 277 N.C. 119, 177 S.E.2d 273 (1970).

It would serve no public policy intended by this Chapter to hold a subcontractor to be a general contractor within the purview of this section. If the legislature had intended to include subcontractors in the class required to be licensed, it would have specifically so provided. Vogel v. Reed Supply Co., 277 N.C. 119, 177 S.E.2d 273 (1970).

Where the public is protected by a State agency which has been delegated the authority to supervise the construction and maintenance of highways and highway bridges, the protection of the public does not require licensure of a subcontractor who contracts to perform a small portion of replacement bridge construction and whose work is closely supervised by the State agency. Florence Concrete Prods., Inc. v. North Carolina Licensing Bd., 341 N.C. 134, 459 S.E.2d 201 (1995).

Licensing statutes have no application to rights and liabilities of contractors and subcontractors inter se where the public interest is not involved. Vogel v. Reed Supply Co., 277 N.C. 119, 177 S.E.2d 273 (1970).

Subcontractor's Lien. — There is no injury to the public, as contemplated by the licensing statutes, which will arise from the enforcement of a lien by a subcontractor where the lien arises out of a valid contract between an unlicensed general contractor and a property owner. Zickgraf Enters., Inc. v. Yonce, 63 N.C. App. 166, 303 S.E.2d 852 (1983).

Subrogation of Subcontractor. — The inability of a general contractor, because of noncompliance with a licensing requirement, to recover on a contract with a property owner will not prevent a subcontractor as subrogee from recovery on the rights created by that same contract. Zickgraf Enters., Inc. v. Yonce, 63 N.C. App. 166, 303 S.E.2d 852 (1983).

OPINIONS OF ATTORNEY GENERAL

General Contractor's License Required to Install Roofing in Certain Circumstances. — See opinion of Attorney General to Mr. James M. Wells, Jr., State Licensing Board for Contractors, 41 N.C.A.G. 414 (1971).

Builder's Construction of Rental Units on Own Property and Leasing to General Public. — The exemption contained in this section allows an unlicensed builder to construct rental units on his own property and lease them to the general public without being licensed as a general contractor under this section. See opinion of Attorney General to Mr. Charles L. Moore, Gaston County Attorney, 55 N.C.A.G. 7 (1985).

§ 87-1.1. Exception for licensees under Article 2 or 4.

G.S. 87-1 shall not apply to a licensee under Article 2 or 4 of this Chapter of the General Statutes, G.S. 87-43 shall not apply to a licensee under Article 2 of this Chapter of the General Statutes, and G.S. 87-21(a)(5) shall not apply to a licensee under Article 4 of this Chapter of the General Statutes when the licensee is bidding and contracting directly with the owner of a public building project if: (i) a licensed general contractor performs all work that falls within the classifications in G.S. 87-10(b) and the State Licensing Board of General Contractor's rules; and (ii) the total amount of the general contracting work so classified does not exceed a percentage of the total bid price pursuant to rules established by the. Board; and (iii) a licensee with the appropriate license under Article 2 or Article 4 of this Chapter performs all work that falls within the classifications in Article 2 and Article 4 of this Chapter. (2003-231, s. 1; 2006-241, s. 2; 2006-259, s. 43; 2006-261, s. 3.)

Editor's Note. — Session Laws 2006-261, s. 3, effective August 27, 2006, made identical amendments to G.S. 87-1.1 as those made by 2006-241, s. 2, but was repealed by Session Laws 2006-259, s. 43, effective August 23, 2006.

Session Laws 2006-261, s. 6, is a severability clause.

Effect of Amendments. — Session Laws 2006-241, s. 2, effective August 13, 2006, rewrote the section.

§ 87-1.2. Exception for specified Department of Transportation contractors.

The letting of contracts for the types of projects specified in G.S. 136-28.14 shall not be subject to the licensing requirement of this Article. (2006-261, s. 2.)

Editor's Note. — Session Laws 2006-261, s. 7, made this section effective August 27, 2006.

Session Laws 2006-261, s. 6, is a severability clause.

§ 87-2. Licensing Board; organization.

There is created the State Licensing Board for General Contractors consisting of nine members appointed by the Governor for staggered five-year terms. Five of the members shall be general contractors, one member shall be a registered engineer who practices structural engineering, and three shall be public members. Of the general contractor members, one shall have as the larger part of his business the construction of highways; one shall have as the larger part of his business the construction of public utilities; one shall have as the larger part of his business the construction of buildings; and two shall have as a larger part of their businesses the construction of residences, one of whom shall be the holder of an unlimited general contractor's license. The public members shall have no ties with the construction industry and shall represent the interests of the public at large. Members shall serve until the expiration of their respective terms and until their successors are appointed and qualified. Vacancies occurring during a term shall be filled by appointment of the Governor for the remainder of the unexpired term. The Governor may remove any member of the Board for misconduct, incompetency, or neglect of duty. No Board member shall serve more than two complete consecutive terms. (1925, c. 318, s. 2; 1979, c. 713, s. 1; 1991, c. 124, s. 1.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For comment, "Application of North Carolina's Contractor Licensing Statute to Parallel Prime Contractors," see 20 Wake Forest L. Rev. 717 (1984).

§ 87-3. Members of Board to take oath.

Each member of the Board shall, before entering upon the discharge of the duties of his office, take and file with the Secretary of State an oath in writing to properly perform the duties of his office as a member of said Board and to uphold the Constitution of North Carolina and the Constitution of the United States. (1925, c. 318, s. 3.)

§ 87-4. First meeting of Board; officers; secretary-treasurer and assistants.

The said Board shall, within 30 days after its appointment by the Governor, meet in the City of Raleigh, at a time and place to be designated by the Governor, and organize by electing a chairman, a vice-chairman, and a secretary-treasurer, each to serve for one year. Said Board shall have power to make such bylaws, rules and regulations as it shall deem best, provided the same are not in conflict with the laws of North Carolina. The secretary-treasurer shall give bond in such sum as the Board shall determine, with such security as shall be approved by the Board, said bond to be conditioned for the faithful performance of the duties of his office and for the faithful accounting of all moneys and other property as shall come into his hands. The secretary-treasurer need not be a member of the Board, and the Board is hereby authorized to employ a full-time secretary-treasurer, and such other assistants and make such other expenditures as may be necessary to the proper carrying out of the provisions of this Article. Payment of compensation and reimbursement of expenses of board members shall be governed by G.S. 93B-5. (1925, c. 318, s. 4; 1941, c. 257, s. 4; 1947, c. 611; 1951, c. 453; 1979, c. 713, s. 6.)

CASE NOTES

Cited in Stephenson v. Bartlett, 358 N.C. 219, 595 S.E.2d 112 (2004).

§ 87-5. Seal of Board.

The Board shall adopt a seal for its own use. The seal shall have the words "North Carolina Licensing Board for General Contractors" and the secretary shall have charge, care and custody thereof. (1925, c. 318, s. 5; 1979, c. 713, s. 7.)

§ 87-6. Meetings; notice; quorum.

The Board shall meet twice each year, once in April and once in October, for the purpose of transacting such business as may properly come before it. At the April meeting in each year the Board shall elect officers. Special meetings may be held at such times as the Board may provide in the bylaws it shall adopt. Due notice of each meeting and the time and place thereof shall be given to each member in such manner as the bylaws may provide. Five members of the Board shall constitute a quorum. (1925, c. 318, s. 6; 1979, c. 713, s. 8.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 87-7. Records of Board; disposition of funds.

The secretary-treasurer shall keep a record of the proceedings of the said Board and shall receive and account for all moneys derived from the operation of this Article. Any funds remaining in the hands of the secretary-treasurer to the credit of the Board after the expenses of the Board for the current year have been paid shall be paid over to the Greater University of North Carolina for the use of the School of Engineering through the North Carolina Engineering Foundation. The Board has the right, however, to retain at least ten percent (10%) of the total expense it incurs for a year's operation to meet any emergency that may arise. As an expense of the Board, said Board is authorized to expend such funds as it deems necessary to provide retirement and disability compensation for its employees. (1925, c. 318, s. 7; 1953, c. 805, s. 1; 1959, c. 1184.)

§ 87-8. Records; roster of licensed contractors; report to Governor.

The secretary-treasurer shall keep a record of the proceedings of the Board and a register of all applicants for license showing for each the date of application, name, qualifications, place of business, place of residence, and whether license was granted or refused. The books and register of this Board shall be *prima facie* evidence of all matters recorded therein. A roster showing the names and places of business and of residence of all licensed general contractors shall be prepared by the secretary of the board during the month of March of each year; the roster shall be printed by the Board out of funds of the Board as provided in G.S. 87-7, with copies being made available to contractors and members of the public, at cost, upon request, or furnished without cost, as directed by the Board. On or before the last day of March of each year the Board shall submit to the Governor a report of its transactions for the preceding year, and shall file with the Secretary of State a copy of the report, together with a complete statement of the receipts and expenditures of the Board, attested by the affidavits of the chairman and the secretary, and a copy of the roster of licensed general contractors. (1925, c. 318, s. 8; 1937, c. 429, s. 2; 1985, c. 630, s. 1; 1993, c. 148, s. 1.)

Legal Periodicals. — For comment, "Application of North Carolina's Contractor Licensing Statute to Parallel Prime Contractors," see 20 Wake Forest L. Rev. 717 (1984).

CASE NOTES

One of the obvious purposes of requiring annual renewal of licenses is to enable the Licensing Board to maintain and publish the roster of currently licensed contractors as required by this section. Ar-Con Constr. Co. v. Anderson, 5 N.C. App. 12, 168 S.E.2d 18 (1969).

§ 87-9. Compliance with Federal Highway Act, etc.; contracts financed by federal road funds; contracts concerning water or waste water systems.

Nothing in this Article shall operate to prevent the Department of Transportation from complying with any act of Congress and any rules and regulations promulgated pursuant thereto for carrying out the provisions of the Federal Highway Act, or shall apply to any person, firm or corporation proposing to submit a bid or enter into contract for any work to be financed in whole or in part with federal aid road funds in such manner as will conflict with any act of Congress or any such rules and regulations promulgated pursuant thereto.

Neither shall anything in this Article prevent the State of North Carolina or any of its political subdivisions or their contractors from complying with any act of Congress and any rules and regulations promulgated pursuant thereto for carrying out the provisions of any federal program to assist in the planning, financing, or construction of drinking water or waste water processing, collection, and disposal systems and facilities. (1939, c. 230; 1971, c. 246, s. 2; 1973, c. 507, s. 5; 1977, c. 464, s. 34; 1989, c. 159.)

§ 87-9.1. Ownership of real property; equipment; liability insurance.

(a) The Board shall have the power to acquire, hold, rent, encumber, alienate, and otherwise deal with real property in the same manner as a private person or corporation, subject only to approval of the Governor and the Council of State as to the acquisition, rental, encumbering, leasing, and sale of real property. Collateral pledged by the Board for an encumbrance is limited to the assets, income, and revenues of the Board.

(b) The Board may purchase or rent equipment and supplies and purchase liability insurance or other insurance to cover the activities of the Board, its operations, or its employees. (1999-349, s. 1.)

§ 87-10. Application for license; examination; certificate; renewal.

(a) Anyone seeking to be licensed as a general contractor in this State shall file an application for an examination on a form provided by the Board, at least 30 days before any regular or special meeting of the Board. The Board may require the applicant to pay the Board or a provider contracted by the Board an examination fee not to exceed one hundred dollars ($100.00) and pay to the Board a license fee not to exceed one hundred twenty-five dollars ($125.00) if the application is for an unlimited license, one hundred dollars ($100.00) if the application is for an intermediate license, or seventy-five dollars ($75.00) if the application is for a limited license. The fees accompanying any application or examination shall be nonrefundable. The holder of an unlimited license shall be entitled to act as general contractor without restriction as to value of any single project; the holder of an intermediate license shall be entitled to act as general contractor for any single project with a value of up to one million dollars ($1,000,000); the holder of a limited license shall be entitled to act as general contractor for any single project with a value of up to five hundred thousand dollars ($500,000); and the license certificate shall be classified in accordance with this section. Before being entitled to an examination an applicant must show to the satisfaction of the Board from the application and proofs furnished that the applicant is possessed of a good character and is otherwise qualified as to competency, ability, integrity, and financial responsibility, and that the applicant has not committed or done any act, which, if committed or done by any licensed contractor would be grounds under the provisions hereinafter set forth for the suspension or revocation of contractor's license, or that the applicant has not committed or done any act involving dishonesty, fraud, or deceit, or that the applicant has never been refused a license as a general contractor nor had such license revoked, either in this State or in another state, for reasons that should preclude the granting of the license applied for, and that the applicant has never been convicted of a felony involving moral turpitude, relating to building or contracting, or involving embezzlement or misappropriation of funds or property entrusted to the applicant: Provided, no applicant shall be refused the right to an examination, except in accordance with the provisions of Chapter 150B of the General Statutes.

(b) The Board shall conduct an examination, either oral or written, of all applicants for license to ascertain, for the classification of license for which the applicant has applied: (i) the ability of the applicant to make a practical application of the applicant's knowledge of the profession of contracting; (ii) the qualifications of the applicant in reading plans and specifications, knowledge of relevant matters contained in the North Carolina State Building Code, knowledge of estimating costs, construction, ethics, and other similar matters pertaining to the contracting business; (iii) the knowledge of the applicant as to the responsibilities of a contractor to the public and of the requirements of the laws of the State of North Carolina relating to contractors, construction, and liens; and (iv) the applicant's knowledge of requirements of the Sedimentation Pollution Control Act of 1973, Article 4 of Chapter 113A of the General Statutes, and the rules adopted pursuant to that Article. If the results of the examination of the applicant shall be satisfactory to the Board, then the Board shall issue to the applicant a certificate to engage as a general contractor in the State of North Carolina, as provided in said certificate, which may be limited into five classifications as follows:

(1) Building contractor, which shall include private, public, commercial, industrial and residential buildings of all types.

(1a) Residential contractor, which shall include any general contractor constructing only residences which are required to conform to the residential building code adopted by the Building Code Council pursuant to G.S. 143-138.

(2) Highway contractor.

(3) Public utilities contractors, which shall include those whose operations are the performance of construction work on the following subclassifications of facilities:

  a. Water and sewer mains, water service lines, and house and building sewer lines as defined in the North Carolina State Building Code, and water storage tanks, lift stations, pumping stations, and appurtenances to water storage tanks, lift stations, and pumping stations.

  b. Water and wastewater treatment facilities and appurtenances thereto.

  c. Electrical power transmission facilities, and primary and secondary distribution facilities ahead of the point of delivery of electric service to the customer.

d. Public communication distribution facilities.

e. Natural gas and other petroleum products distribution facilities; provided the General Contractors Licensing Board may issue license to a public utilities contractor limited to any of the above subclassifications for which the general contractor qualifies.

(4) Specialty contractor, which shall include those whose operations as such are the performance of construction work requiring special skill and involving the use of specialized building trades or crafts, but which shall not include any operations now or hereafter under the jurisdiction, for the issuance of license, by any board or commission pursuant to the laws of the State of North Carolina.

(b1) Public utilities contractors constructing house and building sewer lines as provided in sub-subdivision a. of subdivision (3) of subsection (b) of this section shall, at the junction of the public sewer line and the house or building sewer line, install as an extension of the public sewer line a cleanout at or near the property line that terminates at or above the finished grade. Public utilities contractors constructing water service lines as provided in sub-subdivision a. of subdivision (3) of subsection (b) of this section shall terminate the water service lines at a valve, box, or meter at which the facilities from the building may be connected. Public utilities contractors constructing fire service mains for connection to fire sprinkler systems shall terminate those lines at a flange, cap, plug, or valve inside the building one foot above the finished floor. All fire service mains shall comply with the NFPA standards for fire service mains as incorporated into and made applicable by Volume V of the North Carolina Building Code.

(c) If an applicant is an individual, examination may be taken by his personal appearance for examination, or by the appearance for examination of one or more of his responsible managing employees, and if a copartnership or corporation, or any other combination or organization, by the examination of one or more of the responsible managing officers or members of the personnel of the applicant, and if the person so examined shall cease to be connected with the applicant, then in such event the license shall remain in full force and effect for a period of 90 days thereafter, and then be canceled, but the applicant shall then be entitled to a reexamination, all pursuant to the rules to be promulgated by the Board: Provided, that the holder of such license shall not bid on or undertake any additional contracts from the time such examined employee shall cease to be connected with the applicant until said applicant's license is reinstated as provided in this Article.

(d) Anyone failing to pass this examination may be reexamined at any regular meeting of the Board upon payment of an examination fee. Anyone requesting to take the examination a third or subsequent time shall submit a new application with the appropriate examination and license fees.

(e) A certificate of license shall expire on the thirty-first day of December following its issuance or renewal and shall become invalid 60 days from that date unless renewed, subject to the approval of the Board. Renewals may be effected any time during the month of January without reexamination, by the payment of a fee to the secretary of the Board. The fee shall not exceed one hundred twenty-five dollars ($125.00) for an unlimited license, one hundred dollars ($100.00) for an intermediate license, and seventy-five dollars ($75.00) for a limited license. No later than November 30 of each year, the Board shall mail written notice of the amount of the renewal fees for the upcoming year to the last address of record for each general contractor licensed pursuant to this Article. Renewal applications shall be accompanied by evidence of continued financial responsibility satisfactory to the Board. Renewal applications received by the Board after January shall be accompanied by a late payment of ten dollars ($10.00) for each month or part after January. After a lapse of two years no renewal shall be effected and the applicant shall fulfill all requirements of a new applicant as set forth in this section. (1925, c. 318, s. 9; 1931, c. 62, s. 2; 1937, c. 328; c. 429, s. 3; 1941, c. 257, s. 1; 1953, c. 805, s. 2; c. 1041, s. 3; 1971, c. 246, s. 3; 1973, c. 1036, ss. 1, 2; c. 1331, s. 3; 1975, c. 279, ss. 2, 3; 1979, c. 713, s. 2; 1981, c. 739, ss. 1, 2; 1985, c. 630, ss. 2, 3; 1989, c. 431; 1993, c. 112, ss. 1, 2; c. 553, s. 26; 1999-123, s. 1; 1999-379, s. 7; 1999-427, s. 1; 2001-140, s. 1; 2001-296, s. 1; 2005-381, ss. 1, 2, 3; 2006-241, s. 1; 2007-247, s. 3.)

Effect of Amendments. — Session Laws 2006-241, s. 1, effective August 13, 2006, substituted "90 days" for "30 days" near the middle of subsection (c).

Session Laws 2007-247, s. 3, effective October 1, 2007, in the fourth sentence of subsection (a), substituted "one million dollars ($1,000,000)" for "seven hundred thousand dollars ($700,000)" and substituted "five hundred thousand dollars ($500,000)" for "three hundred fifty thousand dollars ($350,000)."

Legal Periodicals. — For note discussing recovery by unlicensed general contractor in light of Brady v. Flughum, 309 N.C. 580, 308 S.E.2d 327 (1983), see 7 Campbell L. Rev. 199 (1984).

For comment, "Application of North Carolina's Contractor Licensing Statute to Parallel Prime Contractors," see 20 Wake Forest L. Rev. 717 (1984).

CASE NOTES

Editor's Note. — *Many of the cases below were decided prior to the 1989 amendment to this section.*

Legislative Intent As to Validity of License. — It is apparent that the legislature wished to allow a window of time beyond the expiration date of 31 December in which a contractor in the midst of construction could hold, renew, and retain a legally efficacious license with no legally recognizable hiatus in his status as "licensed contractor." Hall v. Simmons, 329 N.C. 779, 407 S.E.2d 816 (1991).

Distinction Between Expiration and Invalidity of License. — This section makes a purposeful distinction between a contractor whose license has expired and one whose license is invalid. The former is a statutory consequence: all contractors' licenses expire on 31 December of each year. The latter is a consequence of contractor inaction: if no attempt to renew is made within 60 days of expiration, the license is invalid, without legal effect. Hall v. Simmons, 329 N.C. 779, 407 S.E.2d 816 (1991).

Purpose. — One of the obvious purposes of requiring annual renewal of licenses is to enable the Licensing Board to maintain and publish the roster of currently licensed contractors as required by G.S. 87-8. Ar-Con Constr. Co. v. Anderson, 5 N.C. App. 12, 168 S.E.2d 18 (1969).

The purpose of this section is to protect the public from incompetent builders by forbidding them to maintain an action on their contracts, thereby discouraging them from undertaking projects beyond their capabilities. Hickory Furn. Mart, Inc. v. Burns, 31 N.C. App. 626, 230 S.E.2d 609 (1976).

By requiring this examination, the legislature seeks to guarantee skill, training and ability to accomplish such construction in a safe and workmanlike fashion. Brady v. Fulghum, 309 N.C. 580, 308 S.E.2d 327 (1983).

The purpose of this section, the North Carolina licensing statute, is to guarantee skill, training and ability to accomplish construction in a safe and workmanlike fashion. Reliable Properties, Inc. v. McAllister, 77 N.C. App. 783, 336 S.E.2d 108 (1985), cert. denied, 316 N.C. 379, 342 S.E.2d 897 (1986).

Allowing a contractor to offset any sums owed to a person by the amount equal to those services performed as an unlicensed contractor would run afoul of the clear statutory purpose to penalize contractors that fail to comply with the applicable licensing procedures. 301 E. Seventh St. Ltd. Partnership v. Gellman Corp., 124 Bankr. 687 (W.D.N.C. 1991).

Annual license renewal should be considered an important, and not merely a perfunctory, requirement in order to accomplish the protective public purpose of the statute. Ar-Con Constr. Co. v. Anderson, 5 N.C. App. 12, 168 S.E.2d 18 (1969).

Nature and Purpose of Annual Renewal Fees. — The annual renewal fees required by this section are in no way related to the license taxes required to be paid by contractors by the North Carolina Revenue Act. The renewal fees required by this section are not part of the State's revenues, but provide the funds by which the North Carolina State Licensing Board for Contractors is enabled to carry out the public purposes for which it was created. Therefore the payment of these fees bears a direct and substantial relationship to the accomplishment of the public purposes of G.S. 87-1 et seq. Ar-Con Constr. Co. v. Anderson, 5 N.C. App. 12, 168 S.E.2d 18 (1969).

License Valid Through 60-Day Period for Purposes of Recovery Expenditures. — A contractor whose license expires during construction is "duly licensed" for purposes of recovering for materials purchased and work performed so long as his license is "valid." The period of validity extends from initial licensing or renewal through the 60-day period following 31 December. A contractor may recover for expenditures for labor and materials made within that period of validity. Hall v. Simmons, 329 N.C. 779, 407 S.E.2d 816 (1991). But see 301 E. Seventh St. Ltd. Partnership v. Gellman Corp., 124 Bankr. 687 (W.D.N.C. 1991).

No Recovery for Services Performed After License Expired. — A license expires on the thirty-first day of December and a contractor is not entitled to any recovery for services performed following the expiration of the license. 301 E. Seventh St. Ltd. Partnership v. Gellman Corp., 124 Bankr. 687 (W.D.N.C. 1991).

No Recovery for Expenditures Made During License's Invalidity. — When a contractor fails to renew his license within the 60-day period, his license is thenceforth invalid, and he may not recover for any expenditures made during its invalidity. Hall v. Simmons, 329 N.C. 779, 407 S.E.2d 816 (1991).

Unlicensed Party May Not Maintain Action. — Where the party who acted as a general contractor was unlicensed not only at the time the contract was entered into but at all times thereafter while undertaking to perform under it, the unlicensed contractor could not maintain his actions against the defendant. Holland v. Walden, 11 N.C. App. 281, 181 S.E.2d 197, cert. denied, 279 N.C. 349, 182 S.E.2d 581 (1971).

An unlicensed contractor cannot affirmatively enforce his contract; neither can he recover in quantum meruit, because this would achieve the result forbidden at law. Hickory Furn. Mart, Inc. v. Burns, 31 N.C. App. 626, 230 S.E.2d 609 (1976).

An unlicensed general contractor may neither affirmatively enforce his contract nor recover in quantum meruit. Phillips v. Parton, 59 N.C. App. 179, 296 S.E.2d 317 (1982), aff'd, 307 N.C. 694, 300 S.E.2d 387 (1983).

One who violates the licensing requirements for general contractors may not recover on the contract nor may he recover under theories of quantum meruit or unjust enrichment. This policy, although a stringent one, has been considered imperative in light of the statutory purpose of G.S. 87-1 to protect the public by deterring unlicensed persons from engaging in the construction business. Brady v. Fulghum, 62 N.C. App. 99, 302 S.E.2d 4, modified and aff'd, 309 N.C. 580, 308 S.E.2d 327 (1983).

Where plaintiff engaged in renovation including the installation of new roofing, correction of dry rot, installation of new storm doors and windows, and the complete renovation of all apartment interiors, the renovation improved already existing buildings and constituted construction within the meaning of G.S. 87-1. And as plaintiff undertook to "superintend or manage" this construction without complying with the licensing requirements of this section, plaintiff was not entitled to recover from defendant on the contract or in quantum meruit. Reliable Properties, Inc. v. McAllister, 77 N.C. App. 783, 336 S.E.2d 108 (1985), cert. denied, 316 N.C. 379, 342 S.E.2d 897 (1986).

Construction company was barred from recovering on a contract to build a house on the property owners' property because the company did not have a valid general contractor's license at the time the contract was formed. Currin & Currin Constr., Inc. v. Lingerfelt, 158 N.C. App. 711, 582 S.E.2d 321 (2003).

Supervision by Licensed Employee When Person Acting as General Contractor Is Unlicensed. — Where record showed that plaintiff, although he was not licensed, acted as a general contractor in contracting to build defendants' house at a cost exceeding $30,000, the order refusing to enforce plaintiff's contract and dismissing its claim against defendants was properly entered, even though the construction contracted for was supervised by its employee, a licensed general contractor. Hanover Realty, Inc. v. Flickinger, 87 N.C. App. 674, 362 S.E.2d 173 (1987).

Denial of Recovery Effectuates Statutory Purpose. — Public policy considerations militate against permitting unlicensed general construction contractors to enforce their contracts. Denying the contractor the right to enforce his contract effectuates the statutory purpose and legislative intent of providing the public with optimum protection. Brady v. Fulghum, 309 N.C. 580, 308 S.E.2d 327 (1983).

Doctrine of Substantial Compliance Rejected. — In recognition of the essential illegality of an unlicensed contractor's entering into a construction contract for which a license is required and in order to give full effect to the legislative intent to furnish protection to the public by strict licensing requirements, the Supreme Court of North Carolina rejects the doctrine of substantial compliance, cognizant that harsh consequences may sometimes fall on those who do contracting work without a license. Brady v. Fulghum, 309 N.C. 580, 308 S.E.2d 327 (1983).

There can be no substantial compliance with the licensing statutes, where an unlicensed contractor has illegally entered into a contract. Neither may the contractor recover for extras, additions or changes made during construction commenced pursuant to the contract. Such a contract is not, however, void. Brady v. Fulghum, 309 N.C. 580, 308 S.E.2d 327 (1983).

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Expiration of License During Construction. — If a licensed contractor's license expires, for whatever reason, during construction, he may recover for only the work performed while he was duly licensed. If, in that situation, the contractor renews his license during construction, he may recover for work performed before expiration and after renewal. If, by virtue of these rules, harsh results fall upon unlicensed contractors who violate the statutes, the contractors themselves bear both the responsibility and the blame. Brady v. Fulghum, 309 N.C. 580, 308 S.E.2d 327 (1983).

Where the contractor was licensed at the significant moment of contracting; the contractor's license lapsed through inadvertence, not as a result of incompetence or disciplinary action by the licensing board; the contractor's license was renewed immediately upon its filing of a renewal application and fees; and the contractor's financial condition and composition remained unchanged during the period the contractor was not licensed, although the contractor was not licensed for 90 percent of the construction period, the factors listed above, particularly the reason for the license lapse and the automatic renewal thereof, confirming the contractor's continued competence and responsibility, indicate that the protective purpose of the licensing statute has been satisfied such that the contractor should not be barred from recovering under its contract with owner. Barrett, Robert & Woods, Inc. v. Armi, 59 N.C. App. 134, 296 S.E.2d 10, cert. denied, 307 N.C. 269, 299 S.E.2d 214 (1982).

Subsequent Procurement of License Does Not Validate Contract. — The existence of a license at the time the contract is signed is determinative and great weight is attached to the significant moment of the entrance of the parties into the relationship. Accordingly, a contract illegally entered into by an unlicensed general construction contractor is unenforceable by the contractor. It cannot be validated by the contractor's subsequent procurement of a license. Brady v. Fulghum, 309 N.C. 580, 308 S.E.2d 327 (1983).

Contract May Be Enforced Defensively. — Although an unlicensed contractor cannot affirmatively enforce his contract, a general contractor can enforce his contract defensively, as a set-off to the claims asserted against him, though the set-off cannot exceed his adversary's claims. This exception limits the penalty paid by the unlicensed builder to the amount he actually expended on the contract and no more. Hickory Furn. Mart, Inc. v. Burns, 31 N.C. App. 626, 230 S.E.2d 609 (1976).

This section contemplates a differing level of expertise for those applying for and receiving licenses in the enumerated categories. Sample v. Morgan, 311 N.C. 717, 319 S.E.2d 607 (1984).

A general contractor is entitled to recover only up to that amount authorized by his license. Sample v. Morgan, 311 N.C. 717, 319 S.E.2d 607 (1984).

In enacting this section, the Legislature reasonably determined that as the cost of a structure increased, there would be additional demands of expertise and responsibilities from the contractor. To permit a general contractor to recover amounts in excess of the allowable limit of his license would vitiate the intended purpose of this statute: to protect the public from incompetent builders. Sample v. Morgan, 311 N.C. 717, 319 S.E.2d 607 (1984).

A contractor who constructs a project, the value of which exceeds the amount of his license, may recover up to the amount authorized by his license for the owner's breach of contract, or for the value of the work and services furnished or materials supplied under the contract on a theory of unjust enrichment. Sample v. Morgan, 311 N.C. 717, 319 S.E.2d 607 (1984), overruling Helms v. Dawkins, 32 N.C. App. 453, 232 S.E.2d 710 (1977), to the extent that it held that a contractor who constructed a project, the value of which exceeded the amount of his license, could not recover any amount for the owner's breach of contract or for the value of the work and services or materials supplied.

Contractor Should Have Been Allowed to Prove Case. — On appeal from summary judgment, where plaintiff contractor was licensed up to $175,000 (now $350,000) when the contract was executed, where, when two months later plaintiff secured an unlimited license, plaintiff began construction during the two-month period, and where he presented his affidavit that he had passed the unlimited general contractor examination when the contract with defendants was executed and that he had done approximately $2,800.00 worth of work before he was issued his unlimited license, the value of the work done by plaintiff was never in excess of his license limit, and plaintiff was not, as evidenced by his license, incompetent to perform the work; thus, plaintiff should have been allowed to prove his case if he could and was entitled if successful to recover to the extent of his unlimited license and defend the counterclaim. Dellinger v. Michal, 92 N.C. App. 744, 375 S.E.2d 698 (1989).

Applied in Revis Sand & Stone, Inc. v. King, 49 N.C. App. 168, 270 S.E.2d 580 (1980); C.C. Walker Grading & Hauling, Inc. v. S.R.F. Mgt. Corp., 311 N.C. 170, 316 S.E.2d 298 (1984); Sartin v. Carter, 76 N.C. App. 278, 332 S.E.2d 521 (1985).

Cited in Zickgraf Enters., Inc. v. Yonce, 63 N.C. App. 166, 303 S.E.2d 852 (1983); Sample v. Morgan, 66 N.C. App. 338, 311 S.E.2d 47 (1984); Spivey & Self, Inc. v. Highview Farms, Inc., 110 N.C. App. 719, 431 S.E.2d 535 (1993); RCDI Constr. v. Spaceplan/Architecture, Planning & Interiors, P.A., 148 F. Supp. 2d 607 (W.D.N.C. 2001).

OPINIONS OF ATTORNEY GENERAL

The term "value" as used in this section should be limited to the cost of the home or other building and should not include the cost of the land. See opinion of Attorney General to The Honorable Daniel F. McComas, N.C. House of Representatives, 1997 N.C.A.G. 56 (9/8/97).

§ 87-10.1. Licensing of nonresidents.

(a) Definitions. — The following definitions apply in this section:

- (1) Delinquent income tax debt. — The amount of income tax due as stated in a final notice of assessment issued to a taxpayer by the Secretary of Revenue when the taxpayer no longer has the right to contest the amount.
- (2) Foreign corporation. — Defined in G.S. 55-1-40.
- (3) Foreign entity. — A foreign corporation, a foreign limited liability company, or a foreign partnership.
- (4) Foreign limited liability company. — Defined in G.S. 57C-1-03.
- (5) Foreign partnership. — Either of the following that does not have a permanent place of business in this State:
  - a. A foreign limited partnership as defined in G.S. 59-102.
  - b. A general partnership formed under the laws of a jurisdiction other than this State.

(b) Licensing. — The Board shall not issue a certificate of license for a foreign corporation unless the corporation has obtained a certificate of authority from the Secretary of State pursuant to Article 15 of Chapter 55 of the General Statutes. The Board shall not issue a certificate of license for a foreign limited liability company unless the company has obtained a certificate of authority from the Secretary of State pursuant to Article 7 of Chapter 57C of the General Statutes.

(c) Information. — Upon request, the Board shall provide the Secretary of Revenue on an annual basis the name, address, and tax identification number of every nonresident individual and foreign entity licensed by the Board. The information shall be provided in the format required by the Secretary of Revenue.

(d) Delinquents. — If the Secretary of Revenue determines that any nonresident individual or foreign corporation licensed by the board, a member of any foreign limited liability company licensed by the Board, or a partner in any foreign partnership licensed by the Board, owes a delinquent income tax debt, the Secretary of Revenue may notify the Board of these nonresident individuals and foreign entities and instruct the Board not to renew their certificates of license. The Board shall not renew the certificate of license of such a nonresident individual or foreign entity identified by the Secretary of Revenue unless the Board receives a written statement from the Secretary that the debt either has been paid or is being paid pursuant to an installment agreement. (1998-162, ss. 4, 10.)

§ 87-11. Revocation of license; charges of fraud, negligence, incompetency, etc.; hearing thereon; reissuance of certificate.

(a) The Board shall have the power to refuse to issue or renew or revoke, suspend, or restrict a certificate of license or to issue a reprimand or take other disciplinary action if a general contractor licensed under this Article is found guilty of any fraud or deceit in obtaining a license, or gross negligence, incompetency, or misconduct in the practice of his or her profession, or willful violation of any provision of this Article. The Board shall also have the power to revoke, suspend, or otherwise restrict the ability of any person to act as a qualifying party for a license to practice general contracting, as provided in G.S. 87-10(c), for any copartnership, corporation or any other organization or combination, if that person committed any act in violation of the provisions of this section and the Board may take disciplinary action against the individual license held by that person.

(a1) Any person may prefer charges of fraud, deceit, negligence, or misconduct against any general contractor licensed under this Article. The charges shall be in writing and sworn to by the complainant and submitted to the Board. The charges, unless dismissed without hearing by the Board as unfounded or trivial, shall be heard and determined by the Board in accordance with the provisions of Chapter 150B of the General Statutes.

(b) The Board shall adopt and publish guidelines, consistent with the provisions of this Article, governing the suspension and revocation of licenses.

(c) The Board shall establish and maintain a system whereby detailed records are kept regarding complaints against each licensee. This record shall include, for each licensee, the date and nature of each complaint, investigatory action taken by the Board, any findings by the Board, and the disposition of the matter.

(d) The Board may reissue a license to any person, firm or corporation whose license has been revoked: Provided, five or more members of the Board vote in favor of such reissuance for reasons the Board may deem sufficient.

The Board shall immediately notify the Secretary of State of its findings in the case of the revocation of a license or of the reissuance of a revoked license.

A certificate of license to replace any certificate lost, destroyed or mutilated may be issued subject to the rules and regulations of the Board.

(e) The Board shall be entitled to recover its reasonable administrative costs associated with the investigation and prosecution of a violation of this Article or rules or regulations of the Board up to a maximum of five thousand dollars ($5,000) for any licensee or qualifying party found to have committed any of the following:

(1) Fraud or deceit in obtaining a license.

(2) Gross negligence, incompetency, or misconduct in the practice of general contracting.

(3) Willful violation of any provision of this Article. (1925, c. 318, s. 10; 1937, c. 429, s. 4; 1953, c. 1041, s. 4; 1973, c. 1331, s. 3; 1979, c. 713, s. 3; 1987, c. 827, s. 1; 1991, c. 124, s. 2; 1999-427, s. 2; 2005-381, s. 4.)

CASE NOTES

Gross Negligence. — Though violations of the building code have been held to constitute "negligence per se," case law does not address the circumstances necessary to elevate mere negligence, within the administrative decision-making process, to that of gross negligence. Bashford v. North Carolina Licensing Bd., 107 N.C. App. 462, 420 S.E.2d 466 (1992).

More than a violation of the building code is required to reach the somewhat elevated level of gross negligence. Bashford v. North Carolina Licensing Bd., 107 N.C. App. 462, 420 S.E.2d 466 (1992).

§ 87-12. Certificate evidence of license.

The issuance of a certificate of license or limited license by this Board shall be evidence that the person, firm, or corporation named therein is entitled to all the rights and privileges of a licensed or limited licensed general contractor while said license remains unrevoked or unexpired. A licensed general contractor holding a license which qualifies him for work as described in G.S. 87-10 shall be authorized to perform the said work without any additional occupational license, notwithstanding the provisions of any other occupational licensing statute. A license issued by any other occupational licensing board having jurisdiction over any work described in G.S. 87-10 shall qualify such licensee to perform the work for which the license qualifies him without obtaining the license from the General Contractors Licensing Board. Nothing contained herein shall operate to relieve any general contractor from the necessity of compliance with other provisions of the law requiring building permits and construction in accordance with appropriate provisions of the North Carolina State Building Code. (1925, c. 318, s. 11; 1937, c. 429, s. 5; 1975, c. 279, s. 4.)

CASE NOTES

Cited in RCDI Constr. v. Spaceplan/Architecture, Planning & Interiors, P.A., 148 F. Supp. 2d 607 (W.D.N.C. 2001).

§ 87-13. Unauthorized practice of contracting; impersonating contractor; false certificate; giving false evidence to Board; penalties.

Any person, firm, or corporation not being duly authorized who shall contract for or bid upon the construction of any of the projects or works enumerated in G.S. 87-1, without having first complied with the provisions hereof, or who shall attempt to practice general contracting in the State, except as provided for in this Article, and any person, firm, or corporation presenting or attempting to file as his own the licensed certificate of another or who shall give false or forged evidence of any kind to the Board or to any member thereof in maintaining a certificate of license or who falsely shall impersonate another or who shall use an expired or revoked certificate of license, and any architect or engineer who recommends to any project owner the award of a contract to anyone not properly licensed under this Article, shall be deemed guilty of a Class 2 misdemeanor. And the Board may, in its discretion, use its funds to defray the expense, legal or otherwise, in the prosecution of any violations of this Article. No architect or engineer shall be guilty of a violation of this section if his recommendation to award a contract is made in reliance upon current written information received by him from the appropriate Contractor Licensing Board of this State which information erroneously indicates that the contractor being recommended for contract award is properly licensed. (1925, c. 318, s. 12; 1931, c. 62, s. 3; 1937, c. 429, s. 6; 1983 (Reg. Sess., 1984), c. 970, s. 2; 1993, c. 539, s. 602; 1994, Ex. Sess., c. 24, s. 14(c).)

Legal Periodicals. — For note discussing recovery by unlicensed general contractor in light of Brady v. Flughum, 309 N.C. 580, 308 S.E.2d 327 (1983), see 7 Campbell L. Rev. 199 (1984).

For comment, "Application of North Carolina's Contractor Licensing Statute to Parallel Prime Contractors," see 20 Wake Forest L. Rev. 717 (1984).

CASE NOTES

Section Strictly Construed. — Since this section imposes criminal penalties for its violation, it must be strictly construed and its scope may not be extended by implication beyond the meaning of its language so as to include offenses not clearly described. Fulton v. Rice, 12

N.C. App. 669, 184 S.E.2d 421 (1971); C.C. Walker Grading & Hauling, Inc. v. S.R.F. Mgt. Corp., 311 N.C. 170, 316 S.E.2d 298 (1984).

Since this section restricts the practice of an otherwise lawful occupation to a special class of persons, it must be construed so as not to extend it to activities and transactions not intended by the legislature to be included. Fulton v. Rice, 12 N.C. App. 669, 184 S.E.2d 421 (1971).

This section makes it a misdemeanor to use an expired license. Ar-Con Constr. Co. v. Anderson, 5 N.C. App. 12, 168 S.E.2d 18 (1969).

Supervision by Licensed Employee When Person Acting as General Contractor Is Unlicensed. — Where record showed that plaintiff, although he was not licensed, acted as a general contractor in contracting to build defendants' house at a cost exceeding $30,000.00, the order refusing to enforce plaintiff's contract and dismissing its claim against defendants was properly entered, even though the construction contracted for was supervised by its employee, a licensed general contractor. Hanover Realty, Inc. v. Flickinger, 87 N.C. App. 674, 362 S.E.2d 173 (1987).

Recovery Barred. — Actions of plaintiff, who was not licensed and who performed general contracting, were illegal, and accordingly the defense of illegality barred plaintiff's recovery on note given by defendants covering work to be done to restore their home. Daye v. Roberts, 89 N.C. App. 344, 365 S.E.2d 660 (1988).

Plaintiffs's claim for tortious interference with contract could not be maintained where, while there was no question that a contract for the construction of a hotel was signed by the plaintiff and defendant, plaintiff was not a contractor licensed by the State of North Carolina at the time of the signing of the contract and the contract was, therefore, not valid. RCDI Constr. v. Spaceplan/Architecture, Planning & Interiors, P.A., 148 F. Supp. 2d 607 (W.D.N.C. 2001).

Applied in Brady v. Fulghum, 309 N.C. 580, 308 S.E.2d 327 (1983); Zickgraf Enters., Inc. v. Yonce, 63 N.C. App. 166, 303 S.E.2d 852 (1983); Sartin v. Carter, 76 N.C. App. 278, 332 S.E.2d 521 (1985).

Cited in Vogel v. Reed Supply Co., 277 N.C. 119, 177 S.E.2d 273 (1970); Revis Sand & Stone, Inc. v. King, 49 N.C. App. 168, 270 S.E.2d 580 (1980).

§ 87-13.1. Board may seek injunctive relief.

Whenever the Board determines that any person, firm or corporation has violated or is violating any of the provisions of this Article or rules and regulations of the Board promulgated under this Article, the Board may apply to the superior court for a restraining order and injunction to restrain the violation; and the superior courts have jurisdiction to grant the requested relief, irrespective of whether or not criminal prosecution has been instituted or administrative sanctions imposed by reason of the violation. The court may award the Board its reasonable costs associated with the investigation and prosecution of the violation. (1979, c. 713, s. 4; 2003-97, s. 2; 2005-381, s. 5.)

§ 87-14. Regulations as to issue of building permits.

Any person, firm or corporation, upon making application to the building inspector or such other authority of any incorporated city, town or county in North Carolina charged with the duty of issuing building or other permits for the construction of any building, highway, sewer, grading or any improvement or structure where the cost thereof is to be thirty thousand dollars ($30,000) or more, shall, before he be entitled to the issuance of such permit, furnish satisfactory proof to such inspector or authority that he or another person contracting to superintend or manage the construction is duly licensed under the terms of this Article to carry out or superintend the same, and that he has paid the license tax required by the Revenue Act of the State of North Carolina then in force so as to be qualified to bid upon or contract for the work for which the permit has been applied, and that he has in effect Workers' Compensation insurance as required by Chapter 97 of the General Statutes; and it shall be unlawful for such building inspector or other authority to issue or allow the issuance of such building permit unless and until the applicant has furnished evidence that he is either exempt from the provisions of this Article or is duly licensed under this Article to carry out or superintend the work for which permit has been applied; and further, that the applicant has paid the license tax required by the State Revenue Act then in force so as to be qualified to bid upon or contract for the work covered by the permit; and further, that the applicant has in effect Workers' Compensation insurance as required by Chapter 97 of the General Statutes. Any building inspector or other such authority who is subject to and violates the terms of this section shall be guilty of a Class 3 misdemeanor and subject only to a fine of not more than fifty dollars ($50.00). (1925, c. 318, s. 13; 1931, c. 62, s. 4; 1937, c. 429, s. 7; 1949, c. 934; 1953, c. 809; 1969, c. 1063, s. 6; 1971, c. 246, s. 4; 1981, c. 783, s. 2; 1989, c. 109, s. 2; 1991 (Reg. Sess., 1992), c. 840, s. 2; 1993, c. 539, s. 603; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 2005-276, s. 21.2, provides: "The North Carolina Code Officials Qualification Board shall take steps to ensure that building inspectors enforce the requirements of G.S. 87-14."

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

§ 87-15. Copy of Article included in specifications; bid not considered unless contractor licensed.

All architects and engineers preparing plans and specifications for work to be contracted in the State of North Carolina shall include in their invitations to bidders and in their specifications a copy of this Article or such portions thereof as are deemed necessary to convey to the invited bidder, whether he be a resident or nonresident of this State and whether a license has been issued to him or not, the information that it will be necessary for him to show evidence of a license before his bid is considered. (1925, c. 318, s. 14; 1937, c. 429, s. 8; 1941, c. 257, s. 2.)

§ 87-15.1. Reciprocity of licensing.

To the extent that other states which provide for the licensing of general contractors provide for similar action, the Board in its discretion may grant licenses of the same or equivalent classification to general contractors licensed by other states, without written examination upon satisfactory proof furnished to the Board that the qualifications of such applicants are equal to the qualifications of holders of similar licenses in North Carolina and upon payment of the required fee. (1971, c. 246, s. 5.)

CASE NOTES

Cited in RCDI Constr. v. Spaceplan/Architecture, Planning & Interiors, P.A., 148 F. Supp. 2d 607 (W.D.N.C. 2001).

§ 87-15.2. Public awareness program.

The Board shall establish and implement a public awareness program to inform the general public of the purpose and function of the Board. (1979, c. 713, s. 4.)

§ 87-15.3. Identity of complaining party confidential.

Once a complaint has been filed with the Board against a licensee or an unlicensed general contractor, the Board may, in its discretion, keep the identity of a complaining party confidential and not a public record within the meaning of Chapter 132 of the General Statutes until a time no later than the receipt of the complaint by the full Board for a disciplinary hearing or injunctive action. (2003-97, s. 1)

§ 87-15.4. Builder designations created.

(a) A licensee who successfully completes the educational requirements for accredited builder or accredited master builder, as established by the North Carolina Builders Institute (Institute), shall be designated by the Board as a "North Carolina Certified Accredited Residential Builder" or "North Carolina Certified Accredited Master Residential Builder," respectively. The Institute shall provide to the Board written certification of those licensees who have successfully completed the requirements for the designations. The certification shall remain in effect as long as: (i) the licensee's license is in effect pursuant to G.S. 87-10; and (ii) the licensee completes at least eight hours of continuing education each calendar year as certified by the Institute.

(b) The Board shall approve for designation a licensee who has successfully completed a course of study, deemed by the Board to be equivalent to the educational requirements under subsection (a) of this section, offered by a community college or by another provider, and who completes the requisite number of hours of continuing education required by the Board.

(c) The Board may use all powers granted to it under this Article to enforce the provisions of this section and ensure that the designations created by this section are conferred upon and used only by a licensee who complies with the provisions of this section and any rules adopted by the Board. (2007-417, s. 1.)

Editor's Note. — Session Laws 2007-417, s. 2, provides: "Any individual currently licensed by the State Licensing Board of General Contractors (Board) who has successfully completed the requirements of G.S. 87-15.4, as enacted by Section 1 of this act, before the effective date of this act may be designated by the Board as a 'North Carolina Certified Accredited Residential Builder' or 'North Carolina Certified Accredited Master Residential Builder' upon submitting to the Board certification from the North Carolina Builders Institute of successful completion of the requirements of G.S. 87-15.4."

Session Laws 2007-417, s. 3, made this section effective August 21, 2007.

ARTICLE 1A.

Homeowners Recovery Fund.

§ 87-15.5. Definitions.

The following definitions apply in this Article:

(1) Applicant. — The owner or former owner of a single-family residential dwelling unit who has suffered a reimbursable loss and has filed an application for reimbursement from the Fund.

(2) Board. — The State Licensing Board for General Contractors.

(3) Dishonest conduct. — Fraud or deceit in either of the following:

  a. Obtaining a license under Article 1 of Chapter 87 of the General Statutes.

  b. The practice of general contracting by a general contractor.

(4) Fund. — The Homeowners Recovery Fund.

(5) General contractor. — A person or other entity who meets any of the following descriptions:
  a. Is licensed under Article 1 of Chapter 87 of the General Statutes.
  b. Fraudulently procures any building permit by presenting the license certificate of a general contractor.
  c. Fraudulently procures any building permit by falsely impersonating a licensed general contractor.

(6) Reimbursable loss. — A monetary loss that meets all of the following requirements:
  a. Results from dishonest or incompetent conduct by a general contractor in constructing or altering a single-family residential dwelling unit.
  b. Is not paid, in whole or in part, by or on behalf of the general contractor whose conduct caused the loss.
  c. Is not covered by a bond, a surety agreement, or an insurance contract.

(7) Single-family residential dwelling unit. — A separately owned residence for use of one or more persons as a housekeeping unit with space for eating, living, and permanent provisions for cooking and sanitation, whether or not attached to other such residences. (1991, c. 547, s. 1.)

OPINIONS OF ATTORNEY GENERAL

Payment from General Contractor Precludes Reimbursement from Fund. — A homeowner who has suffered a monetary loss and who has filed an application for reimbursement from the Homeowners Recovery Fund established pursuant to this Chapter is not entitled to any recovery from the Fund if he has received any monetary payment, regardless of amount, from the general contractor responsible for the loss. See opinion of Attorney General to Mark D. Selph, Secretary-Treasurer N.C. Licensing Board for General Contractors, 1998 N.C.A.G. 3 (1/16/98).

§ 87-15.6. Homeowners Recovery Fund.

(a) The Homeowners Recovery Fund is established as a special account of the Board. The Board shall administer the Fund. The purpose of the Fund is to reimburse homeowners who have suffered a reimbursable loss in constructing or altering a single-family residential dwelling unit.

(b) Whenever a general contractor applies for the issuance of a permit for the construction of any single-family residential dwelling unit or for the alteration of an existing single-family residential dwelling unit, a city or county building inspector shall collect from the general contractor a fee in the amount of ten dollars ($10.00) for each dwelling unit to be constructed or altered under the permit. The city or county inspector shall forward nine dollars ($9.00) of each fee collected to the Board on a quarterly basis and the city or county may retain one dollar ($1.00) of each fee collected. The Board shall deposit the fees received into the Fund. The Board may accept donations and appropriations to the Fund. G.S. 87-7 shall not apply to the Fund.

The Board may suspend collection of this fee for any year upon a determination that the amount in the Fund is sufficient to meet likely disbursements from the Fund for that year. The Board shall notify city and county building inspectors when it suspends collection of the fee.

(c) The Board may adopt rules to implement this Article. (1991, c. 547, s. 1; 2003-372, s. 1.)

§ 87-15.7. Fund administration.

(a) The Board shall determine the procedure for applying to the Board for reimbursement from the Fund, for processing applications, for granting requests for reimbursement, and for the subrogation or assignment of the rights of any reimbursed applicant. The Board shall submit annually a report to the State Treasurer accounting for all monies credited to and expended from the Fund.

(b) The Board may use monies in the Fund only for the following purposes:

(1) To reimburse an applicant's reimbursable loss after approval by the Board.

(2) To purchase insurance to cover reimbursable losses when the Board finds it appropriate to do so.

(3) To invest amounts in the Fund that are not currently needed to reimburse losses and maintain adequate reserves in the manner in which State law allows fiduciaries to invest funds.

(4) To pay the expenses of the Board to administer the Fund, including employment of counsel to prosecute subrogation claims. (1991, c. 547, s. 1.)

§ 87-15.8. Application for reimbursement.

(a) The Board shall prepare a form to be used to apply for reimbursement from the Fund. Only a person whom the Board determines to meet all of the following requirements may be reimbursed from the Fund:

(1) Has suffered a reimbursable loss in the construction or alteration of a single-family residential dwelling unit owned or previously owned by that person.

(2) Did not, directly or indirectly, obtain the building permit in the person's own name or did use a general contractor.

(3) Has exhausted all civil remedies against the general contractor whose conduct caused the loss and, if applicable, the general contractor's estate, and has obtained a judgment against the general contractor that remains unsatisfied. This requirement is waived if the person is prevented from filing suit or obtaining a judgment against the contractor due to the automatic stay provision of section 362 of the U.S. Bankruptcy Code.

(4) Has complied with the applicable rules of the Board.

(b) The Board shall investigate all applications for reimbursement and may reject or allow part or all of a claim based on the amount of money in the Fund. The Board shall have complete discretion to determine the order, amount, and manner of payment of approved applications. All payments are a matter of privilege and not of right and no person has a right to reimbursement from the Fund as a third party beneficiary or otherwise. No attorney shall be compensated by the Board for prosecuting an application before it. (1991, c. 547, s. 1.)

§ 87-15.9. Subrogation for reimbursement made.

The Board is subrogated to an applicant who is reimbursed from the Fund in the amount reimbursed and may bring an action against the general contractor whose conduct caused the reimbursable loss, the general contractor's assets, or the general contractor's estate. The Board may enforce any claims it may have for restitution or otherwise, and may employ and compensate consultants, agents, legal counsel, and others it finds necessary and appropriate to carry out its authority under this section. (1991, c. 547, s. 1.)

ARTICLE 2.

Plumbing and Heating Contractors.

§ 87-16. Board of Examiners; appointment; term of office.

There is created the State Board of Examiners of Plumbing, Heating, and Fire Sprinkler Contractors consisting of seven members appointed by the Governor: one member from a school of engineering of the Greater University of North Carolina, one member who is a plumbing or mechanical inspector from a city in North Carolina, one licensed air conditioning contractor, one licensed plumbing contractor, one licensed heating contractor, one licensed fire sprinkler contractor, and one person who has no tie with the construction industry to represent the interests of the public at large. Members serve for terms of seven years, with the term of one member expiring each year. The term of the member initially appointed to fill the position of licensed fire sprinkler contractor shall commence April 25, 1991. No member appointed after June 7, 1979, shall serve more than one complete consecutive term. Vacancies occurring during a term are filled by appointment of the Governor for the remainder of the unexpired term. (1931, c. 52, s. 1; 1939, c. 224, s. 1; 1971, c. 768, s. 1; 1973, c. 476, s. 128; 1979, c. 834, s. 1; 1989 (Reg. Sess., 1990), c. 842, s. 1; c. 978, s. 1.)

Local Modification. — Anson: 1939, c. 308; Burke: 1939, c. 397; Carteret: 1935, c. 338; Durham: 1939, c. 381; Moore, New Hanover and Stanly: 1935, c. 338; Wake: 1939, c. 381; towns of Albemarle, Atlantic Beach and Beaufort: 1935, c. 338; towns of Morehead City, Pinehurst and Southern Pines: 1935, c. 338.

Cross References. — As to Highway Fund and Highway Trust Fund Small Project Bidding, see G.S. 136-28.10.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

CASE NOTES

Cited in Muse v. Morrison, 234 N.C. 195, 66 S.E.2d 783 (1951).

§ 87-17. Removal, qualifications and compensation of members; allowance for expenses.

The Governor may remove any member of the Board for misconduct, incompetency or neglect of duty. Each member of the Board shall be a resident of this State at the time of his appointment. Each member of the Board shall receive for attending sessions of the Board or of its committees the amount of per diem, and for the time spent in necessary traveling in carrying out the provisions of this Article, and in addition to the per diem compensation, each member shall be reimbursed by the Board from funds in its hands for necessary traveling expenses and for such expenses incurred in carrying out the provisions hereof as shall be approved by a majority of the members of the Board. Payment of compensation and reimbursement of expenses of Board members shall be governed by G.S. 93B-5. (1931, c. 52, s. 2; 1969, c. 445, s. 8; 1979, c. 834, ss. 2, 3.)

§ 87-18. Organization meeting; officers; seal; rules; employment of personnel; acquire property.

The Board shall, within 30 days after its appointment, meet in the City of Raleigh and organize, and elect a chairman, secretary, and treasurer, each to serve for one year. Thereafter the officers shall be elected annually. The secretary and treasurer shall give bond approved by the Board for the faithful performance of their duties in the sum as the Board may, from time to time, determine. The Board shall have a common seal, shall formulate rules to govern its actions, and is hereby authorized to employ personnel as it may deem necessary to carry out the provisions of this Article. The Board shall have the power to acquire, hold, rent, encumber, alienate, and otherwise deal with real property in the same manner as a private person or corporation, subject only to the approval of the Governor and the Council of State. Collateral pledged by the Board for an encumbrance is limited to the assets, income, and revenues of the Board. (1931, c. 52, s. 3; 1939, c. 224, s. 2; 1953, c. 254, s. 1; 2001-270, s. 1.)

CASE NOTES

Cited in Stephenson v. Bartlett, 358 N.C. 219, 595 S.E.2d 112 (2004).

§ 87-19. Regular and special meetings; quorum.

The Board after holding its first meeting as hereinbefore provided, shall thereafter hold at least two regular meetings each year. Special meetings may be held at such times and places as the bylaws and/or rules of the Board provide; or as may be required in carrying out the provisions hereof. A quorum of the Board shall consist of not less than four members. (1931, c. 52, s. 4; 1989 (Reg. Sess., 1990), c. 842, s. 2.)

§ 87-20. Record of proceedings and register of applicants; reports.

The Board shall keep a record of its proceedings and a register of all applicants for examination, showing the date of each application, the name, age and other qualifications, place of business and residence of each applicant. The books and records of the Board shall be prima facie evidence of the correctness of the contents thereof. On or before the first day of March of each year the Board shall submit to the Governor a report of its activities for the preceding year, and file with the Secretary of State a copy of such report, together with a statement of receipts and expenditures of the Board attested by the chairman and secretary. (1931, c. 52, s. 5.)

§ 87-21. Definitions; contractors licensed by Board; examination; posting license, etc.

(a) Definitions. — For the purpose of this Article:

(1) The word "plumbing" is hereby defined to be the system of pipes, fixtures, apparatus and appurtenances, installed upon the premises, or in a building, to supply water thereto and to convey sewage or other waste therefrom.

(2) The phrase "heating, group number one" shall be deemed and held to be the heating system of a building, which requires the use of high or low pressure steam, vapor or hot water, including all piping, ducts,

and mechanical equipment appurtenant thereto, within, adjacent to or connected with a building, for comfort heating.

(3) The phrase "heating, group number two" means an integral system for heating or cooling a building consisting of an assemblage of interacting components producing conditioned air to raise or lower the temperature, and having a mechanical refrigeration capacity in excess of fifteen tons, and which circulates air. Systems installed in single-family residences are included under heating group number three, regardless of size. Holders of a heating group number three license who have heretofore installed systems classified as heating group number two systems may nevertheless service, replace, or make alterations to those installed systems until June 30, 2004.

(4) The phrase "heating, group number three" shall be deemed and held to be a direct heating or cooling system of a building that raises or lowers the temperature of the space within the building for the purpose of comfort in which electric heating elements or products of combustion exchange heat either directly with the building supply air or indirectly through a heat exchanger using an air distribution system of ducts and having a mechanical refrigeration capacity of 15 tons or less. A heating system requiring air distribution ducts and supplied by ground water or utilizing a coil supplied by water from a domestic hot water heater not exceeding 150 degrees Fahrenheit requires either plumbing or heating group number one license to extend piping from valved connections in the domestic hot water system to the heating coil and requires either heating group number one or heating group number three license for installation of coil, duct work, controls, drains and related appurtenances.

(5) Any person, firm or corporation, who for a valuable consideration, (i) installs, alters or restores, or offers to install, alter or restore, either plumbing, heating group number one, or heating group number two, or heating group number three, or (ii) lays out, fabricates, installs, alters or restores, or offers to lay out, fabricate, install, alter or restore fire sprinklers, or any combination thereof, as defined in this Article, shall be deemed and held to be engaged in the business of plumbing, heating, or fire sprinkler contracting; provided, however, that nothing herein shall be deemed to restrict the practice of qualified registered professional engineers. Any person who installs a plumbing, heating, or fire sprinkler system on property which at the time of installation was intended for sale or to be used primarily for rental is deemed to be engaged in the business of plumbing, heating, or fire sprinkler contracting without regard to receipt of consideration, unless exempted elsewhere in this Article.

(6) The word "contractor" is hereby defined to be a person, firm or corporation engaged in the business of plumbing, heating, or fire sprinkler contracting.

(7) The word "heating" shall be deemed and held to mean heating group number one, heating group number two, heating group number three, or any combination thereof.

(8) Repealed by Session Laws 1997-298, s. 1.

(9) The word "Board" means the State Board of Examiners of Plumbing, Heating, and Fire Sprinkler Contractors.

(10) The word "experience" means actual and practical work directly related to the category of plumbing, heating group number one, heating group number two, heating group number three, or fire sprinkler contracting, and includes related work for which a license is not required.

(11) The phrase "fire sprinkler" means an automatic or manual sprinkler system designed to protect the interior or exterior of a building or structure from fire, and where the primary extinguishing agent is water. These systems include wet pipe and dry pipe systems, preaction systems, water spray systems, foam water sprinkler systems, foam water spray systems, nonfreeze systems, and circulating closed-loop systems. These systems also include the overhead piping, combination standpipes, inside hose connections, thermal systems used in connection with the sprinklers, tanks, and pumps connected to the sprinklers, and controlling valves and devices for actuating an alarm when the system is in operation. This subsection shall not apply to owners of property who are building or improving farm outbuildings. This subsection shall not include water and standpipe systems having no connection with a fire sprinkler system. Nothing herein shall prevent licensed plumbing contractors, utility contractors, or fire sprinkler contractors from installing underground water supplies for fire sprinkler systems.

(b) Classes of Licenses; Eligibility and Examination of Applicant; Necessity for License. —

(1) In order to protect the public health, comfort and safety, the Board shall establish two classes of licenses: Class I covering all plumbing, heating, and fire sprinkler systems for all structures, and Class II covering plumbing and heating systems in single-family detached residential dwellings.

(2) The Board shall establish and issue a fuel piping license for use by persons who do not possess the required Class I or Class II plumbing or heating license, but desire to engage in the contracting or installing of fuel piping extending from an approved fuel source at or near the premises, which piping is used or may be used to supply fuel to any systems, equipment, or appliances located inside the premises.

The Board may also establish additional restricted classifications to provide for: (i) the licensing of any person, partnership, firm, or corporation desiring to engage in a specific phase of heating, plumbing, or fire sprinkling contracting; (ii) the licensing of any person, partnership, firm, or corporation desiring to engage in a specific phase of heating, plumbing, or fire sprinkling contracting that is an incidental part of their primary business, which is a lawful business other than heating, plumbing, or fire sprinkling contracting; or (iii) the licensing of persons desiring to engage in contracting and installing fuel piping from an approved fuel source on the premises to a point inside the residence.

(3) The Board shall prescribe the standard of competence, experience and efficiency to be required of an applicant for license of each class, and shall give an examination designed to ascertain the technical and practical knowledge of the applicant concerning the analysis of plans and specifications, estimating costs, fundamentals of installation and design, codes, fire hazards, and related subjects as these subjects pertain to plumbing, heating, or fire sprinkler systems. The examination for a fire sprinkler contractor's license shall include such materials as would test the competency of the applicant and which may include the minimum requirements of certification for Level III, subfield of Automatic Sprinkler System Layout, National Institute for Certification of Engineering Technologies (NICET). As a result of the examination, the Board shall issue a certificate of license of the appropriate class in plumbing, heating, or fire sprinkler contracting, and a license shall be obtained, in accordance with the provisions of

this Article, before any person, firm or corporation shall engage in, or offer to engage in, the business of plumbing, heating, or fire sprinkler contracting, or any combination thereof. The obtaining of a license, as required by this Article, shall not of itself authorize the practice of another profession or trade for which a State qualification license is required. Prior to taking the examination, the applicant may be required by the Board to establish that the applicant is at least 18 years of age and is of good moral character. The Board may require experience as a condition of examination, provided that (i) the experience required may not exceed two years, (ii) that up to one-half the experience may be in the form of academic or technical courses of study, and (iii) that registration is not required at the commencement of the period of experience.

(4) Conditions of examination set by the Board shall be uniformly applied to each applicant within each license classification. It is the purpose and intent of this section that the Board shall provide an examination for plumbing, heating group number one, or heating group number two, or heating group number three, or each restricted classification, and may provide an examination for fire sprinkler contracting or may accept a current certification of the National Institute for Certification in Engineering Technologies for Fire Protection Engineering Technician, Level III, subfield of Automatic Sprinkler System Layout.

(5) The Board is authorized to issue a certificate of license limited to either plumbing or heating group number one, or heating group number two, or heating group number three, or fire sprinkler contracting, or any combination thereof. The Board is also authorized to issue a certificate of license limited to one or more restricted classifications that are established pursuant to this section.

(6) Examinations shall be given at least twice each year, and additional examinations may be given as the Board deems wise and necessary. The examination shall be conducted in two parts to include a business and law portion and a technical portion. Requests for examination applications and information shall be made available online without charge and supplied at no cost to the potential examinee. The Board may offer written examinations or administer examinations by computer within 30 days after approving an application. Applicants shall be permitted to obtain the test score from each part of computerized examinations immediately upon completion of the examination. Upon passing the examination and paying the annual license fee, the applicant shall be issued a license. A person who fails to pass any examination shall not be reexamined until after 90 days from the date the person was last examined. An applicant who fails to pass any examination may take the failed portion within six months of the date approved to take the examination without retaking the portion passed. The Board may require applicants who fail any part of the examination three times to receive additional education before the applicant is allowed to retake the examination or wait one year before retaking any portion of the examination.

(c) To Whom Article Applies. — The provisions of this Article shall apply to all persons, firms, or corporations who engage in, or attempt to engage in, the business of plumbing, heating, or fire sprinkler contracting, or any combination thereof as defined in this Article. The provisions of this Article shall not apply to those who make minor repairs or minor replacements to an already installed system of plumbing, heating or air conditioning, but shall apply to those who make repairs, replacements, or modifications to an already installed fire sprinkler system. Minor repairs or minor replacements within the meaning of this subsection shall include the replacement of parts in an installed system which do not require any change in energy source, fuel type, or routing or sizing of venting or piping. Parts shall include a compressor, coil, contactor, motor, or capacitor.

(c1) Exemption. — The provisions of this Article shall not apply to a person who performs the on-site assembly of a factory designed drain line system for a manufactured home, as defined in G.S. 143-143.9(6), if the person (i) is a licensed manufactured home retailer, a licensed manufactured home set-up contractor, or a full-time employee of either, (ii) obtains an inspection by the local inspections department and (iii) performs the assembly according to the State Plumbing Code.

(c2) Exemption. — The provisions of this Article shall not apply to electric generating facilities that are subject to G.S. 62-110.1 or that provide power sold at wholesale that is regulated by the Federal Energy Regulatory Commission.

(d) Repealed by Session Laws 1979, c. 834, s. 7.

(d1) Expired December 31, 1991.

(e) Posting License; License Number on Contracts, etc. — The current license issued in accordance with the provisions of this Article shall be posted in the business location of the licensee, and its number shall appear on all proposals or contracts and requests for permits issued by municipalities. The initial qualified licensee on a license is the permanent possessor of the license number under which that license is issued, except that a licensee, or the licensee's legal agent, personal representative, heirs or assigns, may designate in writing to the Board a qualified licensee to whom the Board shall assign the license number upon the payment of a ten dollar ($10.00) assignment fee. Upon such assignment, the qualified licensee becomes the permanent possessor of the assigned license number. Notwithstanding the foregoing, the license number may be assigned only to a qualified licensee who has been employed by the initial licensee's plumbing and heating company for at least 10 years or is a lineal relative, sibling, first cousin, nephew, niece, daughter-in-law, son-in-law, brother-in-law, or sister-in-law of the initial licensee. Each successive licensee to whom a license number is assigned under this subsection may assign the license number in the same manner as provided in this subsection.

(f) Repealed by Session Laws 1971, c. 768, s. 4.

(g) The Board may, in its discretion, grant to plumbing, heating, or fire sprinkler contractors licensed by other states license of the same or equivalent classification without written examination upon receipt of satisfactory proof that the qualifications of such applicants are substantially equivalent to the qualifications of holders of similar licenses in North Carolina and upon payment of the usual license fee.

(h) Expired December 31, 1993.

(i) The provisions of this Article shall not apply to a retailer, as defined in G.S. 105-164.3(35), who, in the ordinary course of business, enters into a transaction with a buyer in which the retailer of a water heater sold for installation in a one- or two-family residential dwelling contracts with a licensee under this Article to provide the installation services for the water heater if the retail sales and installation contract with the buyer is signed by the buyer, the retailer, and the licensee and bears the licensee's license number and telephone number. All installation services rendered by the licensee in connection with any such contract must be performed in compliance with all building code, permit, and inspection requirements.

(j) The provisions of this Article shall not apply to a person primarily engaged in the retail sale of goods and services who contracts for or arranges financing for the sale and installation of a single-family residential heating or cooling system for which a license to install such system is required under this Article, provided all of the following requirements are met:

(1) No contract or proposal for sale or installation may be presented to or signed by the buyer unless either (i) the specifications for and design of the system have been first reviewed and approved by an employee of the retail seller who is licensed under this Article or (ii) the specifications for and design of the system have been first reviewed and approved by the person licensed under this Article who will install the system, if the installer is not an employee of the retail seller. This subdivision does not prohibit the retailer from providing a written estimate to a potential buyer so long as no contract or proposal for contract is presented or signed prior to the review and approval required by this subsection.

(2) The person installing the system is licensed under this Article.

(3) The contract for sale and for installation is signed by the buyer, by an authorized representative of the retail seller, and by the licensed contractor and contains the contractor's name, license number, and telephone number and the license number of the person approving the system design specifications.

(4) Installation services are performed in compliance with all applicable building codes, manufacturer's installation instructions, and permit and inspection requirements.

(5) The retailer provides, in addition to any other warranties it may offer with respect to the system itself, a warranty for a period of at least one year for any defects in installation.

(k) The provisions of subsections (i) and (j) of this section shall not apply to a system meeting the definition of subdivision (a)(11) of this section. (1931, c. 52, s. 6; 1939, c. 224, s. 3; 1951, c. 953, ss. 1, 2; 1953, c. 254, s. 2; 1967, c. 770, ss. 1-6; 1971, c. 768, ss. 2-4; 1973, c. 1204; 1979, c. 834, ss. 4-7; 1981, c. 332, s. 1; 1983, c. 569, ss. 1, 2; 1989, c. 623, s. 1; 1989 (Reg. Sess., 1990), c. 842, s. 3; c. 978, s. 2; 1991, c. 355, s. 1; c. 507, s. 1; c. 761, s. 13; 1993, c. 78, s. 1; 1997-298, s. 1; 1997-382, ss. 1, 4; 2001-270, s. 2; 2002-159, s. 36(a); 2003-2, s. 1; 2003-31, ss. 1-3.1; 2004-203, s. 69; 2005-131, s. 1; 2005-289, s. 3.)

Effect of Amendments. — Session Laws 2005-131, s. 1, effective January 1, 2006, in subdivision (b)(6), added the present second, third, fifth, and eighth sentences; and, in the last sentence, inserted "any part of" preceding "the examination" and added "or wait one year before retaking any portion of the examination" at the end.

CASE NOTES

Validity of Classification of Subjects of Taxation. — If the classification of the subjects of taxation, provided for in this section, is not arbitrary and unjust it cannot be regarded in law as a breach of the rule of uniformity. Classification by population is not in itself arbitrary, unreasonable, or unjust. Roach v. City of Durham, 204 N.C. 587, 169 S.E. 149 (1933).

A journeyman plumber, duly licensed under the ordinances of a municipality, who furnishes no materials, supplies or fixtures, but merely attaches or replaces fixtures, and does not install plumbing systems or make substantial alterations thereof, is not engaged in carrying on the business of plumbing and heating contracting within this section, since plumbing is defined in the act in terms of the "plumbing system" and the act refers to plumbing and heating "contractors," and even granting that the definition in the act is ambiguous and is susceptible to a construction which would include journeyman plumbers, the court could not adopt such construction, since the statute must be given that construction which is favorable to defendant and tends least to interfere with personal liberty. State v. Mitchell, 217 N.C. 244, 7 S.E.2d 567 (1940).

Cited in Pippen v. Scales, 822 F. Supp. 305 (M.D.N.C. 1993).

OPINIONS OF ATTORNEY GENERAL

Applicability of Licensing Requirements to Property Owners. — The licensing requirements of Article 2, Chapter 87 for plumbing contractors are not applicable to a property owner who installs pipe from an existing well to a mobile home connection point and sewage lines from a mobile home connection point to an existing septic tank facility. See opinion of Attorney General to Honorable W.G. Smith, 45 N.C.A.G. 176 (1975).

§ 87-22. License fee; expiration and renewal; reinstatement.

All persons, firms, or corporations engaged in the business of either plumbing or heating contracting, or both, shall pay an annual license fee not to exceed one hundred fifty dollars ($150.00). The annual fee for a piping or restricted classification license shall not exceed that for a plumbing or heating license. All persons, firms, or corporations engaged in the business of fire sprinkler contracting shall pay an initial application fee not to exceed seventy-five dollars ($75.00) and an annual license fee not to exceed three hundred dollars ($300.00). In the event the Board refuses to license an applicant, the license fee deposited shall be returned by the Board to the applicant. All licenses shall expire on the last day of December in each year following their issuance or renewal. Persons who obtain a license by passing an examination on or after October 1 of any year may receive a license for the remainder of the year by paying one-half of the usual license fee for that classification of license. It shall be the duty of the secretary and treasurer to send by United States mail or e-mail to every licensee registered with the Board, notice to the licensee's last known address reflected on the records of the Board of the amount of fee required for renewal of license, the notice to be mailed at least one month in advance of the expiration of the license. The Board may require payment of all unpaid annual fees before reissuing a license. In the event of failure on the part of any person, firm or corporation to renew the license certificate annually and pay the required fee during the month of January in each year, the Board shall increase the license fee by twenty-five dollars ($25.00) to cover any additional expense associated with late renewal. The Board shall require reexamination upon failure of a licensee to renew license within three years after expiration. The Board may adopt regulations requiring attendance at programs of continuing education as a condition of license renewal. A licensee employed full time as a local government plumbing, heating, or mechanical inspector and holding qualifications from the Code Officials Qualifications Board may renew the license at a fee not to exceed twenty-five dollars ($25.00). (1931, c. 52, s. 7; 1939, c. 224, s. 4; 1971, c. 768, s. 5; 1979, c. 834, s. 8; 1981, c. 332, s. 2; 1989, c. 623, s. 2; 1989 (Reg. Sess., 1990), c. 842, s. 4; 1997-382, s. 2; 2001-270, s. 3; 2005-131, s. 2.)

Effect of Amendments. — Session Laws 2005-131, s. 2, effective January 1, 2006, added the present sixth sentence.

CASE NOTES

Applied in N.C. Sch. Bds. Ass'n v. Moore, 160 N.C. App. 253, 585 S.E.2d 418 (2003).

§ 87-22.1. Examination fees; funds disbursed upon warrant of chairman and secretary-treasurer.

The Board shall charge a nonrefundable application and examination fee not to exceed one hundred fifty dollars ($150.00) for each examination or any part of an examination, and the funds collected shall be disbursed upon warrant of the chairman and secretary-treasurer, to partially defray general expenses of the Board. The application and examination fee shall be retained by the Board whether or not the applicant is granted a license. Until changed by the Board pursuant to rules adopted by the Board, the fee for each examination or any part taken on a particular day shall be one hundred dollars ($100.00). (1959, c. 865, s. 2; 1989, c. 623, s. 3; 2001-270, s. 4; 2005-131, s. 3.)

Effect of Amendments. — Session Laws 2005-131, s. 3, effective January 1, 2006, inserted "or any part of an examination" near the middle of the first sentence and added the last sentence.

§ 87-22.2. Licensing of nonresidents.

(a) Definitions. — The following definitions apply in this section:
- (1) Delinquent income tax debt. — The amount of income tax due as stated in a final notice of assessment issued to a taxpayer by the Secretary of Revenue when the taxpayer no longer has the right to contest the amount.
- (2) Foreign corporation. — Defined in G.S. 55-1-40.
- (3) Foreign entity. — A foreign corporation, a foreign limited liability company, or a foreign partnership.
- (4) Foreign limited liability company. — Defined in G.S. 57C-1-03.
- (5) Foreign partnership. — Either of the following that does not have a permanent place of business in this State:
  - a. A foreign limited partnership as defined in G.S. 59-102.
  - b. A general partnership formed under the laws of a jurisdiction other than this State.

(b) Licensing. — The Board shall not issue a license for a foreign corporation unless the corporation has obtained a certificate of authority from the Secretary of State pursuant to Article 15 of Chapter 55 of the General Statutes. The Board shall not issue a license for a foreign limited liability company unless the company has obtained a certificate of authority from the Secretary of State pursuant to Article 7 of Chapter 57C of the General Statutes.

(c) Information. — Upon request, the Board shall provide the Secretary of Revenue on an annual basis the name, address, and tax identification number of every nonresident individual and foreign entity licensed by the Board. The information shall be provided in the format required by the Secretary of Revenue.

(d) Delinquents. — If the Secretary of Revenue determines that any nonresident individual or foreign corporation licensed by the Board, a member of any foreign limited liability company licensed by the Board, or a partner in any foreign partnership licensed by the Board, owes a delinquent income tax debt, the Secretary of Revenue may notify the Board of these nonresident individuals and foreign entities and instruct the Board not to renew their licenses. The Board shall not renew the license of such a nonresident individual or foreign entity identified by the Secretary of Revenue unless the Board receives a written statement from the Secretary that the debt either has been paid or is being paid pursuant to an installment agreement. (1998-162, ss. 5, 11.)

§ 87-23. Revocation or suspension of license for cause.

(a) The Board shall have power to revoke or suspend the license of or order the reprimand or probation of any plumbing, heating, or fire sprinkler contractor, or any combination thereof, who is guilty of any fraud or deceit in obtaining or renewing a license, or who fails to comply with any provision or requirement of this Article, or the rules adopted by the Board, or for gross negligence, incompetency, or misconduct, in the practice of or in carrying on the business of a plumbing, heating, or fire sprinkler contractor, or any combination thereof, as defined in this Article. Any person may prefer charges of such fraud, deceit, gross negligence, incompetency, misconduct, or failure to comply with any provision or requirement of this Article, or the rules of the Board, against any plumbing, heating, or fire sprinkler contractor, or any combination thereof, who is licensed under the provisions of this Article. All of the charges shall be in writing and investigated by the Board. Any proceedings on the charges shall be carried out by the Board in accordance with the provisions of Chapter 150B of the General Statutes.

(b) The Board shall adopt and publish guidelines, consistent with the provisions of this Chapter, governing the suspension and revocation of licenses.

(c) The Board shall establish and maintain a system whereby detailed records are kept regarding complaints against each licensee. (1931, c. 52, s. 8; 1939, c. 224, s. 5; 1953, c. 1041, s. 5; 1973, c. 1331, s. 3; 1979, c. 834, s. 9; 1987, c. 827, s. 1; 1989 (Reg. Sess., 1990), c. 842, s. 5; 1997-382, s. 3.)

CASE NOTES

Purpose of Law. — The manifest purpose of the law is to promote the health, comfort, and safety of the people by regulating plumbing and heating in public and private buildings. Roach v. City of Durham, 204 N.C. 587, 169 S.E. 149 (1933).

Cited in Pippen v. Scales, 822 F. Supp. 305 (M.D.N.C. 1993).

§ 87-24. Reissuance of revoked licenses; replacing lost or destroyed license.

The Board may in its discretion reissue license to any person, firm or corporation whose license may have been revoked: Provided, four or more members of the Board vote in favor of such reissuance for reasons deemed sufficient by the Board. A new certificate of registration to replace any license which may be lost or destroyed may be issued subject to the rules and regulations of the Board. (1931, c. 52, s. 9; 1989 (Reg. Sess., 1990), c. 842, s. 6.)

§ 87-25. Violations made misdemeanor; employees of licensees excepted.

Any person, firm or corporation who shall engage in or offer to engage in, or carry on the business of plumbing, heating, or fire sprinkler contracting, or any combination thereof, as defined in G.S. 87-21, without first having been licensed to engage in such business, or businesses, as required by the provisions of this Article; or any person, firm or corporation holding a limited plumbing or heating license under the provisions of this Article who shall practice or offer to practice or carry on any type of plumbing or heating contracting not authorized by said limited license; or any person, firm or corporation who shall give false or forged evidence of any kind to the Board, or any member thereof, in obtaining a license, or who shall falsely impersonate any other practitioner of like or different name, or who shall use an expired or revoked license, or who shall violate any of the provisions of this Article, shall be guilty of a Class 2 misdemeanor. An employee in the course of his work as a bona fide employee of a licensee of the Board shall not be construed to have engaged in the business of plumbing, heating, or fire sprinkler contracting, as the case may be. (1931, c. 52, s. 10; 1939, c. 224, s. 6; 1989, c. 623, s. 4; 1989 (Reg. Sess., 1990), c. 842, s. 7; 1993, c. 539, s. 604; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Acts Not Constituting Contracting. — A journeyman plumber, contracting and agreeing with various persons to perform labor required to install certain plumbing at a stipulated lump sum price, and who does not maintain a fixed place of business or sell or contract to furnish materials, supplies or fixtures of any kind, and who fails to obtain a license from the State Board of Examiners of Plumbing and Heating Contractors, is not guilty of a misdemeanor under the provisions of this section, since his occupation does not constitute carrying on the "business of plumbing and heating contracting" within the meaning of the penal provisions of the statute. State v. Ingle, 214 N.C. 276, 199 S.E. 10 (1938).

§ 87-25.1. Board may seek injunctive relief.

Whenever it appears to the Board that any person, firm or corporation is violating any of the provisions of this Article or of the rules and regulations of the Board promulgated under this Article, the Board may apply to the superior court for a restraining order and injunction to restrain the violation; and the superior courts have jurisdiction to grant the requested relief, irrespective of whether or not criminal prosecution has been instituted or administrative sanctions imposed by reason of the violation. The venue for actions brought under this subsection shall be the superior court of any county in which such acts are alleged to have been committed or in the county where the defendants in such action reside. (1979, c. 834, s. 11.)

§ 87-26. Corporations; partnerships; persons doing business under trade name.

(a) A license may be issued in the name of a corporation, provided, one or more officers, or full time employee or employees, or both, empowered to act for the corporation, are licensed in accordance with the provisions of this Article; and provided such officers or employee or employees shall execute contracts to the extent of their license qualifications in the name of the said corporation and exercise general supervision over the work done thereunder.

(b) A license may be issued in the name of a partnership provided one or more general partners, or full time employee or employees empowered to act for the partnership, are licensed in accordance with the provisions of this Article, and provided such general partners or employee or employees shall execute contracts to the extent of their license qualifications in the name of the said partnership, and exercise general supervision over the work done thereunder.

(c) A license may be issued in an assumed or designated trade name, provided the owner of the business conducted thereunder, or full time employee or employees empowered to act for the owner, are licensed in accordance with the provisions of this Article; and such owner or employee or employees shall execute contracts to the extent of their license qualifications, in the said trade name, and exercise general supervision over the work done thereunder.

(d) A certificate of license may be issued in accordance with the provisions of this Article upon payment of the annual license fee by such corporation, partnership, or owner of the business conducted under an assumed or designated trade name, as the case may be, and the names and qualifications of individual licensee or licensees connected therewith shall be indicated on the aforesaid license.

(e) It shall be necessary that persons licensed in accordance with the provisions of this section shall exercise general supervision over contracts to completion. (1931, c. 52, s. 12; 1939, c. 224, s. 8; 1957, c. 815; 1967, c. 770, s. 7.)

§ 87-27. License fees payable in advance; application of.

All license fees shall be paid in advance to the secretary and treasurer of the Board and by him held as a fund for the use of the Board. The compensation and expenses of the members of the Board as herein provided, the salaries of its employees, the costs of continuing educational programs for licensees and applicants, and all expenses incurred in the discharge of its duties under this Article shall be paid out of such fund, upon the warrant of the chairman and secretary and treasurer. (1931, c. 52, s. 13; 1933, c. 57; 1939, c. 224, s. 9; 1953, c. 254, s. 3; 1959, c. 865, s. 1; 1979, c. 834, s. 10.)

CASE NOTES

It is obvious that the pervading intent of this section is to provide for the maintenance of the Board and not to impose a tax as a part of the general revenue of the State and thereby exclude the operation of the police power. It is true that the act does not in express words authorize the exercise of this power, but in our opinion it appears by implication that the exercise of such power was intended. Roach v. City of Durham, 204 N.C. 587, 169 S.E. 149 (1933).

Cited in Muse v. Morrison, 234 N.C. 195, 66 S.E.2d 783 (1951).

§ 87-27.1. Public awareness program.

The Board shall establish and implement a public awareness program to inform the general public of the purpose and function of the Board. (1979, c. 834, s. 11.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

ARTICLE 3.

Tile Contractors.

§§ 87-28 through 87-38: Repealed by Session Laws 1977, c. 143.

ARTICLE 4.

Electrical Contractors.

§ 87-39. Board of Examiners; appointment; terms; chairman; meetings; quorum; principal office; compensation; oath.

(a) The State Board of Examiners of Electrical Contractors shall continue as the State agency responsible for the licensing of persons engaging in electrical contracting within this State, and shall consist of one member from the North

Carolina Department of Insurance to be designated by the Commissioner of Insurance; one member who has satisfied the requirements for an unlimited license as defined in G.S. 87-43.3 and who is a representative of the North Carolina Association of Electrical Contractors to be designated by the governing body of that organization; and five members to be appointed by the Governor: one from the faculty of The Greater University of North Carolina who teaches or does research in the field of electrical engineering, one who is serving as a chief electrical inspector of a municipality or county in North Carolina, one who has satisfied the requirements for an unlimited license as defined in G.S. 87-43.3 and who is a representative of the Carolinas Electrical Contractors Association operating a sole proprietorship, partnership or corporation located in North Carolina which is actively engaged in the business of electrical contracting, and two who have no ties with the construction industry and who represent the interest of the public at large.

(b) Members of the Board shall serve staggered seven-year terms. Each member shall serve until his or her successor is designated or appointed, and is duly qualified. Vacancies occurring during a term shall be filled for the remainder of that term by the authority that designated or appointed the departing member.

(c) Members of the Board shall not serve consecutive, complete terms. For purposes of this subsection, only a term of less than seven years that results from the filling of a vacancy is an incomplete term; a term of less than seven years that results from the successor's late designation or appointment is not an incomplete term.

(d) All members shall be residents of North Carolina during their tenure on the Board. Any member of the Board may be removed by the authority that designated or appointed that member for misconduct, incompetency, or neglect of duty.

(e) The Board shall hold regular meetings quarterly and may hold meetings on call of the chair. The chair shall be required to call a special meeting upon written request by two members of the Board. At its regular first quarter meeting, the Board shall elect from its membership a chair and a vice-chair, each to serve for one year. Four members of the Board shall constitute a quorum. The principal office of the Board shall be at such place as shall be designated by a majority of the members thereof. Payment of compensation and reimbursement of expenses of Board members shall be governed by G.S. 93B-5.

(f) Before entering upon the performance of his or her duties hereunder, each member of the Board shall take and file with the Secretary of State an oath in writing to properly perform the duties of his or her office as a member of the Board, and to uphold the Constitution of North Carolina and the Constitution of the United States. (1937, c. 87, s. 1; 1969, c. 669, s. 1; 1979, c. 904, ss. 1-3; 1989, c. 709, s. 1; 1995, c. 114, s. 1.)

Cross References. — As to Highway Fund and Highway Trust Fund Small Project Bidding, see G.S. 136-28.10.

Editor's Note. — Session Laws 1995, c. 114, s. 5, effective January 1, 1997, provides that, notwithstanding the provisions of G.S. 87-39 to the contrary, the terms of members serving on the Board on January 1, 1997 shall expire upon completion of those terms. The following expiration of terms shall apply: the term of one member who represents the interest of the public at large on June 30, 2004; the representative of the Association of Electrical Contractors on June 30, 2005; the chief electrical inspector of a municipality or county on June 30, 2006; and the remaining appointments seven years after their successors' terms expire. Thereafter all terms shall be seven years. Members serving terms less than seven years are not serving complete terms and are eligible for redesignation or appointment to the Board.

§ 87-40. Secretary-treasurer.

At its regular first quarter meeting, the Board shall appoint a secretary-treasurer to serve for one year. The secretary-treasurer need not be a member of the Board, and the Board is authorized to employ a full-time secretary-treasurer and such other assistants and to make such other expenditures as may be necessary to the proper performance of the duties of the Board under this Article. The compensation and the duties of the secretary-treasurer shall be fixed by the Board, and the secretary-treasurer shall give bond in such sum and form as the Board shall require for the faithful performance of duty. The secretary-treasurer shall keep a record of the proceedings of said Board and shall receive and account for all moneys derived from the operations of the Board under this Article. (1937, c. 87, ss. 2, 3; 1969, c. 669, s. 1; 1995, c. 114, s. 2.)

§ 87-41. Seal of Board.

The Board shall adopt a seal for its own use, and the secretary-treasurer shall have charge and custody thereof. The seal shall have inscribed thereon the words "Board of Examiners of Electrical Contractors, State of North Carolina." (1937, c. 87, s. 3; 1969, c. 669, s. 1.)

§ 87-41.1. Definitions.

As used in this Article, unless the context requires otherwise:

(1) A "qualified individual" is an individual who is qualified in a specific license classification as a result of having taken and passed the qualifying examination required by this Article for such a classification and who has been certified as such by the Board pursuant to G.S. 87-42.

(2) A "listed qualified individual" is a qualified individual whose name is listed on a license issued by the Board. A listed qualified individual has the specific duty and authority to supervise and direct electrical contracting done by or in the name of a licensee of the Board on whose license the qualified individual is so listed.

(3) A licensee of the Board is a person listed pursuant to subsection (2), or a partnership, firm or corporation that regularly employs at least one listed qualified individual and which has been issued a license by the Board. (1989, c. 709, s. 2.)

§ 87-42. Duties and powers of Board.

In order to protect the life, health and property of the public, the State Board of Examiners of Electrical Contractors shall provide for the written examination of all applicants for certification as a qualified individual, as defined in G.S. 87-41.1. The Board shall receive all applications for certification as a qualified individual and all applications for licenses to be issued under this Article, shall examine all applicants to determine that each has met the requirements for certification and shall discharge all duties enumerated in this Article. Applicants for certification as a qualified individual must be at least 18 years of age and shall be required to demonstrate to the satisfaction of the Board their good character and adequate technical and practical knowledge concerning the safe and proper installation of electrical work and equipment. The examination to be given for this purpose shall include, but not be limited to, the appropriate provisions of the National Electrical Code as incorporated in the North Carolina State Building Code, the analysis of electrical plans and specifications, estimating of electrical installations, and the fundamentals of the installation of electrical work and equipment. Certification of qualified individuals shall be issued in the same classifications as provided in this Article for license classifications. The Board shall prescribe the standards of knowledge, experience and proficiency to be required of qualified individuals, which may vary for the various license classifications. The Board shall issue certifications and licenses to all applicants meeting the requirements of this Article and of the Board upon the receipt of the fees prescribed by G.S. 87-44. The Board shall have power to make rules and regulations necessary to the performance of its duties and for the effective implementation of the provisions of this Article. The Board shall have the power to administer oaths and issue subpoenas requiring the attendance of persons and the production of papers and records before the Board in any hearing, investigation, or proceeding conducted by it. Members of the Board's staff or the sheriff or other appropriate official of any county of this State shall serve all notices, subpoenas, and other papers given to them by the Chairman for service in the same manner as process issued by any court of record. Any person who neglects or refuses to obey a subpoena issued by the Board shall be guilty of a Class 1 misdemeanor. The Board shall have the power to acquire, rent, encumber, alienate, and otherwise deal with real property in the same manner as a private person or corporation, subject only to approval of the Governor and the Council of State. Collateral pledged by the Board for an encumbrance is limited to the assets, income, and revenues of the Board. The Board shall keep minutes of all its proceedings and shall keep an accurate record of receipts and disbursements which shall be audited at the close of each fiscal year by a certified public accountant, and the audit report shall be filed with the State of North Carolina in accordance with Chapter 93B of the General Statutes. (1937, c. 87, s. 4; 1969, c. 669, s. 1; 1989, c. 709, s. 3; 1993, c. 539, s. 605; 1994, Ex. Sess., c. 24, s. 14(c); 2001-159, s. 1.)

§ 87-43. Electrical contracting defined; licenses.

Electrical contracting shall be defined as engaging or offering to engage in the business of installing, maintaining, altering or repairing any electric work, wiring, devices, appliances or equipment. No person, partnership, firm or corporation shall engage, or offer to engage, in the business of electrical contracting within the State of North Carolina without having received a license in the applicable classification described in G.S. 87-43.3 from the State Board of Examiners of Electrical Contractors in compliance with the provisions of this Article, regardless of whether the offer was made or the work was performed by a qualified individual as defined in G.S.87-41.1. In each separate place of business operated by an electrical contractor at least one listed qualified individual shall be regularly on active duty and shall have the specific duty and authority to supervise and direct all electrical wiring or electrical installation work done or made by such separate place of business. Every person, partnership, firm or corporation engaging in the business of electrical contracting shall display a current certificate of license in his principal place of business and in each branch place of business which he operates. Licenses issued hereunder shall be signed by the chairman and the secretary-treasurer of the Board, under the seal of the Board. A registry of all licenses issued to electrical contractors shall be kept by the secretary-treasurer of the Board, and said registry shall be open for public inspection during ordinary business hours. (1937, c. 87, s. 5; 1951, c. 650, ss. 1-21/2; 1953, c. 595; 1961, c. 1165; 1969, c. 669, s. 1; 1989, c. 709, s. 4.)

§ 87-43.1. Exceptions.

The provisions of this Article shall not apply:

(1) To the installation, construction or maintenance of facilities for providing electric service to the public ahead of the point of delivery of electric service to the customer;

(2) To the installation, construction, maintenance, or repair of telephone, telegraph, or signal systems, by public utilities, or their corporate affiliates, when said work pertains to the services furnished by said public utilities;

(3) To any person in the course of his work as a bona fide employee of a licensee of this Board;

(4) To the installation, construction or maintenance of electrical equipment and wiring for temporary use by contractors in connection with the work of construction;

(5) To the installation, construction, maintenance or repair of electrical wiring, devices, appliances or equipment by persons, firms or corporations, upon their own property when such property is not intended at the time for rent, lease, sale or gift, who regularly employ one or more electricians or mechanics for the purpose of installing, maintaining, altering or repairing of electrical wiring, devices or equipment used for the conducting of the business of said persons, firms or corporations;

(5a) To any person who is himself and for himself installing, maintaining, altering or repairing electric work, wiring, devices, appliances or equipment upon his own property when such property is not intended at the time for rent, lease, or sale;

(6) To the installation, construction, maintenance or repair of electrical wiring, devices, appliances or equipment by State institutions and private educational institutions which maintain a private electrical department;

(7) To the replacement of lamps and fuses and to the installation and servicing of cord-connected appliances and equipment connected by means of attachment plug-in devices to suitable receptacles which have been permanently installed or to the servicing of appliances connected to a permanently installed junction box. This exception does not apply to permanently installed receptacles or to the installation of the junction box. (1937, c. 87, s. 5; 1951, c. 650, ss. 1-21/2; 1953, c. 595; 1961, c. 1165; 1969, c. 669, s. 1; 1979, c. 904, ss. 4-7.)

§ 87-43.2. Issuance of license.

(a) A person, partnership, firm, or corporation shall be eligible to be licensed as an electrical contractor and to have such license renewed, subject to the provisions of this Article, provided:

(1) At least one listed qualified individual shall be regularly employed by the applicant at each separate place of business to have the specific duty and authority to supervise and direct electrical contracting done by or in the name of the licensee;

(2) An application is filed with the Board which contains a statement of ownership, states the names and official positions of all employees who are listed qualified individuals and provides such other information as the Board may reasonably require;

(3) The applicant, through an authorized officer or owner, shall agree in writing to report to the Board within five days any additions to or loss of the employment of listed qualified individuals; and

(4) The applicant furnishes, upon the initial application for a license, a bonding ability statement completed by a bonding company licensed to do business in North Carolina, verifying the applicant's ability to

furnish performance bonds for electrical contracting projects having a value in excess of the project value limit for a limited license established pursuant to G.S. 87-43.3 for the intermediate license classification and in excess of the project value limit for an intermediate license established pursuant to G.S. 87-43.3 for the unlimited license classification. In lieu of furnishing the bonding ability statement, the applicant may submit for evaluation and specific approval of the Board other information certifying the adequacy of the applicant's financial ability to engage in projects of the license classification applied for. The bonding ability statement or other financial information must be submitted in the same name as the license to be issued. If the firm for which a license application is filed is owned by a sole proprietor, the bonding ability statement or other financial information may be furnished in either the firm name or the name of the proprietor. However, if the application is submitted in the name of a sole proprietor, the applicant shall submit information verifying that the person in whose name the application is made is in fact the sole proprietor of the firm.

(5) Repealed by Session Laws 1989, c. 709, s. 5.

(b) A license shall indicate the names and classifications of all listed qualified individuals employed by the applicant. A license shall be cancelled if at any time no listed qualified individual is regularly employed by the applicant; provided, that work begun prior to such cancellation may be completed under such conditions as the Board shall direct; and provided further that no work for which a license is required under this Article may be bid for, contracted for or initiated subsequent to such cancellation until said license is reinstated by the Board. (1937, c. 87, s. 5; 1951, c. 650, ss. 1-2½; 1953, c. 595; 1961, c. 1165; 1969, c. 669, s. 1; 1989, c. 709, s. 5; 1995, c. 509, s. 135.2(e); 2007-247, s. 2.)

Editor's Note. — Session Laws 2007-247, s. 4, provides: "Effective on October 1, 2007, and until changed by permanent rule adopted by the State Board of Examiners of Electrical Contractors, for purposes of Sections 1 and 2 of this act, the project value limitation for the Limited classification shall be forty thousand dollars ($40,000) and the project value limitation for the Intermediate classification shall be one hundred ten thousand dollars ($110,000)."

Effect of Amendments. — Session Laws 2007-247, s. 2, effective October 1, 2007, in the first sentence of subdivision (a)(4), substituted "the project value limit for a limited license established pursuant to G.S. 87-43.3" for "twenty-five thousand dollars ($25,000)" and substituted "the project value limit for an intermediate license established pursuant to G.S. 87-43.3" for "seventy-five thousand dollars ($75,000)."

§ 87-43.3. Classification of licenses.

An electrical contracting license shall be issued in one of the following classifications: Limited, under which a licensee shall be permitted to engage in a single electrical contracting project of a value, as established by the Board, not in excess of one hundred thousand dollars ($100,000) and on which the equipment or installation in the contract is rated at not more than 600 volts; Intermediate, under which a licensee shall be permitted to engage in a single electrical contracting project of a value, as established by the Board, not in excess of two hundred thousand dollars ($200,000); Unlimited, under which a licensee shall be permitted to engage in any electrical contracting project regardless of value; and such other special Restricted classifications as the Board may establish from time to time to provide, (i) for the licensing of persons, partnerships, firms or corporations wishing to engage in special restricted electrical contracting, under which license a licensee shall be permitted to engage only in a specific phase of electrical contracting of a special, limited nature, and (ii) for the licensing of persons, partnerships, firms or corporations wishing to engage in electrical contracting work as an incidental part of their primary business, which is a lawful business other than electrical contracting, under which license a licensee shall be permitted to engage only in a specific phase of electrical contracting of a special, limited nature directly in connection with said primary business. The Board may establish appropriate standards for each classification, such standards not to be inconsistent with the provisions of G.S. 87-42. The Board may, by rule, modify the project value limitations up to the maximum amounts set forth in this section for limited and intermediate licenses no more than once every three years based upon an increase or decrease in the project cost index for electrical projects in this State. (1969, c. 669, s. 1; 1973, c. 1228, s. 1; 1975, c. 29; 1989, c. 709, s. 6; 1995, c. 114, s. 6; 2007-247, s. 1.)

Editor's Note. — Session Laws 2007-247, s. 4, provides: "Effective on October 1, 2007, and until changed by permanent rule adopted by the State Board of Examiners of Electrical Contractors, for purposes of Sections 1 and 2 of this act, the project value limitation for the Limited classification shall be forty thousand dollars ($40,000) and the project value limitation for the Intermediate classification shall be one hundred ten thousand dollars ($110,000)."

Effect of Amendments. — Session Laws 2007-247, s. 1, effective October 1, 2007, in the first sentence, inserted "as established by the Board" twice, substituted "one hundred thousand dollars ($100,000)" for "twenty-five thousand dollars ($25,000)," and substituted "two hundred thousand dollars ($200,000)" for "seventy-five thousand dollars ($75,000)"; and added the last sentence.

§ 87-43.4. Residential dwelling license.

There is hereby created a separate license for electrical contractors which shall permit an electrical contractor to engage in electrical contracting projects pertaining to single-family detached residential dwellings. The value of a single project pertaining to a single-family detached residential dwelling shall not be in excess of the maximum value, established in G.S. 87-43.3, of a single project engaged in by a licensee with a license classified as limited. The Board shall establish appropriate standards for this new license. The standards of knowledge, experience and proficiency shall be those appropriate for that license. (1973, c. 1343; 1995, c. 114, s. 3.)

§ 87-44. Fees; license term.

The Board shall collect a fee from each applicant before granting or renewing a license under the provisions of this Article; the annual license fee for the limited classification shall not exceed one hundred dollars ($100.00) for each principal and each branch place of business; the annual license fee for the intermediate classification shall not exceed one hundred fifty dollars ($150.00) for each principal and each branch place of business; the annual license fee for the unlimited classification shall not exceed two hundred dollars ($200.00) for each principal and each branch place of business; and the annual license fee for the special restricted classifications and for the single-family detached residential dwelling license shall not exceed one hundred dollars ($100.00) for each principal and each branch place of business.

The Board shall establish a system for the renewal of licenses with varying expiration dates. However, all licenses issued by the Board shall expire one year after the date of issuance. Licenses shall be renewed by the Board, subject to G.S. 87-44.1 and G.S. 87-47, after receipt and evaluation of a renewal application from a licensee and the payment of the required fee. The application shall be upon a form provided by the Board and shall require such information as the Board may prescribe. Renewal applications and fees shall be due 30 days prior to the license expiration date.

Upon failure to renew by the expiration date established by the Board, the license shall be automatically revoked. This license may be reinstated by the Board, subject to G.S. 87-44.1 and G.S. 87-47, upon payment of the license fee, an administrative fee of twenty-five dollars ($25.00), and all fees for the lapsed period during which the person, partnership, firm or corporation engaged in electrical contracting, and, further, upon the satisfaction of such experience requirements during the lapse as the Board may prescribe by rule.

The Board may collect fees from applicants for examinations in an amount not to exceed one hundred twenty-five dollars ($125.00), except the fee for a specially arranged examination shall not exceed two hundred dollars ($200.00). In addition, the Board may collect an examination review fee, not to exceed twenty-five dollars ($25.00), from failed examinees who apply for a supervised review of their failed examinations. (1937, c. 87, ss. 6, 7, 10; 1953, c. 1041, s. 7; 1969, c. 669, s. 1; 1973, c. 1228, s. 2; 1979, c. 904, ss. 8-10; 1985, c. 317; 1989, c. 709, s. 7; 2001-159, s. 2.)

CASE NOTES

Applied in N.C. Sch. Bds. Ass'n v. Moore, 160 N.C. App. 253, 585 S.E.2d 418 (2003).

§ 87-44.1. Continuing education courses required.

Beginning July 1, 1991, the Board may require as prerequisite to the annual renewal of a license that every listed qualified individual complete continuing education courses in subjects relating to electrical contracting to assure the safe and proper installation of electrical work and equipment in order to protect the life, health, and property of the public. The listed qualified individual shall complete, during the 12 months immediately preceding license renewal, a specific number of hours of continuing education courses approved by the Board prior to enrollment. The Board shall not require more than 10 hours of continuing education courses per 12 months and such continuing education courses shall include those taught at a community college as approved by the Board. The listed qualified individual may accumulate and carry forward not more than two additional years of the annual continuing education requirement. Attendance at any course or courses of continuing education shall be certified to the Board on a form provided by the Board and shall be submitted at the time the licensee makes application to the Board for its license renewal and payment of its license renewal fee. This continuing education requirement may be waived by the Board in cases of certified illness or undue hardship as provided for in the Rules of the Board. (1989, c. 709, s. 8.)

§ 87-44.2. Licensing of nonresidents.

(a) Definitions. — The following definitions apply in this section:

(1) Delinquent income tax debt. — The amount of income tax due as stated in a final notice of assessment issued to a taxpayer by the Secretary of Revenue when the taxpayer no longer has the right to contest the amount.

(2) Foreign corporation. — Defined in G.S. 55-1-40.

(3) Foreign entity. — A foreign corporation, a foreign limited liability company, or a foreign partnership.

(4) Foreign limited liability company. — Defined in G.S. 57C-1-03.

(5) Foreign partnership. — Either of the following that does not have a permanent place of business in this State:

a. A foreign limited partnership as defined in G.S. 59-102.

b. A general partnership formed under the laws of a jurisdiction other than this State.

(b) Licensing. — The Board shall not issue a license for a foreign corporation unless the corporation has obtained a certificate of authority from the Secretary of State pursuant to Article 15 of Chapter 55 of the General Statutes. The Board shall not issue a license for a foreign limited liability company unless the company has obtained a certificate of authority from the Secretary of State pursuant to Article 7 of Chapter 57C of the General Statutes.

(c) Information. — Upon request, the Board shall provide the Secretary of Revenue on an annual basis the name, address, and tax identification number of every nonresident individual and every foreign entity licensed by the Board. The information shall be provided in the format required by the Secretary of Revenue.

(d) Delinquents. — If the Secretary of Revenue determines that any nonresident individual or foreign corporation licensed by the Board, a member of any foreign limited liability company licensed by the Board, or a partner in any foreign partnership licensed by the Board, owes a delinquent income tax debt, the Secretary of Revenue may notify the Board of these nonresident individuals and foreign entities and instruct the Board not to renew their licenses. The Board shall not renew the license of such a nonresident individual or foreign entity identified by the Secretary of Revenue unless the Board receives a written statement from the Secretary that the debt either has been paid or is being paid pursuant to an installment agreement. (1998-162, ss. 6, 12.)

§ 87-45. Funds.

The fees collected for examinations and licenses under this Article shall be used for the expenses of the State Board of Examiners of Electrical Contractors in carrying out the provisions of this Article. No expenses of the Board or compensation of any member or employee of the Board shall be payable out of the treasury of the State of North Carolina; and neither the Board nor any member or employee thereof shall have any power or authority to make or incur any expense, debt or other financial obligation binding upon the State of North Carolina. Any funds remaining in the hands of the secretary-treasurer to the credit of the Board after all expenses of the Board for the current fiscal year have been fully provided for shall be paid over to the North Carolina Engineering Foundation, Inc., for the benefit of the electrical engineering department of the Greater University of North Carolina. Provided, however, the Board shall have the right to maintain an amount, the cumulative total of which shall not exceed twenty percent (20%) of gross receipts for the previous fiscal year of its operation as a maximum contingency or emergency fund. (1937, c. 87, ss. 3, 7; 1969, c. 669, s. 1.)

§ 87-46. Responsibility of licensee; nonliability of Board.

Nothing in this Article shall relieve the holder or holders of licenses issued under the provisions hereof from complying with the building or electrical codes or statutes or ordinances of the State of North Carolina, or of any county or municipality thereof now in force or hereafter enacted. Nothing in this Article shall be construed as relieving the holder of any license issued hereunder from responsibility or liability for negligent acts on the part of such holder in connection with electrical contracting work; nor shall the State Board of Examiners of Electrical Contractors be accountable in damages, or otherwise for the negligent act or acts of any holder of such license. (1937, c. 87, s. 12; 1969, c. 669, s. 1.)

§ 87-47. Penalties imposed by Board; enforcement procedures.

(a) Repealed by Session Laws 1989, c. 709, s. 9.

(a1) The following activities are prohibited:

(1) Offering to engage or engaging in electrical contracting without being licensed.
(2) Selling, transferring, or assigning a license, regardless of whether for a fee.
(3) Aiding or abetting an unlicensed person, partnership, firm, or corporation to offer to engage or to engage in electrical contracting.
(4) Being convicted of a crime involving fraud or moral turpitude.
(5) Engaging in fraud or misrepresentation to obtain a certification, obtain or renew a license, or practice electrical contracting.
(6) Engaging in false or misleading advertising.
(7) Engaging in malpractice, unethical conduct, fraud, deceit, gross negligence, gross incompetence, or gross misconduct in the practice of electrical contracting.

(a2) The Board may administer one or more of the following penalties if the applicant, licensee, or qualified individual has engaged in any activity prohibited under subsection (a1) of this section:

(1) Reprimand.
(2) Suspension from practice for a period not to exceed 12 months.
(3) Revocation of the right to serve as a listed qualified individual on any license issued by the Board.
(4) Revocation of license.
(5) Probationary revocation of license or the right to serve as a listed qualified individual on any license issued by the Board, upon conditions set by the Board as the case warrants, and revocation upon failure to comply with the conditions.
(6) Revocation of certification.
(7) Refusal to certify an applicant or a qualified individual.
(8) Refusal to issue a license to an applicant.
(9) Refusal to renew a license.

(a3) In addition to administering a penalty under subsection (a2) of this section, the Board may assess a civil penalty of not more than one thousand dollars ($1,000) against a licensee or a qualified individual who has engaged in an activity prohibited under subsection (a1) of this section or has violated another provision of this Article or a rule adopted by the Board. The clear proceeds of civil penalties collected under this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

In determining the amount of a civil penalty, the Board shall consider:

(1) The degree and extent of harm to the public safety or to property, or the potential for harm.
(2) The duration and gravity of the violation.
(3) Whether the violation was committed willfully or intentionally, or reflects a continuing pattern.
(4) Whether the violation involved elements of fraud or deception either to the public or to the Board, or both.
(5) The violator's prior disciplinary record with the Board.
(6) Whether and the extent to which the violator profited by the violation.

(a4) Any person, including the Board and its staff on their own initiative, may prefer charges pursuant to this section, and such charges must be submitted in writing to the Board. The Board may, without a hearing, dismiss charges as unfounded or trivial. The Board may issue a notice of violation based on the charges, to be served by a member of the Board's staff or in accordance with Rule 4 of the Rules of Civil Procedure, against any person, partnership, firm, or corporation for engaging in an activity prohibited under subsection (a1) of this section or for a violation of the provisions of this Article or any rule adopted by the Board. The person or other entity to whom the notice of violation is issued may request a hearing by notifying the Board in writing within 20 days after being served with the notice of violation. Hearings shall be conducted by the Board or an administrative law judge pursuant to Article 3A of Chapter 150B of the General Statutes. In conducting hearings, the Board may remove the hearings to any county in which the offense, or any part thereof, was committed if in the opinion of the Board the ends of justice or the convenience of witnesses require such removal.

(a5) If the person or other entity does not request a hearing under subsection (a4) of this section, the Board shall enter a final decision and may impose penalties against the person or other entity. If the person or other entity is not a licensee or a qualified individual, the Board may impose penalties under subsection (a2) of this section. If the person or other entity is a licensee or a qualified individual, the Board may impose penalties under subsection (a2) of this section, subsection (a3) of this section, or both.

(b) The Board shall adopt and publish rules, in accordance with Chapter 150B of the General Statutes and consistent with the provisions of this Article, governing the matters contained in this section.

(c) The Board shall establish and maintain a system whereby detailed records are kept regarding charges and notices of violation pursuant to this section. This record shall include, for each person, partnership, firm, and corporation charged or notified of a violation, the date and nature of each charge or notice of violation, investigatory action taken by the Board, any findings by the Board, and the disposition of the matter.

(d) The Board may reinstate a qualified individual's certification and may reinstate a license after having revoked it, provided that one year has elapsed from revocation until reinstatement and that the vote of the Board for reinstatement is by a majority of its members.

The Board shall immediately notify the Secretary of State and the electrical inspectors within the licensee's county of residence upon the revocation of a license or the reissuance of a license which had been revoked.

(e) In any case in which the Board is entitled to convene a hearing to consider imposing any penalty provided for in subsection (a2) or (a3) of this section, the Board may accept an offer in compromise of the charge, whereby the accused shall pay to the Board a penalty of not more than one thousand dollars ($1,000). The clear proceeds of penalties collected by the Board under this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1969, c. 669, s. 1; 1973, c. 1331, s. 3; 1979, c. 904, s. 11; 1989, c. 709, s. 9; 1995, c. 114, s. 4; 1998-215, s. 132.)

CASE NOTES

Standing. — Plaintiff electrical contractor who filed complaint with the North Carolina State Board of Examiners of Electrical Contractors (the Board) alleging that a licensee engaged in conduct proscribed by Chapter 87, and whose first cause of action in the superior court was a request for an order to compel the Board to apply for an administrative law judge to hold a hearing on the original complaint, lacked standing to bring the action. Bryant v. North Carolina State Bd. of Exmrs. of Elec. Contractors, 111 N.C. App. 875, 433 S.E.2d 814 (1993), cert. granted, 335 N.C. 552, 441 S.E.2d 111 (1994).

Hearings on Charges Required. — Though the language is not explicit in requiring that the Board of Examiners of Electrical Contractors hold a hearing on charges, such a requirement is implicit both in the language referring to "hearings of charges" and in the stated purpose of the statute governing the jurisdiction of the Board to hear such charges.

Bryant v. North Carolina State Bd. of Exmrs. of Elec. Contractors, 338 N.C. 288, 449 S.E.2d 188 (1994).

It would be contrary to the intent expressed in subsection (a1), that of protecting the public, to determine that plaintiff was not entitled to a hearing and decision on charges brought to effectuate that very purpose. Bryant v. North Carolina State Bd. of Exmrs. of Elec. Contractors, 338 N.C. 288, 449 S.E.2d 188 (1994).

§ 87-48. Penalty for violation of Article; powers of Board to enjoin violation.

(a) Any person, partnership, firm or corporation who shall violate any of the provisions of this Article or any rule of the Board adopted pursuant to this Article or who shall engage or offer to engage in the business of installing, maintaining, altering or repairing within the State of North Carolina any electric wiring, devices, appliances or equipment without first having obtained a license under the provisions of this Article shall be guilty of a Class 2 misdemeanor.

(b) Whenever it shall appear to the State Board of Examiners of Electrical Contractors that any person, partnership, firm or corporation has violated, is violating, or threatens to violate any provisions of this Article, the Board may apply to the courts of the State for a restraining order and injunction to restrain such practices. If upon such application the court finds that any provision of this Article is being violated, or a violation thereof is threatened, the court shall issue an order restraining and enjoining such violations, and such relief may be granted regardless of whether criminal prosecution is instituted under the provisions of this Article. The venue for actions brought under this subsection shall be the superior court of any county in which such acts are alleged to have been committed or in the county where the defendants in such action reside. (1937, c. 87, s. 13; 1969, c. 669, s. 1; 1979, c. 904, s. 14; 1989, c. 709, s. 10; 1993, c. 539, s. 606; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 87-49. No examination required of licensed contractors.

Any person, firm or corporation licensed in this State as a Class II electrical contractor on the effective date of this Article shall be entitled to be licensed, without examination, in the limited classification upon payment of the required fee and may be licensed in the intermediate or in the unlimited classification without written examination upon satisfactory proof to the Board that such applicant is in fact qualified for such classification. Any person, firm or corporation licensed in this State as a Class I electrical contractor on the effective date of this Article shall be entitled to be licensed without examination in the limited, intermediate or unlimited classification upon payment of the required fee. Provided, that any person who has been once duly licensed by the Board, whose license has expired solely because of failure to apply for renewal, may apply and have a license issued under the provisions of this section if within a period of 12 months preceding such issuance the applicant shall have been primarily actively engaged as an electrical contractor or in an occupation which in the judgment of the Board is similar or equivalent to that of an electrical contractor. (1969, c. 669, s. 1.)

§ 87-50. Reciprocity.

To the extent that other states which provide for the licensing of electrical contractors provide for similar action, the Board may grant licenses of the same or equivalent classification to electrical contractors licensed by other states without written examination upon satisfactory proof furnished to the Board that the qualifications of such applicants are equal to the qualifications of holders of similar licenses in North Carolina and upon payment of the required fee. (1969, c. 669, s. 1.)

§ 87-50.1. Public awareness program.

The Board shall establish and implement a public awareness program to inform the general public of the purpose and function of the Board. (1979, c. 904, s. 13.)

§ 87-51. Severability of provisions.

If any provision of this Article or the application thereof to any person or circumstances is for any reason held invalid, such invalidity shall not affect other provisions or applications of the Article which can be given effect without the invalid provision or application, and to this end the provisions of this Article are declared to be severable. (1969, c. 669, s. 1.)

Article 5.

Refrigeration Contractors.

§ 87-52. State Board of Refrigeration Examiners; appointment; term of office.

For the purpose of carrying out the provisions of this Article, the State Board of Refrigeration Examiners is created, consisting of seven members appointed by the Governor to serve seven-year staggered terms. The Board shall consist of one member who is a wholesaler or a manufacturer of refrigeration equipment; one member from an engineering school of The University of North Carolina, one member from the Division of Public Health of The University of North Carolina, two licensed refrigeration contractors, one member who has no ties with the construction industry to represent the interest of the public at large, and one member with an engineering background in refrigeration. The term of office of one member shall expire each year. Vacancies occurring during a term shall be filled by appointment of the Governor for the unexpired term. Whenever the term "Board" is used in this Article, it means the State Board of Refrigeration Examiners. No Board member shall serve more than one complete consecutive term. (1955, c. 912, s. 1; 1959, c. 1206, s. 2; 1973, c. 476, s. 128; 1979, c. 712, s. 1; 1995, c. 376, s. 1.)

Cross References. — As to Highway Fund and Highway Trust Fund Small Project Bidding, see G.S. 136-28.10.

Legal Periodicals. — For comment on this Article, see 33 N.C.L. Rev. 520 (1955).

§ 87-53. Removal, qualifications and compensation of members; allowance for expenses.

The Governor may remove any member of the Board for misconduct, incompetency or neglect of duty. Each member of the Board shall be a resident of this State at the time of his appointment. Payment of compensation and reimbursement of expenses of Board members shall be governed by G.S. 93B-5. (1955, c. 912, s. 2; 1969, c. 445, s. 9; 1979, c. 712, ss. 2, 7.)

§ 87-54. Organization meeting; officers; seal; rules.

The Board shall within 30 days after its appointment meet in the City of Raleigh and organize, and shall elect a chairman and secretary and treasurer, each to serve for one year. Thereafter said officer shall be elected annually. The secretary and treasurer shall give bond approved by the Board for the faithful performance of his duties, in such sum as the Board may, from time to time, determine. The Board shall have a common seal, shall formulate rules to govern its actions, and is hereby authorized to employ such personnel as it may deem necessary to carry out the provisions of this Article. (1955, c. 912, s. 3.)

§ 87-55. Regular and special meetings; quorum.

The Board after holding its first meeting, as hereinbefore provided, shall thereafter hold at least two regular meetings each year. Special meetings may be held at such times and places as the bylaws and/or rules of the Board provide; or as may be required in carrying out the provisions hereof. A quorum of the Board shall consist of four members. (1955, c. 912, s. 4.)

§ 87-56. Record of proceedings and register of applicants; reports.

The Board shall keep a record of its proceedings and a register of all applicants for examination, showing the date of each application, the name, age and other qualifications, places of business and residence of each applicant. The books and records of the Board shall be prima facie evidence of the correctness of the contents thereof. On or before the first day of March of each year the Board shall submit to the Governor a report of its activities for the preceding year, and file with the Secretary of State a copy of such report, together with a statement of receipts and expenditures of the Board attested by the chairman and secretary. (1955, c. 912, s. 5.)

§ 87-57. License required of persons, firms or corporations engaged in the refrigeration trade.

In order to protect the public health, safety, morals, order and general welfare of the people of this State, all persons, firms or corporations, whether resident or nonresident of the State of North Carolina, before engaging in refrigeration business or contracting, as defined in this Article, shall first apply to the Board and shall procure a license. (1955, c. 912, s. 6.)

§ 87-58. Definitions; contractors licensed by Board; examinations.

(a) As applied in this Article, “refrigeration trade or business” is defined to include all persons, firms or corporations engaged in the installation, maintenance, servicing and repairing of refrigerating machinery, equipment, devices and components relating thereto and within limits as set forth in the codes, laws and regulations governing refrigeration installation, maintenance, service and repairs within the State of North Carolina or any of its political subdivisions. This Article shall not apply to the replacement of lamps and fuses and to the installation and servicing of domestic household refrigerators and freezers or domestic ice-making appliances connected by means of attachment plug-in devices to suitable receptacles which have been permanently installed. The provisions of this Article shall not repeal any wording, phrase, or paragraph as set forth in Article 2 of Chapter 87 of the General Statutes. This

Article shall not apply to employees of persons, firms, or corporations or persons, firms or corporations, not engaged in refrigeration contracting as herein defined, that install, maintain and service their own refrigerating machinery, equipment and devices. The provisions of this Article shall not apply to any person, firm or corporation engaged in the business of selling, repairing and installing any comfort cooling devices or systems.

(b) The term "refrigeration contractor" means a person, firm or corporation engaged in the business of refrigeration contracting.

(b1) The term "transport refrigeration contractor" means a person, firm, or corporation engaged in the business of installation, maintenance, servicing, and repairing of transport refrigeration.

(c) Any person, firm or corporation who for valuable consideration engages in the refrigeration business or trade as herein defined shall be deemed and held to be in the business of refrigeration contracting.

(d) In order to protect the public health, comfort and safety, the Board shall prescribe the standard of experience to be required of an applicant for license and shall give an examination designed to ascertain the technical and practical knowledge of the applicant concerning the analysis of plans and specifications, estimating cost, fundamentals of installation and design as they pertain to refrigeration; and as a result of the examination, the Board shall issue a certificate of license in refrigeration to applicants who pass the required examination and a license shall be obtained in accordance with the provisions of this Article, before any person, firm or corporation shall engage in, or offer to engage in the business of refrigeration contracting. The Board shall prescribe standards for and issue licenses for refrigeration contracting and for transport refrigeration contracting. A transport refrigeration contractor license is a specialty license that authorizes the licensee to engage only in transport refrigeration contracting. A refrigeration contractor licensee is authorized to engage in transport refrigeration and all other aspects of refrigeration contracting.

Each application for examination shall be accompanied by a check, post-office money order or cash in the amount of the annual license fee required by this Article. Regular examinations shall be given in the months of April and October of each year and additional examinations may be given at times the Board deems wise and necessary. Any person may demand in writing a special examination and upon payment by the applicant of the cost of holding the examination and the deposit of the amount of the annual license fee, the Board in its discretion will fix a time and place for the examination.

(e) Repealed by Session Laws 1979, c. 843, s. 1.

(f) Licenses Granted without an Examination. — Persons who had an established place of business prior to July 1, 1979, and who produce satisfactory evidence that they are engaged in the refrigeration business as herein defined in any city, town or other area in which Article 5 of Chapter 87 of the General Statutes did not previously apply shall be granted a certificate of license, without examination, upon application to the Board and payment of the license fee, provided completed applications shall be made prior to June 30, 1981.

(g) The current license issued in accordance with the provisions of this Article shall be posted in the business location of the licensee, and its number shall appear on all proposals or contracts and requests for permits issued by municipalities.

(h) A transport refrigeration contractor having an established place of business doing transport refrigeration contracting prior to October 1, 1995, shall be granted a transport refrigeration contracting specialty license, without examination, if the person produces satisfactory evidence the person is engaged in transport refrigeration contracting, pays the required license fee, and applies to the Board prior to January 1, 1997. The current specialty license shall be posted in accordance with subsection (g) of this section.

(i) Nothing in this Article shall relieve the holder of a license issued under this section from complying with the building or electrical codes, statutes, or ordinances of the State or of any county or municipality or from responsibility or liability for negligent acts in connection with refrigeration contracting work. The Board shall not be liable in damages, or otherwise, for the negligent acts of licensees.

(j) The Board in its discretion upon application may grant a reciprocal license to a person holding a valid, active substantially comparable license from another jurisdiction, but only to the extent the other jurisdiction grants reciprocal privileges to North Carolina licensees. (1955, c. 912, s. 7; 1959, c. 1206, s. 1; 1979, c. 843, ss. 1, 2; 1987 (Reg. Sess., 1988), c. 1082, s. 5; 1989, c. 770, s. 13; 1995, c. 376, s. 2; 1998-216, ss. 1, 2, 2.1.)

§ 87-59. Revocation or suspension of license for cause.

(a) The Board shall have power to revoke or suspend the license of any refrigeration contractor who is guilty of any fraud or deceit in obtaining a license, or who fails to comply with any provision or requirement of this Article, or for gross negligence, incompetency, or misconduct, in the practice of or in carrying on the business of a refrigeration contractor as defined in this Article. Any person may prefer charges of fraud, deceit, gross negligence, incompetency, misconduct, or failure to comply with any provision or requirement of this Article, against any refrigeration contractor who is licensed under the provisions of this Article. All charges shall be in writing and verified by the complainant, and shall be heard and determined by the Board in accordance with the provisions of Chapter 150B of the General Statutes.

(b) The Board shall adopt and publish guidelines, consistent with the provisions of this Article, governing the suspension and revocation of licenses.

(c) The Board shall establish and maintain a system whereby detailed records are kept regarding complaints against each licensee. This record shall include, for each licensee, the date and nature of each complaint, investigatory action taken by the Board, any findings of the Board, and the disposition of the matter.

(d) In a case in which the Board is entitled to convene a hearing to consider a charge under this section, the Board may accept an offer to compromise the charge, whereby the accused shall pay to the Board a penalty not to exceed one thousand dollars ($1,000). The funds derived from the penalty shall be deposited into the General Fund.

(e) All records, papers, and other documents containing information collected and compiled by the Board, or its members or employees, as a result of investigations, inquiries, or interviews conducted in connection with a licensing or disciplinary matter, shall not be considered public records within the meaning of Chapter 132 of the General Statutes. (1955, c. 912, s. 8; 1973, c. 1331, s. 3; 1979, c. 712, s. 3; 1989, c. 770, s. 14; 1995, c. 376, s. 3.)

§ 87-60. Reissuance of revoked licenses; replacing lost or destroyed licenses.

The Board may in its discretion reissue license to any person, firm or corporation whose license was revoked if a majority of the Board votes in favor of such reissuance for reasons deemed sufficient by the Board. A new certificate of registration to replace any license which may be lost or destroyed may be issued subject to the rules and regulations of the Board. (1955, c. 912, s. 9; 1998-216, s. 3.)

§ 87-61. Violations made misdemeanor; employees of licensees excepted.

Any person, firm or corporation who shall engage in or offer to engage in, or carry on the business of refrigeration contracting as defined in this Article, without first having been licensed to engage in the business, or businesses, as required by the provisions of this Article; or any person, firm or corporation holding a refrigeration license under the provisions of this Article who shall practice or offer to practice or carry on any type of refrigeration contracting not authorized by the license; or any person, firm or corporation who shall give false or forged evidence of any kind to the Board, or any member thereof, in obtaining a license, or who shall falsely impersonate any other practitioner of like or different name, or who shall use an expired or revoked license, or who shall violate any of the provisions of this Article, shall be guilty of a Class 2 misdemeanor. The Board may, in its discretion, use its funds to defray the costs and expenses, legal or otherwise, in the prosecution of any violation of this Article. Employees, while working under the supervision and jurisdiction of a person, firm or corporation licensed in accordance with the provisions of this Article, shall not be construed to have engaged in the business of refrigeration contracting. (1955, c. 912, s. 10; 1993, c. 539, s. 607; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 376, s. 4.)

§ 87-61.1. Board may seek injunctive relief.

Whenever it appears to the Board that any person, firm or corporation is violating any of the provisions of this Article or of the rules and regulations promulgated under this Article, the Board may apply to the superior court for a restraining order and injunction to restrain the violation; and the superior courts have jurisdiction to grant the requested relief, irrespective of whether or not criminal prosecution has been instituted or administrative sanctions imposed by reason of the violation. (1979, c. 712, s. 4.)

§ 87-62. Only one person in partnership or corporation need have license.

(a) A corporation or partnership may engage in the business of refrigeration contracting if one or more persons connected with the corporation or partnership is registered and licensed as herein required, and the licensed person executes all contracts, exercises general supervision over the work done thereunder and is responsible for compliance with all the provisions of this Article. The Board may determine the number of businesses and the proximity of the businesses one to another over which the licensed person may be responsible.

(b) For purposes of this section, the licensee's connection to the corporation or partnership shall be in the form of a written contract that is executed prior to the corporation or partnership engaging in refrigeration contracting.

(c) Nothing in this Article shall prohibit any employee from becoming licensed pursuant to the provisions thereof. (1955, c. 912, s. 11; 1998-216, s. 4.)

§ 87-63. License fees payable in advance; application of.

All license fees shall be paid in advance as hereafter provided to the secretary and treasurer of the Board and by him held as a fund for the use of the Board. The compensation and expenses of the members of the Board as herein provided, the salaries of its employees, and all expenses incurred in the discharge of its duties under this Article shall be paid out of such fund, upon the warrant of the chairman and secretary and treasurer: Provided, upon the payment of the necessary expenses of the Board as herein set out, and the retention by it of twenty-five per centum (25%) of the balance of funds collected hereunder the residue, if any, shall be paid to the State Treasurer. (1955, c. 912, s. 12.)

§ 87-64. Examination and license fees; annual renewal.

Each applicant for a license by examination shall pay to the Board of Refrigeration Examiners a nonrefundable examination fee in an amount not to exceed the sum of forty dollars ($40.00). In the event the applicant successfully passes the examination, the examination fee shall be applied to the license fee required of licensees for the current year in which the examination was taken and passed.

The license of every person licensed under the provisions of this statute shall be annually renewed. On or before November 1 of each year the Board shall cause to be mailed an application for renewal of license to every person who has received from the Board a license to engage in the refrigeration business, as heretofore defined. On or before January 1 of each year every licensed person who desires to continue in the refrigeration business shall forward to the Board a renewal fee in an amount not to exceed forty dollars ($40.00) together with the application for renewal. Upon receipt of the application and renewal fee the Board shall issue a renewal certificate for the current year. Failure to renew the license annually shall automatically result in a forfeiture of the right to engage in the refrigeration business. Any licensee who allows the license to lapse may be reinstated by the Board upon payment of a fee not to exceed seventy-five dollars ($75.00). Any person who fails to renew a license for two consecutive years shall be required to take and pass the examination prescribed by the Board for new applicants before being licensed to engage further in the refrigeration business. (1955, c. 912, s. 13; 1969, c. 314; 1979, c. 843, ss. 3, 4; 1998-216, s. 5.)

§ 87-64.1. Public awareness program.

The Board shall establish and implement a public awareness program to inform the general public of the purpose and function of the Board. (1979, c. 712, s. 4.)

Article 6.

Water Well Contractors.

§§ 87-65 through 87-82: Repealed by Session Laws 1977, c. 712, s. 2.

Article 7.

North Carolina Well Construction Act.

§ 87-83. Short title.

This Article shall be known and may be cited as the North Carolina Well Construction Act. (1967, c. 1157, s. 1.)

Cross References. — As to Highway Fund and Highway Trust Fund Small Project Bidding, see G.S. 136-28.10.

Legal Periodicals. — For article, "The Evolution of Modern North Carolina Environmental and Conservation Policy Legislation," see 29 Campbell L. Rev. 535 (2007).

§ 87-84. Findings and policy.

The General Assembly of North Carolina finds that improperly constructed, operated, maintained, or abandoned wells can adversely affect the public health and the groundwater resources of the State. Consistent with the duty to safeguard the public welfare, safety, health and to protect and beneficially develop the groundwater resources of this State, it is declared to be the policy of this State to require that the location, construction, repair, and abandonment of wells, and the installation of pumps and pumping equipment conform to such reasonable requirements as may be necessary to protect the public welfare, safety, health and groundwater resources. (1967, c. 1157, s. 2.)

§ 87-85. Definitions.

As used in this Article, unless the context otherwise requires:

(1) "Abandoned well" means a well whose use has been discontinued, or which is in such a state of disrepair that continued use for obtaining groundwater or other useful purpose is impracticable.

(2) "Aquifer" means a geologic formation, group of such formations, or a part of such a formation that is water bearing.

(3) "Artesian well" means a well tapping a confined or artesian aquifer.

(4) "Environmental Management Commission" means the North Carolina Environmental Management Commission or its successor, unless otherwise indicated.

(5) "Construction of wells" means all acts necessary to construct wells for any intended purpose or use, including the location and excavation of the well; placement of casings, screens and fittings; development and testing.

(5a) "Department" means the Department of Environment and Natural Resources unless otherwise indicated.

(6) "Installation of pumps and pumping equipment" means the procedure employed in the placement and preparation for operation of pumps and pumping equipment, including all construction involved in making entrances to the well and establishing seals.

(7) "Municipality" means a city, town, county, district, or other public body created by or pursuant to State law, or any combination thereof acting cooperatively or jointly.

(8) "Nonpotable mineralized water" means brackish, saline, or other water containing minerals of such quantity or type as to render the water unsafe, harmful or generally unsuitable for human consumption and general use.

(9) "Person" shall mean any and all persons, including individuals, firms, partnerships, associations, public or private institutions, municipalities or political subdivisions, governmental agencies, or private or public corporations organized or existing under the laws of this State or any other state or country.

(10) "Polluted water" means water containing organic or other contaminants of such type and quantity as to render it unsafe, harmful or unsuitable for human consumption and general use.

(10a) "Private drinking water well" means any excavation that is cored, bored, drilled, jetted, dug, or otherwise constructed to obtain groundwater for human consumption and that serves or is proposed to serve

14 or fewer service connections or that serves or is proposed to serve 24 or fewer individuals. The term "private drinking water well" includes a well that supplies drinking water to a transient noncommunity water system as defined in 40 Code of Federal Regulations § 141.2 (July 1, 2003 Edition).

(11) "Pumps" and "pumping equipment" means any equipment or materials utilized or intended for use in withdrawing or obtaining groundwater including well seals.

(12) "Repair" means work involved in deepening, reaming, sealing, installing or changing casing depths, perforating, screening, or cleaning, acidizing or redevelopment of a well excavation, or any other work which results in breaking or opening the well seal.

(13) "Water supply well" means any well intended or usable as a source of water supply, but not to include a well constructed by an individual on land which is owned or leased by him, appurtenant to a single-family dwelling, and intended for domestic use (including household purposes, farm livestock, or gardens).

(14) "Well" means any excavation that is cored, bored, drilled, jetted, dug or otherwise constructed for the purpose of locating, testing or withdrawing groundwater or for evaluating, testing, developing, draining or recharging any groundwater reservoirs or aquifer, or that may control, divert, or otherwise cause the movement of water from or into any aquifer.

(15) "Well driller," "driller" or "water well contractor" means any person, firm, or corporation engaged in the business of constructing wells.

(16) "Well seal" means an approved arrangement or device used to cap a well or to establish and maintain a junction between the casing or curbing of a well and the piping or equipment installed therein, the purpose or function of which is to prevent pollutants from entering the well at the upper terminal.

(17) "Operation of wells" means the process, frequency, and duration of withdrawing water or other fluids from a well by any means. (1967, c. 1157, s. 3; 1973, c. 1262, s. 23; 1977, c. 771, s. 4; 1987, c. 496, s. 1; 1989, c. 727, s. 218(21); 1997-358, s. 4; 1997-443, s. 11A.119(a); 2006-202, s. 1.)

Effect of Amendments. — Session Laws 2006-202, s. 1, effective August 7, 2006, added subdivision (10a).

§ 87-86. Scope.

No person shall construct, operate, repair, or abandon, or cause to be constructed, operated, repaired, or abandoned, any well, nor shall any person install, repair, or cause to be installed or repaired, any pump or pumping equipment contrary to the provisions of this Article and applicable rules and regulations, provided that this Article shall not apply to any distribution of water beyond the point of discharge from the pump. (1967, c. 1157, s. 4; 1987, c. 496, ss. 2, 3.)

§ 87-87. Authority to adopt rules, regulations, and procedures.

The Environmental Management Commission shall adopt rules governing the location, construction, repair, and abandonment of wells, the operation of water wells or well systems with a designed capacity of 100,000 gallons per day or greater, and the installation and repair of pumps and pumping equipment.

The Environmental Management Commission shall be responsible for the administration of this Article and shall:

(1) Hold public hearings, upon not less than 30 days' prior notice setting forth the date, place, and time of hearing, and the proposed rules and regulations to be considered at said public hearing, which notice shall be published in one or more newspapers having general circulation throughout the State, in connection with proposed rules and regulations and amendments thereto.

(2) Enforce the provisions of this Article, and any rules and regulations not inconsistent with the provisions of this Article adopted pursuant thereto.

(3) Establish procedures and forms for the submission, review, approval, and rejection of applications, notifications, and reports required under this Article.

(4) Issue such additional regulations as may be necessary to carry out the provisions of this Article.

(5) Neither adopt nor enforce any rule or regulation that concerns the civil liability of an owner to a well driller for any costs or expenses of drilling and installing a well for the owner.

(6) Adopt rules governing the permitting and inspection by the Commission of private drinking water wells with a designed capacity of 100,000 gallons per day or greater.

(7) Adopt rules governing the permitting and inspection by local health departments of private drinking water wells pursuant to G.S. 87-97. (1967, c. 1157, s. 5; 1973, c. 1262, s. 23; 1985, c. 728, s. 4; 1987, c. 496, s. 4; 2006-202, s. 2.)

Effect of Amendments. — Session Laws 2006-202, s. 2, effective August 7, 2006, in the introductory paragraph, substituted "adopt rules" for "adopt, and may from time to time amend, rules and regulations not inconsistent with this Article" near the beginning, substituted "equipment. The Environmental Management Commission" for "equipment, and" near the end, and substituted "Article and shall" for "Article. With respect thereto it shall" at the end; added paragraphs (6) and (7); and made minor punctuation and stylistic changes throughout the section.

§ 87-88. General standards and requirements.

(a) Prior Permission. — Prior permission shall be obtained from the Environmental Management Commission for the construction of (i) any water well or of well systems with a designed capacity of 100,000 gallons per day or greater; and (ii) of any well in a geographical area where the Environmental Management Commission finds, after public hearings, such permission to be reasonably necessary to protect the groundwater resources and the public welfare, safety and health, taking into consideration other applicable State laws; provided, however, that the Environmental Management Commission shall not reject any application under this subsection for permission to construct a well except upon the ground that the well would not be in compliance with a provision of this Article or with a rule or regulation of the Environmental Management Commission adopted pursuant to the provisions of G.S. 87-87 of this Article. Notification of approval or rejection of an application for permission to construct a well shall be given the applicant within a period of 15 days after receipt of such application. Private drinking water wells (i) with a designed capacity of 100,000 gallons per day or greater or (ii) that are to be constructed in a geographical area where the Environmental Management Commission has found that prior permission is necessary shall be subject to permitting and inspection by the Environmental Management Commission and shall not be subject to permitting and inspection by a local health department. All other private drinking water wells shall be subject to permitting and inspection by the local health department as provided in G.S. 87-97.

(b) Reports. — Any person completing or abandoning any well shall furnish the Environmental Management Commission a certified record of the construction or abandonment of such well within a period of 30 days after completion of construction or abandonment.

(c) Prevention of Contamination. — Every well shall be constructed and maintained in a condition whereby it is not a source or channel of contamination of the groundwater supply or any aquifer. Wells subject to the provisions of subdivision (a)(i) of this section shall be operated in such a way that they shall not cause the violation of applicable groundwater quality standards. Contamination as used herein shall mean the act of introducing into water foreign materials of such a nature, quality, and quantity as to cause degradation of the quality of the water.

(d) Valves and Casing on Flowing Artesian Wells. — Valves and casing on all flowing artesian wells shall be maintained in a condition so that the flow of water can be completely stopped when the well is not being put to a beneficial use. Valves shall be closed when a beneficial use is not being made.

(e) Access Port. — Every water-supply well and such other wells, as may be specified by the Environmental Management Commission, shall be equipped with a usable access port or air line and to be a minimum of 0.5 inch inside diameter opening so that the position of the water level can be determined at any time. Such port shall be installed and maintained in such manner as to prevent entrance of water or foreign material.

(f) Mineralized Water. — Whenever a water-bearing stratum or aquifer that contains nonpotable mineralized water is encountered in well construction, the stratum shall be adequately cased or cemented off as conditions may require so that contamination of the overlying or underlying groundwater zones will not occur.

(g) Polluted Water. — In constructing any well, all water-bearing zones that are known to contain polluted water shall be adequately cased or cemented off so that pollution of the overlying and underlying groundwater zones will not occur.

(h) Well Test. — Every water-supply well shall be tested for capacity by a method and for a period of time acceptable to the Department and depending on the intended use of the well.

(i) Chlorination of the Well. — Upon completion of the well construction and pump installation, all water-supply wells installed for the purpose of obtaining groundwater for human consumption shall be sterilized in accordance with standards for sterilization of drinking water wells established by the U.S. Public Health Service.

(j) Use of Well for Recharge or Disposal. — No well shall be used for recharge, injection or disposal purposes without prior permission from the Environmental Management Commission.

(k) Abandonment of Wells. —

(1) Temporary Abandonment: When any well is temporarily removed from service, the top of the well shall be sealed with a water-tight cap or seal.

(2) Permanent Abandonment: Any well that is to be permanently abandoned shall be filled, plugged, or sealed in such a manner as to prevent the well from being a channel allowing the vertical movement of water and a source of contamination of the groundwater supply.

(3) Abandonment of Water Supply Wells for Other Use: Any water supply well that is removed from service as a potable water supply source may be used for other purposes, including, but not limited to,

irrigation, commercial use, or industrial use, and such well is not subject to either subdivision (1) or (2) of this subsection during its use for other purposes. (1967, c. 1157, s. 6; 1973, c. 476, s. 128; c. 1262, s. 23; 1987, c. 496, s. 4; 1989, c. 727, s. 14; 1998-212, s. 14.9B(a); 2006-202, s. 3; 2006-259, s. 50(a).)

Effect of Amendments. — Session Laws 2006-202, s. 3, effective August 7, 2006, added the last two sentences in subsection (a); and substituted "human consumption and all private drinking water wells" for "domestic consumption" in the middle of subsection (i).

Session Laws 2006-259, s. 50(a), effective August 23, 2006, deleted "and all private drinking water wells" following "human consumption" in subsection (i).

§ 87-89. Existing installations.

No well or pump installation in existence and in use on July 6, 1967, shall be required to conform to provisions of subsection (a) of G.S. 87-88, or any rules or regulations adopted pursuant thereto not inconsistent with the provisions of this Article; provided, however, that any well now or hereafter abandoned, including any well deemed to have been abandoned, as defined in the Article, shall, within such time as may be specified by the Environmental Management Commission, be brought into compliance with the requirements of this Article and any applicable rules or regulations with respect to abandonment of wells. It is the intention of the General Assembly that if the provisions of this section are held invalid as a grant of an exclusive or separate emolument or privilege, within the meaning of Article I, Sec. 7 of the North Carolina Constitution, the remainder of this Article shall be given effect without the invalid provision or provisions. (1967, c. 1157, s. 7; 1973, c. 1262, s. 23.)

Editor's Note. — The reference to the Constitution in this section is to the Constitution adopted in 1868, as amended. See now N.C. Const., Art. I, § 32.

§ 87-90. Rights of investigation, entry, access and inspection.

The Environmental Management Commission or Department shall have the right to conduct such investigations as it may reasonably find necessary to carry on its duties prescribed in this Article, and for this purpose to enter at reasonable times upon any property, public or private, for the purpose of investigating the condition, installation, or operation of any well or associated equipment, facility, or property, and to require written statements or the filing of reports under oath, with respect to pertinent questions relating to the installation or operation of any well: Provided, that no person shall be required to disclose any secret formula, processes or methods used in any manufacturing operation or any confidential information concerning business activities carried on by him or under his supervision. No person shall refuse entry or access to any authorized representative of the Environmental Management Commission who requests entry for purposes of inspection, and who presents appropriate credentials, nor shall any person obstruct, hamper or interfere with any such representative while in the process of carrying out his official duties, consistent with the provisions of this Article. (1967, c. 1157, s. 8; 1973, c. 1262, s. 23.)

§ 87-91. Notice of violation; remedial action order.

(a) Whenever the Environmental Management Commission has reasonable grounds to believe that there has been a violation of this Article or any rule adopted pursuant to this Article, the Environmental Management Commission or Department shall give written notice to the person or persons alleged to be in violation. The notice shall identify the provision of this Article or rule adopted pursuant to this Article alleged to be violated and the facts alleged to constitute the violation. The Environmental Management Commission may also issue an order requiring specific remedial action. An order requiring remedial action shall specify the action to be taken, the date by which the action must be completed, the possible consequences of failing to comply with the order, and the procedure by which the alleged violator may seek review of the order.

(b) The notice may be served by any means authorized under G.S. 1A-1, Rule 4. (1967, c. 1157, s. 9; 1973, c. 1262, s. 23; 1977, c. 771, s. 4; 1989, c. 727, s. 15; 1997-358, s. 7; 1997-443, s. 11A.119(a).)

§ 87-92. Hearings; appeals.

Any person wishing to contest a penalty, permit decision, or other order issued under this Article shall be entitled to an administrative hearing and judicial review conducted according to the procedures established in Chapter 150B of the General Statutes. (1967, c. 1157, s. 10; 1973, c. 1262, s. 23; 1977, c. 771, s. 4; 1985, c. 728, s. 1; 1987, c. 827, ss. 1, 70.)

§ 87-93: Repealed by Session Laws 1985, c. 728, s. 2.

Cross References. — As to hearings and appeals under this Article, see now G.S. 87-92.

§ 87-94. Civil penalties.

(a) Any person who violates any provision of this Article, Article 7A of this Chapter, any order issued pursuant thereto, or any rule adopted thereunder, shall be subject to a civil penalty of not more than one thousand dollars ($1,000) for each violation, as determined by the Secretary of Environment and Natural Resources. Each day of a continuing violation shall be considered a separate offense. No person shall be subject to a penalty who did not directly commit the violation or cause it to be committed.

(b) Repealed by Session Laws 1997-358, s. 3, effective August 4, 1997.

(c) In determining the amount of the penalty the Secretary shall consider factors set out in G.S. 143B-282.1(b). The procedures set out in G.S. 143-215.6A and G.S. 143B-282.1 shall apply to civil penalties assessed under this section.

(d) The Secretary shall notify any person assessed a civil penalty of the assessment and the specific reasons therefor by registered or certified mail, or by any means authorized by G.S. 1A-1, Rule 4.

(e) Repealed by Session Laws 1997-358, s. 3, effective August 4, 1997.

(f) Repealed by 1995 (Reg. Sess., 1996), c. 743, s. 2, effective July 1, 1996.

(g) The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1967, c. 1157, s. 12; 1985, c. 728, s. 3; 1987, c. 246, s. 2; 1989, c. 727, s. 218(22); 1989 (Reg. Sess., 1990), c. 1036, s. 10; 1995 (Reg. Sess., 1996), c. 743, s. 2; 1997-358, s. 3; 1997-443, s. 11A.119(a); 1998-215, s. 44; 2001-440, s. 1.4.)

§ 87-95. Injunctive relief.

Upon violation of any of the provisions of or any order issued pursuant to this Article, or duly adopted rule of the Commission implementing the provisions of this Article, the Secretary of Environment and Natural Resources may, either before or after the institution of proceedings for the collection of the penalty imposed by this Article for such violations, request the Attorney General to institute a civil action in the superior court in the name of the State upon the relation of the Department of Environment and Natural Resources for injunctive relief to restrain the violation or require corrective action, and for such other or further relief in the premises as said court shall deem proper. Neither the institution of the action nor any of the proceedings thereon shall relieve any party to such proceedings from the penalty prescribed by this Article for any violation of same. (1967, c. 1157, s. 13; 1973, c. 1262, s. 23; 1975, c. 842, s. 1; 1977, c. 771, s. 4; 1989, c. 727, s. 16; 1989 (Reg. Sess., 1990), c. 1004, s. 19(b); 1997-443, s. 11A.119(a).)

§ 87-96. Conflict with other laws.

(a) The provisions of any law, rule, or local ordinance which establish standards affording greater protection to groundwater resources or public health, safety, or welfare shall prevail, within the jurisdiction to which they apply, over the provisions of this Article and rules adopted pursuant to this Article.

(b) Rules relating to public health, wells, or groundwater adopted by the Commission for Public Health shall prevail over this Article, rules adopted pursuant to this Article, and rules adopted by a local board of health pursuant to subsection (c) of this section. This Article shall not be construed to repeal any law or rule in effect as of July 1, 1989.

(c) A local board of health may adopt by reference rules adopted by the Environmental Management Commission pursuant to this Article, and may adopt more stringent rules when necessary to protect the public health. (1967, c. 1157, s. 14; 1973, c. 476, s. 128; 1989, c. 727, s. 17; 1991, c. 650, s. 1; 2007-182, s. 2.)

Effect of Amendments. — Session Laws 2007-182, s. 2, effective July 5, 2007, substituted "Commission for Public Health" for "Commission for Health Services" in subsection (b).

§ 87-97. (See Editor's note for effective date) Permitting, inspection, and testing of private drinking water wells.

(a) Mandatory Local Well Programs. — Each county, through the local health department that serves the county, shall implement a private drinking water well permitting, inspection, and testing program. Local health departments shall administer the program and enforce the minimum well construction, permitting, inspection, repair, and testing requirements set out in this Article and rules adopted pursuant to this Article.

(b) Permit Required. — Except for those wells required to be permitted by the Environmental Management Commission pursuant to G.S. 87-88, no person shall:

(1) Construct or assist in the construction of a private drinking water well unless a construction permit has been obtained from the local health department.

(2) Repair or assist in the repair of a private drinking water well unless a repair permit has been obtained from the local health department, except that a permit shall not be required for the repair or replacement of a pump or tank.

(c) Permit Not Required for Maintenance or Pump Repair or Replacement. — A repair permit shall not be required for any private drinking water well maintenance work that does not involve breaking or opening the well seal. A repair permit shall not be required for any private drinking water well repair work that involves only the repair or replacement of a pump or tank.

(d) Well Site Evaluation. — The local health department shall conduct a field investigation to evaluate the site on which a private drinking water well is proposed to be located before issuing a permit pursuant to this section. The field investigation shall determine whether there is any abandoned well located on the site, and if so, the construction permit shall be conditioned upon the proper closure of all abandoned wells located on the site in accordance with the requirements of this Article and rules adopted pursuant to this Article. If a private drinking water well is proposed to be located on a site on which a wastewater system subject to the requirements of Article 11 of Chapter 130A of the General Statutes is located or proposed to be located, the application for a construction permit shall be accompanied by a plat or site plan, as defined in G.S. 130A-334.

(e) Issuance of Permit. — The local health department shall issue a construction permit or repair permit if it determines that a private drinking water well can be constructed or repaired and operated in compliance with this Article and rules adopted pursuant to this Article. The local health department may impose any conditions on the issuance of a construction permit or repair permit that it determines to be necessary to ensure compliance with this Article and rules adopted pursuant to this Article.

(f) Expiration and Revocation. — A construction permit or repair permit shall be valid for a period of five years except that the local health department may revoke a permit at any time if it determines that there has been a material change in any fact or circumstance upon which the permit is issued. The foregoing shall be prominently stated on the face of the permit. The validity of a construction permit or a repair permit shall not be affected by a change in ownership of the site on which a private drinking water well is proposed to be located or is located if the location of the well is unchanged and the well and the facility served by the well remain under common ownership.

(f1) Chlorination of the Well. — Upon completion of construction of a private drinking water well, the well shall be sterilized in accordance with the standards of drinking water wells established by the United States Public Health Service.

(g) Certificate of Completion. — Upon completion of construction of a private drinking water well or repair of a private drinking water well for which a permit is required under this section, the local health department shall inspect the well to determine whether it was constructed or repaired in compliance with the construction permit or repair permit. If the local health department determines that the private drinking water well has been constructed or repaired in accordance with the requirements of the construction permit or repair permit, the construction and repair requirements of this Article, and rules adopted pursuant to this Article, the local health department shall issue a certificate of completion. No person shall place a private drinking water well into service without first having obtained a certificate of completion. No person shall return a private drinking water well that has undergone repair to service without first having obtained a certificate of completion.

(h) Drinking Water Testing. — Within 30 days after it issues a certificate of completion for a newly constructed private drinking water well, the local health department shall test the water obtained from the well or ensure that the water obtained from the well has been sampled and tested by a certified laboratory in accordance with rules adopted by the Commission for Public Health. The water shall be tested for the following parameters: arsenic, barium, cadmium, chromium, copper, fluoride, lead, iron, magnesium, manganese, mercury, nitrates, nitrites, selenium, silver, sodium, zinc, pH, and bacterial indicators.

(i) Commission for Public Health to Adopt Drinking Water Testing Rules. — The Commission for Public Health shall adopt rules governing the sampling and testing of well water and the reporting of test results. The rules shall allow local health departments to designate third parties to collect and test samples and report test results. The rules shall also provide for corrective action and retesting where appropriate. The Commission for Public Health may by rule require testing for additional parameters if the Commission makes a specific finding that testing for the additional parameters is necessary to protect public health.

(j) Test Results. — The local health department shall provide test results to the owner of the newly constructed private drinking water well and, to the extent practicable, to any leaseholder of a dwelling unit or other facility served by the well at the time the water is sampled.

(k) Registry of Permits and Test Results. — Each local health department shall maintain a registry of all private drinking water wells for which a construction permit or repair permit is issued. The registry shall specify the physical location of each private drinking water well and shall include the results of all tests of water from each well. The local health department shall retain a record of the results of all tests of water from a private drinking water well until the well is properly closed in accordance with the requirements of this Article and rules adopted pursuant to this Article.

(*l*) Authority Not Limited. — This section shall not be construed to limit any authority of local boards of health, local health departments, the Department of Health and Human Services, or the Commission for Public Health to protect public health. (2006-202, s. 4; 2006-259, ss. 50(b), 50(c), 51; 2007-182, s. 2; 2007-495, s. 1.)

Editor's Note. — Session Laws 2006-202, s. 8, makes this section, as enacted by 2006-202, s. 4, effective July 1, 2008, except that subsection (i) is effective August 7, 2006.

Session Laws 2006-259, s. 50(b), effective August 23, 2006, amended G.S. 87-97 "as enacted by Section 4 of House Bill 2873" (Session Laws 2006-202), by adding subsection (f1), contingent on House Bill 2873 becoming law, which it did.

Effect of Amendments. — Session Laws 2006-259, ss. 50(a), (b), and 51, effective August 23, 2006, added subsection (f1); inserted "the construction repair requirements of" near the middle of subsection (g); and substituted "well or ensure that the water obtained from the well has been sampled and tested by a certified laboratory in accordance with rules adopted by the Commission for Health Services. The water shall be tested" for "well" in subsection (h).

Session Laws 2007-182, s. 2, effective July 5, 2007, substituted "Commission for Public Health" for "Commission for Health Services" in subsections (h) and (*l*), and three times in subsection (i).

Session Laws 2007-495, s. 1, effective August 30, 2007, substituted "plat or site plan" for "plat" in the last sentence of subsection (d).

§ 87-98. Bernard Allen Memorial Emergency Drinking Water Fund.

(a) The Bernard Allen Memorial Emergency Drinking Water Fund is established under the control and direction of the Department. The Fund shall be a nonreverting, interest-bearing fund consisting of monies appropriated by the General Assembly or made available to the Fund from any other source and investment interest credited to the Fund.

(b) The Fund may be used to pay for notification, to the extent practicable, of persons aged 18 and older who reside in any dwelling unit, and the senior official in charge of any business, at which drinking water is supplied from a private drinking water well or improved spring that is located within 1,500 feet of, and at risk from, known groundwater contamination. The senior official in charge of the business shall take reasonable measures to notify all employees of the business of the groundwater contamination, including posting a notice of the contamination in a form and at a location that is readily accessible to the employees of the business. The Fund may also be used by the Department to pay the costs of testing of private drinking water wells and improved springs for suspected contamination up to once every three years upon request by a person who uses the well and for the temporary or permanent provision of alternative drinking water supplies to persons whose drinking water well or improved spring is contaminated. Under this subsection, an alternative drinking water supply includes the repair or replacement of a contaminated well or the connection to a public water supply.

(c) The Department shall disburse monies from the Fund based on financial need and on the risk to public health posed by groundwater contamination and shall give priority to the provision of services under this section to instances when an alternative source of funds is not available. The Fund shall not be used for remediation of groundwater contamination. Nothing in this section expands, contracts, or modifies the obligation of responsible parties under Article 9 or 10 of Chapter 130A of the General Statutes, this Article, or Article 21A of this Chapter to assess contamination, identify receptors, or remediate groundwater or soil contamination. The Fund shall not be used to provide alternative water supply to households with incomes greater than three hundred percent (300%) of the current federal poverty level. The Fund shall not be used to provide alternative drinking water supplies unless the concentration of one or more contaminants in the private drinking water well or improved spring exceeds the Maximum Contaminant Level, or the federal drinking water action level as defined in 40 Code of Federal Regulations § 141.1 through § 141.571 (1 July 2006) and 40 Code of Federal Regulations § 143.3 (1 July 2006). The Fund shall not be used to provide temporary water supplies in any calendar quarter until all needs for permanent replacement water supplies that have been identified in that calendar quarter have been met through hookups to public water supplies, repair, or replacement of contaminated wells. In disbursing monies from the Fund, preference shall be given to providing permanent replacement water supplies by connection to public water supplies and repair or replacement of contaminated wells over the provision of temporary water supplies.

(d) The Department shall establish criteria by which the Department is to evaluate applications and disburse monies from this Fund and may adopt any rules necessary to implement this section.

(e) The Department, in consultation with the Commission for Public Health and local health departments, shall report no later than 1 October of each year to the Environmental Review Commission, the House of Representatives and Senate Appropriations Subcommittees on Natural and Economic Resources, and the Fiscal Research Division of the General Assembly on the implementation of this section. The report shall include the purpose and amount of all expenditures from the Fund during the prior fiscal year, a discussion of the benefits and deficiencies realized as a result of the section, and may also include recommendations for any legislative action. (2006-255, s. 5.2; 2007-182, s. 2; 2007-323, s. 12.2(a).)

Editor's Note. — Session Laws 2006-255, s. 14 makes this section effective August 23, 2006.

Session Laws 2007-323, s. 12.2(b), provides that the first report required by G.S. 87-98(e) shall be submitted on or before October 1, 2008.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-182, s. 2, effective July 5, 2007, substituted "Commission for Public Health" for "Commission for Health Services" in subsection (e).

Session Laws 2007-323, s. 12.2(a), effective July 1, 2007, in subsection (a), in the first sentence, inserted "Bernard Allen Memorial" and substituted "under the control and direction of" for "within" and added the second sentence; in subsection (b), inserted "or improved spring" in the first sentence, in the third sentence, substituted "Fund" for "funds," substituted "by the Department to pay" for "to cover," substituted "and improved springs for suspected contamination up to once every three years upon requests by a person who uses the well" for "for contamination," inserted "temporary or permanent" and inserted "or improved spring," and added the last sentence; in subsection (c), substituted "Fund" for "funds" in the second sentence and added the third through seventh sentences; substituted "monies" for "funds" in the middle of subsection (d); and added subsection (e).

ARTICLE 7A.

Well Contractors Certification.

§ 87-98.1. Title.

This Article may be cited as the North Carolina Well Contractors Certification Act. (1997-358, s. 2.)

§ 87-98.2. Definitions.

The definitions in G.S. 87-85 and the following definitions apply in this Article:

(1) Commission. — The Well Contractors Certification Commission, as established by G.S. 143B-301.11.

(2) Department. — The Department of Environment and Natural Resources.

(3) Person. — A natural person.

(4) Secretary. — The Secretary of Environment and Natural Resources.

(5) Well contractor. — A person in trade or business who undertakes to perform a well contractor activity or who undertakes to personally supervise or personally manage the performance of a well contractor activity on the person's own behalf or for any person, firm, or corporation.

(6) Well contractor activity. — The construction, installation, repair, alteration, or abandonment of any well. (1997-358, s. 2; 1997-443, s. 11A.119(b); 2002-165, s. 1.1.)

§ 87-98.3. Purpose.

It is the purpose of this Article to protect the public health and safety by ensuring the integrity and competence of well contractors, to protect and beneficially develop the groundwater resources of the State, to require the examination of well contractors and the certification of their competency to supervise or conduct well contractor activity, and to establish procedures for the examination and certification of well contractors. (1997-358, s. 2.)

§ 87-98.4. Well contractor certification required; exemptions.

(a) Certification Required. — No person shall perform, manage, or supervise any well contractor activity without being certified under this Article. A person who is not a certified well contractor or who is not employed by a certified well contractor shall not offer to perform any well contractor activity unless the person utilizes a certified well contractor to perform the well contractor activity and, prior to the performance of the well contractor activity, the person discloses to the landowner in writing the name of the certified well contractor who will perform the well contractor activity, the certification number of the well contractor, and the name of the company that employs the certified well contractor.

(b) Exempt persons and activities. — This Article does not apply to any of the following persons or activities:

(1) A person who is employed by, or performs labor or services for, a certified well contractor in connection with well contractor activity performed under the personal supervision of the certified well contractor.

(2) A person who constructs, repairs, or abandons a well that is located on land owned or leased by that person.

(3) A person who is employed by a government agency and who performs well contractor activity solely within the scope of the person's government employment.

(4) A person who is licensed as a professional engineer under Chapter 89C of the General Statutes, a geologist under Chapter 89E of the General Statutes, or a soil scientist under Chapter 89F of the General Statutes who uses a hand auger to collect soil or water samples or to measure water levels. This exemption does not include the construction of a monitoring well.

(5) Construction, repair, or abandonment of a well used for a temporary dewatering activity that is associated with, and necessary to complete construction of, a utility distribution or collection system, a building or other structure, or a transportation system, if all of the following conditions are met:

a. The dewatering well is constructed solely for the purpose of removing water from or lowering the water table in the immediate area of the construction activity.

b. The dewatering well is located within 25 feet of the excavation and is not greater than 25 feet deeper than the excavation.

c. The dewatering well is abandoned in accordance with rules governing the abandonment of wells adopted by the Environmental Management Commission pursuant to G.S. 87-87 within 30 days of installation of the well or within 10 days of completion of the project, whichever is later.

(6) Construction, repair, or abandonment of a well used for a temporary dewatering activity that is associated with the construction of a borrow pit if the dewatering activity is located within 15 feet of the proposed perimeter of the borrow pit.

(7) Exploratory drilling for mining-related investigations.

(8) Installation of a water level observation well on property for which a mining permit has been issued under the Mining Act of 1971, Article 7 of Chapter 74 of the General Statutes.

(9) Drilling of a blast hole.

(10) Installation of a cathodic protection anode.

(11) Installation of a wetland monitoring gauge at a depth of eight feet or less for the purpose of monitoring fluctuations in the water table.

(12) Installation of a caisson, piling, or structural pier.

(c) Additional Exemptions. — In addition to the exemptions set out in subsection (b) of this section, the Commission may exempt by rule a geophysical activity, construction activity, or other well contractor activity from the requirements of this Article if the Commission finds that the activity has a negligible impact on the environment; public health, safety, and welfare; and the groundwater resources of the State. (1997-358, s. 2; 1998-129, s. 1; 2001-440, s. 1.1; 2005-386, s. 9.)

§ 87-98.5. Types of certification; sole certification.

The Commission, with the advice and assistance of the Secretary, shall establish the appropriate types of certification for well contractors. Each certification type established by the Commission shall be the sole certification required to engage in well contractor activity in the State. (1997-358, s. 2.)

§ 87-98.6. Well contractor qualifications and examination.

The Commission, with the advice and assistance of the Secretary, shall establish minimum requirements of education, experience, and knowledge for each type of certification for well contractors and shall establish procedures for receiving applications for certification, conducting examinations, and making investigations of applicants as may be necessary and appropriate so that prompt and fair consideration will be given to each applicant. (1997-358, s. 2.)

§ 87-98.7. Issuance and renewal of certificates; temporary certification; refusal to issue a certificate.

(a) Issuance. — An applicant, upon satisfactorily meeting the appropriate requirements, shall be certified to perform in the capacity of a well contractor and shall be issued a suitable certificate by the Commission designating the level of the person's competency. A certificate shall be valid for one year or until any of the following occurs:

(1) The certificate holder voluntarily surrenders the certificate to the Commission.

(2) The certificate is revoked or suspended by the Commission for cause.

(b) Renewal. — A certificate shall be renewed annually by payment of the annual fee and proof that the applicant has completed any professional development hours as may be required by the rules of the Commission. A person who fails to renew a certificate within 30 days of the expiration of the certificate must reapply for certification under this Article.

(c) Temporary Certification. — A person may receive temporary certification to construct a well upon submission of an application to the Commission and subsequent approval in accordance with the criteria established by the Commission and upon payment of a temporary certification fee. A temporary certification shall be granted to the same person only once per calendar year and may not be valid for a period in excess of 45 consecutive days. To perform additional well contractor activity during that same calendar year, the person shall apply for certification under this Article.

(d) Refusal to Issue a Certificate. — The Commission shall not issue a certificate under any of the following circumstances:

(1) The applicant has not paid civil penalties assessed against the applicant under G.S. 87-94 for a violation of this Article, Article 7 of this Chapter, or any rule adopted to implement either of those Articles.

(2) The applicant has not conducted all restoration activities ordered by the Department related to a violation by the applicant of Article 7 of this Chapter.

(3) As determined by the Commission, the applicant has a history of not complying with this Article, Article 7 of this Chapter, or any rule adopted to implement either of those Articles. (1997-358, s. 2; 2001-440, s. 1.2; 2007-495, s. 2.)

Effect of Amendments. — Session Laws 2007-495, s. 2, effective August 30, 2007, added "and proof that the applicant has completed any professional development hours as may be required by the rules of the Commission" to the end of subsection (b).

§ 87-98.8. Disciplinary actions.

The Commission may issue a written reprimand to a well contractor or, in accordance with the provisions of Article 3A of Chapter 150B of the General Statutes, may suspend or revoke the certificate of a well contractor if the Commission finds that the well contractor has:

(1) Engaged in fraud or deception in connection with obtaining certification or in connection with any well contractor activity.

(2) Failed to use reasonable care, judgment, or the application of the person's knowledge or ability in the performance of any well contractor activity.

(3) Been grossly negligent or has demonstrated willful disregard of any applicable laws or rules governing well construction.

(4) Failed to satisfactorily complete continuing education requirements established by the Commission. (1997-358, s. 2.)

§ 87-98.9. Fees; Well Construction Fund.

(a) Fees. — The Commission may set a fee for certification by examination, an annual fee for certification renewal, and a fee for temporary certification. The fee for certification by examination may not exceed one hundred dollars ($100.00), the annual fee may not exceed two hundred dollars ($200.00) per year, and the temporary certification fee shall not exceed one hundred dollars ($100.00). A well contractor certificate is void if the well contractor fails to pay the annual fee within 30 days of the date the fee is due.

(b) Fund. — The Well Construction Fund is created as a nonreverting account within the Department. All fees collected pursuant to this Article shall be credited to the Fund. The Fund shall be used for the costs of administering this Article. (1997-358, s. 2.)

§ 87-98.10. Promotion of training.

The Commission and the Secretary may provide training for well contractors and cooperate with educational institutions and private and public associations, persons, or corporations in providing training for well contractors. (1997-358, s. 2.)

§ 87-98.11. Responsibilities of well contractors.

All persons receiving certification under this Article to perform well contractor activities in this State shall be responsible for complying with all statutes, rules, and generally accepted construction practices, including all local rules or ordinances governing well contractor activities. (1997-358, s. 2.)

§ 87-98.12. (Effective until September 1, 2010) Continuing education requirements; exemption.

(a) In order to continue to be certified under this Article, a well contractor shall satisfactorily complete the number of hours of approved continuing education required by the Commission. The Commission shall establish the minimum number of hours of continuing education that shall be required to maintain certification, shall specify the scope of required continuing education courses, and shall approve continuing education courses.

§ 87-89.12 is set out twice. See notes.

(b) A well contractor who is 70 years of age or more; who has engaged in well contractor activity for more than 20 years; who has no record of having violated any provision of this Article, Article 7 of this Chapter, or order issued pursuant to or rule adopted under this Article or Article 7 of this Chapter in the previous 10 years; and who meets all other requirements for certification under this Article is exempt from continuing education requirements adopted pursuant to this section. (1997-358, s. 2; 1998-129, s. 1; 2001-440, s. 1.3; 2007-495, s. 5.)

Section Set Out Twice. — The section above is effective until September 1, 2010. For the section as amended September 1, 2010, see the following section, also numbered G.S. 87-98.12.

Editor's Note. — Session Laws 2001-440, s. 5, as amended by Session Laws 2007-495, s. 5, provides that Session Laws 2001-440, s. 1.3, which amended this section by adding subsection (b) and making related changes, expires September 1, 2010.

§ 87-98.12. (Effective September 1, 2010) Continuing education requirements.

In order to continue to be certified under this Article, a well contractor shall satisfactorily complete the number of hours of approved continuing education required by the Commission. The Commission shall establish the minimum number of hours of continuing education that shall be required to maintain certification, shall specify the scope of required continuing education courses, and shall approve continuing education courses. (1997-358, s. 2; 1998-129, s. 1; 2001-440, s. 1.3; 2007-495, s. 5.)

Section Set Out Twice. — The section above is effective September 1, 2010. For the section as in effect until September 1, 2010, see the preceding section, also numbered G.S. 87-98.12.

Editor's Note. — Session Laws 2001-440, s. 5, as amended by Session Laws 2007-495, s. 5, provides that Session Laws 2001-440, s. 1.3, which amended this section by adding subsection (b) and making related changes, expires September 1, 2010. The section is set out above as it read prior to the amendment by Session Laws 2001-440, s. 5.

§ 87-98.13. Injunctive relief.

Upon violation of this Article, a rule adopted under this Article, or an order issued under this Article, the Secretary may, either before or after the institution of proceedings for the collection of any penalty imposed under this Article for the violation, request the Attorney General to institute a civil action in the superior court in the name of the State for injunctive relief to restrain the violation or require corrective action and for any other relief the court finds proper. Initiating an action shall not relieve any party to the proceedings from any penalty prescribed by this Article. (1997-358, s. 2.)

§ 87-99: Reserved for future codification purposes.

Article 8.

Underground Damage Prevention.

§ 87-100. Short title.

This Article shall be known as the "Underground Damage Prevention Act". (1985, c. 785, s. 1.)

Cross References. — As to Highway Fund and Highway Trust Fund Small Project Bidding, see G.S. 136-28.10.

CASE NOTES

Cited in Coastal Plains Utils., Inc. v. New Hanover County, 166 N.C. App. 333, 601 S.E.2d 915, 2004 N.C. App. LEXIS 1745 (2004).

§ 87-101. Definitions.

As used in this Article:

(1) "Association" means an association, sponsored by utility owners, that will provide for receipt of notification of excavation operations in a defined geographical area, and that will maintain the records of the notifications.

(2) "Damage" includes the substantial weakening of structural or lateral support of an underground utility, penetration or destruction of protective coating, housing, or other protective device of an underground utility, and the partial or complete severance of an underground utility.

(3) "Excavate" or "excavation" means an operation for the purpose of the movement or removal of earth, rock, or other materials in or on the ground by use of equipment operated by means of mechanical power and/or an operation by which a structure or mass of material is wrecked, razed, moved, or removed by means of any tools, equipment, or discharge of explosives. This term includes road construction but does not include road maintenance activities within rights-of-way of a highway, including those maintenance activities defined by the rules and regulations of the North Carolina Department of Transportation.

(4) "Highway" has the meaning set out in G.S. 20-4.01 as the same shall be amended from time to time.

(5) "Location of underground utilities" means a strip of land not wider than the width of the underground utility plus two and one-half (2½) feet on either side of the underground utility.

(6) "Person" means a corporation, individual, copartnership, company, association, or any combination of individuals or organizations doing business as a unit, any subdivision or instrumentality of the State, and includes any officer, agent, trustee, receiver, assignee, lessee, or personal representative of any of the above entities.

(7) "Person financially responsible" means that person who ultimately receives the benefits of any completed excavation activities, including a person owning or leasing real property or holding an easement or interest in an easement.

(8) "Public spaces" means any area owned by the State or any of its political subdivisions or dedicated for public use.

(9) "Road construction" means the actual building of a new highway; or the paving, grading, widening, relocation, reconstruction, or other major improvement of a substantial portion of an existing highway.

(10) "Road maintenance" means preservation, including repairs and resurfacing of a highway, not amounting to road construction.

(11) "Street" has the meaning set out in G.S. 20-4.01 as the same shall be amended from time to time.

(12) "Underground utility" means any underground line, system or facility used for producing, storing, conveying, transmitting, or distributing communication or telecommunication, electricity, gas, petroleum

and petroleum products, coal slurry, hazardous liquids, water under pressure, steam, or sanitary sewage, but not including traffic signal control cables and vehicle detection cables of the North Carolina Department of Transportation.

(13) "Utility owner" means any person who owns or operates an underground utility.

(14) "Work day" means every day except Saturday, Sunday, national legal holidays and State legal holidays. (1985, c. 785, s. 1.)

CASE NOTES

"Excavation." — A contractor's cleaning out of an overgrown ditch constituted "excavation" on the owner's property. MCI Worldcom Network Servs. v. Lee, — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 22619 (E.D.N.C. Oct. 31, 2000).

Applied in Continental Tel. Co. v. Gunter, 99 N.C. App. 741, 394 S.E.2d 228 (1990); Coastal Plains Utils., Inc. v. New Hanover County, 166 N.C. App. 333, 601 S.E.2d 915, 2004 N.C. App. LEXIS 1745 (2004).

§ 87-102. Notice required prior to excavation.

(a) Except as provided in G.S. 87-106, before commencing any excavations in highways, public spaces or in private easements of a utility owner, a person planning to excavate shall notify each utility owner having underground utilities located in the proposed area to be excavated, either orally or in writing, not less than two nor more than 10 working days prior to starting, of his intent to excavate.

(b) The written or oral notice required in subsection (a) shall contain:

(1) The name, address, and telephone number of the person filing the notice;

(2) The name, address, and telephone number of the person doing the excavating;

(3) The anticipated starting date of the excavation;

(4) The anticipated duration of the excavation;

(5) The type of excavation to be conducted;

(6) The location of the proposed excavation; and

(7) Whether or not explosives will be used.

(c) If the notice required by this section is made by telephone, an adequate record shall be made of the notification by the utility owners or the utility association and the person making the notification, to document compliance with this section. (1985, c. 785, s. 1.)

CASE NOTES

Liability in Damages is Remedy Under the Underground Damage Prevention Act. — Liability in damages is a remedy contemplated by the drafters of the Underground Damage Prevention Act, G.S. 87-100 et seq., for an excavator's breach of the duty established by G.S. 87-102 and G.S. 87-104. MCI Worldcom Network Servs. v. Lee, — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 22619 (E.D.N.C. Oct. 31, 2000).

Applied in Continental Tel. Co. v. Gunter, 99 N.C. App. 741, 394 S.E.2d 228 (1990).

Cited in Lexington Tel. Co. v. Davidson Water, Inc., 122 N.C. App. 177, 468 S.E.2d 66 (1996).

§ 87-103. Effect of permit on liability.

A permit authorizing excavation operations and issued pursuant to law or ordinance shall not relieve a person of the responsibility of complying with this Article. (1985, c. 785, s. 1.)

§ 87-104. Requirements of person doing excavation.

(a) Except as provided in G.S. 87-106, no person may excavate in a highway, a public space, or a private easement of a utility owner without first having given the notice required in G.S. 87-102 to the utility owners.

(b) In addition to the notification requirements, each person excavating shall:

(1) Plan the excavation to avoid damage and to minimize interference with underground utilities in and near the construction area, to the best of his abilities;

(2) Maintain a clearance between an underground utility and the cutting edge or point of any mechanized equipment, taking into account the known limit of control of that cutting edge or point, as is reasonably required to avoid damage; and

(3) Provide support for the underground utilities in or near the construction area, including backfill, as may be reasonably required by the utility owner for the protection of the underground utilities. (1985, c. 785, s. 1.)

CASE NOTES

Liability in Damages is Remedy Under the Underground Damage Prevention Act. — Liability in damages is a remedy contemplated by the drafters of the Underground Damage Prevention Act, G.S. 87-100 et seq., for an excavator's breach of the duty established by G.S. 87-102 and G.S. 87-104. MCI Worldcom Network Servs. v. Lee, — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 22619 (E.D.N.C. Oct. 31, 2000).

Municipalities were not liable under the North Carolina Underground Damage Prevention Act, G.S. 87-100 et seq., for damage to a utility's water pipes; there had been a meeting between the county, the contractors, and the utility regarding the construction of a water and sewage system for the municipalities, and the utility had been advised of the construction and was asked to mark the lines where its pipes lay that were later damaged during the construction. Coastal Plains Utils., Inc. v. New Hanover County, 166 N.C. App. 333, 601 S.E.2d 915, 2004 N.C. App. LEXIS 1745 (2004).

Applied in Continental Tel. Co. v. Gunter, 99 N.C. App. 741, 394 S.E.2d 228 (1990).

§ 87-105. Requirements of the person financially responsible for the excavation.

The person financially responsible shall provide to the person responsible for doing the excavating, the names of all underground utility owners in the area of the proposed excavation. The names of the utility owners may be obtained from the County Register of Deeds or the Building Inspection Department of the political subdivision in which the excavating is taken place, if there is one. (1985, c. 785, s. 1.)

CASE NOTES

Owner's Responsibility to Notify Construction Contractor. — In contractor's indemnity or contribution action against property owner for failing to notify the contractor of utilities in the area, which action arose out of contractor's liability to a phone company for severing an underground phone cable, it was irrelevant that the cable was on property adjacent to the owner's property; the Underground Damage Prevention Act, G.S. 87-105, required the property owner to notify the contractor of all utilities "in the area." MCI Worldcom Network Servs. v. Lee, — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 22619 (E.D.N.C. Oct. 31, 2000).

Status of Independent Contractor. — In contractor's indemnity or contribution action against property owner for failing to notify the contractor of utilities in the area, which action arose out of contractor's liability to a phone company for severing an underground phone cable, the contractor's status as an independent contractor was irrelevant because the property owner owed a direct duty to the contractor, who in turn owed a direct duty to the phone company. MCI Worldcom Network Servs. v. Lee, — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 22619 (E.D.N.C. Oct. 31, 2000).

Municipalities were not liable under the North Carolina Underground Damage Prevention Act, G.S. 87-100 et seq., for damage to a utility's water pipes; there had been a meeting between the county, the contractors, and the utility regarding the construction of a water and sewage system for the municipalities, and the utility had been advised of the construction and was asked to mark the lines where its pipes lay that were later damaged during the construction. Coastal Plains Utils., Inc. v. New Hanover County, 166 N.C. App. 333, 601 S.E.2d 915, 2004 N.C. App. LEXIS 1745 (2004).

§ 87-106. Exceptions.

The following excavations are exempted from the notification requirements of this Article:

(1) Tilling of soil for agricultural purposes;

(2) Excavation by a utility owner, by the State or its subdivisions or agencies, or by anyone contracting with any of these entities to perform the excavation, on or within an easement, right-of-way, or property owned or controlled by any of these entities, where:

  a. Only the facilities of the utility owner doing the excavating are permitted; or

  b. All persons having an interest in the excavation and the underground utilities that may be damaged during the excavation have agreed in writing to provide the equivalent of the notification required by this Article among themselves; or

(3) The replacement of a pole as long as the replacement pole is within three feet of the original pole and within the line of existing poles. This exception shall not apply to poles at highway intersections or at the crossings of highways and permanently marked transmission underground utilities.

(4) In the case of an emergency involving danger to life, health, or property requiring immediate correction, or in order to continue the operation of a major industrial plant, or in order to assure the continuity of utility services, excavations immediately required to repair or maintain the needed service may be made, without using explosives, if notice is given to the utility owner or association as soon as is reasonably possible; except that the prohibition against the use of explosives shall not apply to the North Carolina Department of Transportation. Performance of emergency excavation shall not relieve the excavator of liability for damages. (1985, c. 785, s. 1.)

CASE NOTES

Applied in Lexington Tel. Co. v. Davidson Water, Inc., 122 N.C. App. 177, 468 S.E.2d 66 (1996).

§ 87-107. Duties of the utility owners.

Each utility owner, or his designated representative including an association, notified of an intent to excavate shall, before the proposed start of excavating (unless another period is agreed to by the person conducting the excavation and the utility owner or their representatives), provide the following information to the person excavating to the extent such information is reflected by records in the possession of and reasonably available to the utility owner:

(1) The location and description of all of the underground utilities which may be damaged as a result of the excavation;
(2) The location and description of all utility markers indicating the location of the underground utilities; and
(3) Any other information that would assist in locating and avoiding damage to the underground utilities, including providing temporary markings when necessary indicating the location of the underground utility in locations where permanent utility markers do not exist. (1985, c. 785, s. 1.)

CASE NOTES

Cost of Locating Underground Utilities. — So long as the excavating utility provides notice in conformance with this chapter, the locating utility cannot charge the excavating utility for locating its underground cables when the location of such lines is necessary to assure the excavating utility's maintenance of service to customers, even when the locating is required to be done outside of normal business hours. Lexington Tel. Co. v. Davidson Water, Inc., 122 N.C. App. 177, 468 S.E.2d 66 (1996).

Cited in MCI Worldcom Network Servs. v. Lee, — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 22619 (E.D.N.C. Oct. 31, 2000).

§ 87-108. Absence of utility location.

Should any utility owner who has been given notice pursuant to G.S. 87-102 fail to respond to that notice as provided in G.S. 87-107, or fail to properly locate the underground utility, then the person excavating is free to proceed with the excavation. Neither the excavator nor the person financially responsible for the excavation will be liable to the nonresponding or improperly responding utility owner for damages to that utility owner's facilities if the person doing the excavating shall exercise due care to protect existing underground utilities when there is evidence of the existence of those underground utilities near the proposed excavation site. (1985, c. 785, s. 1.)

CASE NOTES

Liability in Damages is Remedy Under the Underground Damage Prevention Act. — Liability in damages is a remedy contemplated by the drafters of the Underground Damage Prevention Act, G.S. 87-100 et seq., for an excavator's breach of the duty established by G.S. 87-102 and G.S. 87-104. MCI Worldcom Network Servs. v. Lee, — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 22619 (E.D.N.C. Oct. 31, 2000).

Cited in Lexington Tel. Co. v. Davidson Water, Inc., 122 N.C. App. 177, 468 S.E.2d 66 (1996).

§ 87-109. Recording requirements for associations.

An association shall record with the Register of Deeds of each county in which participating utility owners own or operate underground utilities, a notarized document providing the telephone number and address of the association, a description of the geographical area served by the association, and a list of the names and addresses of the utility owners receiving these services from the association. (1985, c. 785, s. 1.)

CASE NOTES

Applied in Continental Tel. Co. v. Gunter, 99 N.C. App. 741, 394 S.E.2d 228 (1990).

§ 87-110. Recording requirements for utility owners.

(a) Each utility owner having underground utilities in North Carolina shall record a notarized document containing the name of the utility owner and the title, address, and telephone number of its representatives designated to receive the written or oral notice of intent to excavate, with the Register of Deeds of each county in which the utility owner owns or operates underground facilities. This document shall be executed by an officer of the utility owner or in the case of a governmental entity, the authorized official.

(b) Any change or modification of the information recorded by a utility owner, pursuant to subsection (a) of this section, shall be made by recording the corrected information with the Register of Deeds of each county to which the change or modification applies, in the manner required by subsection (a) of this section within five days of the change made to the utilities.

(c) For purposes of the recordings required by subsections (a) and (b) of this section, recordings by an association pursuant to G.S. 87-109 shall satisfy the recording requirements for each utility owner who is a member of the association while that utility owner remains a member of the association.

(d) Upon receipt of the documents recorded pursuant to subsections (a), (b), or (c) of this section, the Register of Deeds shall place the documents in the Grantor's Index under the heading "Underground Utilities". The registration fee imposed by Chapter 161 of the General Statutes shall apply to these documents. (1985, c. 785, s. 1.)

§ 87-111. Recorded information filed with inspection departments.

A copy of any document or modification or change in the information in that document recorded pursuant to G.S. 87-109 or G.S. 87-110 shall be filed with any county or municipal inspection department having jurisdiction over any area where the underground utilities are located. Such inspection departments shall maintain these filings in alphabetical order in an accessible form. (1985, c. 785, s. 1.)

§ 87-112. Color-coding.

When the location of an underground utility is marked with stakes or by other physical means, pursuant to this Article, the utility owner shall use colored markers following the American Public Works Association Uniform Color Code for Utilities. (1985, c. 785, s. 1.)

§ 87-113. Notification required when damage done.

(a) The person doing an excavation that results in any known damage to an underground utility shall, immediately after the discovery of the damage, notify the utility owner of the location and nature of the damage and shall allow the utility owner reasonable time to repair the damage before completing the excavation in the immediate area of the damaged underground utility.

(b) The person responsible for conducting any excavation that results in damage to an underground utility where the damage may endanger life, health, or property shall, immediately after the discovery of the damage, take action to protect the public and property, notify the utility owner, notify the police or fire departments, and take any other actions to minimize the hazards until the arrival of the utility owner's personnel, the police, or the fire department. The excavator shall delay any backfilling in the immediate area of the damaged underground utility until authorized by the utility owner unless it is necessary to prevent injury or property damage to others. Repair of any damage shall be performed by the utility owner or by qualified personnel authorized by the utility owner. (1985, c. 785, s. 1.)

§ 87-114. Homeowners.

This Article does not require utility notification before a property owner digs in any area on his own property with nonmechanized equipment nor prior to tilling the soil for agricultural, gardening or landscaping purposes. Mechanized equipment may be used, without utility notification, in any area on the owner's property with the exception of recorded underground utility easements which describes the location of the easement with specificity. (1985, c. 785, s. 1.)

Chapter 88.

Cosmetic Art.

Sec.
88-1 through 88-30. [Repealed.]

§§ 88-1 through 88-30: Repealed by Session Laws 1998-230, s. 1, effective November 1, 1998.

Cross References. — For Cosmetic Art, see now G.S. 88B-1 et seq.

Chapter 88A.

Electrolysis Practice Act.

Sec.
88A-1. Short title.
88A-2. Purpose.
88A-3. Definitions.
88A-4. Unlawful practice.
88A-5. Creation and membership of Board.
88A-6. Powers and duties of the Board.
88A-7. Applicability of Executive Budget Act; audit oversight.
88A-8. The Board may accept contributions, etc.
88A-9. Expenses and fees.
88A-10. Requirements for licensure as an electrologist.
88A-10.1. Temporary license.
88A-11. Licensure without examination.
88A-11.1. Requirements for licensure as a laser hair practitioner; limitations on licensed laser hair practitioners.
88A-12. License renewal.
88A-13. Continuing education.

Sec.
88A-14. Inactive list.
88A-15. Exemptions from licensure.
88A-15.1. Persons and practices not affected.
88A-16. Permanent establishment required.
88A-17. Requirements for certification as an electrology instructor.
88A-17.1. Requirements for licensure as a laser hair practitioner instructor.
88A-18. Renewal of instructor's license.
88A-19. Requirements for certification as a Board approved school of electrology.
88A-19.1. Requirements for certification as a Board-approved school of laser, light source, or pulsed-light treatments.
88A-20. Certification renewal.
88A-21. Disciplinary authority of the Board.
88A-22. Enjoining illegal practices.
88A-23. Reports and immunity from suit.

§ 88A-1. Short title.

This chapter may be cited as the “Electrolysis Practice Act.” (1989 (Reg. Sess., 1990), c. 1033, s. 1.)

Legal Periodicals. — For article, “The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?,” see 15 Campbell L. Rev. 223 (1993).

§ 88A-2. Purpose.

The purpose of this Chapter is to ensure minimum standards of competency, to protect the public from misrepresentation of status by persons who hold themselves out to be “licensed electrologists” or “licensed laser hair practitioners” and to provide the public with safe care by the mandatory licensing of electrologists and laser hair practitioners. (1989 (Reg. Sess., 1990), c. 1033, s. 1; 2007-489, s. 1.)

Effect of Amendments. — Session Laws 2007-489, s. 1, effective October 1, 2007, substituted “‘licensed electrologists or ‘licensed laser hair practitioners’” for “certified electrologists” and “electrologists and laser hair practitioners” for “electrologists.”

§ 88A-3. Definitions.

As used in this Chapter, unless the context requires otherwise:

(1) “Board” means the North Carolina Board of Electrolysis Examiners.

(2) “Electrolysis” means the permanent removal of hair by the application of an electrical current to the dermal papilla by a filament to cause decomposition, coagulation, or dehydration within the hair follicle as approved by the Food and Drug Administration of the United States Government.

(3) "Electrologist" or "electrolocist" means a person who engages in the practice of electrolysis for permanent hair removal.

(4) "Electrology" means the art and practice relating to the removal of hair from the normal skin of the human body by application of an electric current to the hair papilla by means of a needle or needles so as to cause growth inactivity of the hair papilla and thus permanently remove the hair.

(5) "Laser hair practitioner" means a person who engages in laser, light source, or pulsed-light treatments for the removal of hair.

(6) "Laser, light source, or pulsed-light devices" means a device used exclusively in the nonablative procedure for the removal of hair.

(7) "Laser, light source, or pulsed-light treatments" means the use of laser or pulsed-light devices for nonablative procedures for the removal of hair. (1989 (Reg. Sess., 1990), c. 1033, s. 1; 2007-489, s. 2.)

Editor's Note. — Subdivisions (6) and (7), as added by Session Laws 2007-489, s. 2, have been redesignated as subdivisions (7) and (6), at the direction of the Revisor of Statutes.

Effect of Amendments. — Session Laws 2007-489, s. 2, effective October 1, 2007, added subdivisions (5) through (7).

§ 88A-4. Unlawful practice.

(a) It shall be unlawful to engage in the practice of electrolysis or laser, light source, or pulsed-light treatments in this State without a license.

(b) Any person practicing electrology or laser, light source, or pulsed-light treatments for the purpose of hair removal or hair reduction in this State without being licensed by the Board shall be guilty of a Class I felony and may be assessed a civil penalty of up to five thousand dollars ($5,000) for each offense. Any other violation of this Chapter shall be a Class 2 misdemeanor. (1989 (Reg. Sess., 1990), c. 1033, s. 1; 1991 (Reg. Sess., 1992), c. 1003, s. 2; 1993, c. 530, s. 3; c. 539, s. 609; 1994, Ex. Sess., c. 24, s. 14(c); 2007-489, s. 3.)

Effect of Amendments. — Session Laws 2007-489, s. 3, effective October 1, 2007, inserted "or laser, light source, or pulsed-light treatments" in subsection (a); in subsection (b), added the first sentence and inserted "other" following "Any" in the last sentence.

§ 88A-5. Creation and membership of Board.

(a) The North Carolina Board of Electrolysis Examiners is created. The Board shall consist of five members as follows:

(1) Three electrologists who have engaged in the practice of electrolysis for at least five years, one of whom shall be appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives, one of whom shall be appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, and one of whom shall be appointed by the Governor.

(2) A physician licensed under Chapter 90 of the General Statutes, who shall be nominated by the North Carolina Medical Board and appointed by the Governor.

(3) A public member, appointed by the Governor, who has not practiced electrolysis, who is not in training to become an electrologist, and who is not related to anyone who would be prohibited by this subdivision from serving on the Board as a public member.

(b) Legislative appointments shall be made in accordance with G.S. 120-121. A vacancy in a legislative appointment shall be filled in accordance with G.S. 120-122.

(c) Each member shall be appointed for a term of three years and shall serve until a successor is appointed. Of the members initially appointed, one of the electrologist members shall serve a term of one year. The public member and the second electrologist member shall serve a term of two years. The physician member and the third electrologist member shall serve a term of three years. The terms of all initial appointments shall commence within 30 days of the effective date of this act. No member may serve more than two consecutive full terms.

(d) Vacancies shall be filled by the appropriate appointing authority within 30 days after the position is vacated. Appointees shall serve the remainder of the unexpired term and until their successors have been appointed and qualified.

(e) The Board may remove any of its members for gross neglect of duty, incompetence, or unprofessional conduct. A member subject to disciplinary proceedings shall be disqualified from all Board business until the charges are resolved. The Governor may also remove any member of the Board which he appoints.

(f) Each member of the Board shall receive per diem compensation and reimbursement for travel and subsistence in the amounts the Board votes upon and records in its minutes, provided the amounts do not exceed the amounts specified in G.S. 93B-5.

(g) The Board shall elect a Chairman, a Vice-Chairman, a Treasurer, and such other officers as are deemed necessary by the Board. All officers shall be elected annually by the Board for one-year terms and shall serve until their successors are elected and qualified.

(h) The Board shall hold at least two meetings each year to conduct its business, and shall adopt rules governing the calling, holding, and conducting of regular and special meetings. A majority of the members shall constitute a quorum. (1989 (Reg. Sess., 1990), c. 1033, s. 1; 1995, c. 94, s. 6.)

§ 88A-6. Powers and duties of the Board.

The Board shall have the following general powers and duties:

(1) To administer and interpret this Chapter;
(2) To adopt rules in the manner prescribed by Chapter 150B of the General Statutes as may be necessary to carry out the provisions of this Chapter;
(3) To determine the qualifications of persons who are licensed or certified pursuant to this Chapter;
(4) To issue, renew, deny, restrict, suspend, or revoke licenses and to carry out any of the other actions authorized by this Chapter;
(5) To establish, publish, and enforce rules of professional conduct, and to regulate advertising by licensees;
(6) To maintain a record of all proceedings and make available to persons licensed under this Chapter, and to other concerned parties, an annual report of all Board action;
(7) To collect fees for licensure, licensure renewal, and other services deemed necessary to carry out the purpose of this Chapter;
(8) To employ and fix the compensation of personnel, including an executive director, that the Board determines are necessary to carry out the provisions of this Chapter and to incur other expenses necessary to effectuate this Chapter;
(9) To conduct investigations for the purpose of determining whether violations of this Chapter or grounds for disciplining persons licensed or certified under this Chapter exist; and,
(10) To adopt a seal containing the name of the Board for use on all certificates, licenses, and official reports issued by it. (1989 (Reg. Sess., 1990), c. 1033, s. 1.)

§ 88A-7. Applicability of Executive Budget Act; audit oversight.

The Treasurer or the Executive Director shall deposit all fees payable to the Board with the State Treasurer, to be credited to the account of the Board. These funds shall be held and expended under the supervision of the Director of the Budget. The provisions of the Executive Budget Act apply to this Chapter. The Board is subject to the oversight of the State Auditor under Article 5A of Chapter 147 of the General Statutes. (1989 (Reg. Sess., 1990), c. 1033, s. 1; 1993 (Reg. Sess., 1994), c. 755, s. 5.1.)

§ 88A-8. The Board may accept contributions, etc.

The Board may accept grants, contributions, devises, bequests, and gifts that shall be kept in the same account as the funds deposited in accordance with G.S. 88A-7 and shall be used to carry out the provisions of this Chapter. (1989 (Reg. Sess., 1990), c. 1033, s. 1.)

§ 88A-9. Expenses and fees.

(a) All salaries, compensation, and expenses incurred or allowed for the purpose of carrying out the purposes of this Chapter shall be paid by the Board exclusively out of the fees received by the Board as authorized by this Chapter, or funds received pursuant to G.S. 88A-7. No salary, expense, or other obligations of the Board may be charged against the General Fund of the State. Neither the Board nor any of its officers or employees may incur any expense, debt, or other financial obligation binding upon the State.

(b) All fees may be calculated by the Board in amounts sufficient to pay the costs of administration of this act, but in no event may they exceed the following:

(1) Application for licensure as an electrologist	$150.00
(1a) Initial license	150.00
(1b) Examination or reexamination	125.00
(2) Licensure of electrology renewal	150.00
(3) Application for licensure as an electrology instructor	150.00
(4) Licensure of electrology instructor renewal	150.00
(5) Application for certification as a Board-approved school of electrology	500.00
(5a) Application for licensure as laser hair practitioner	150.00
(5b) Licensure of laser hair practitioner renewal	150.00
(5c) Application for licensure as laser hair practitioner instructor	150.00
(5d) Licensure of laser hair practitioner instructor renewal	150.00
(5e) Application for certification as a Board-approved school of laser, light source, or pulsed-light treatments	500.00
(5f) Certificate of Board-approved school of laser, light source, or pulsed-light renewal	400.00
(6) Certificate of Board-approved school of electrology renewal	250.00
(6a) Certification of out-of-state schools	150.00
(6b) Certification of out-of-state schools renewal	100.00
(6c) Office inspection or reinspection	100.00
(6d) License by reciprocity	150.00
(7) Late renewal charge	125.00
(8) Reinstatement of expired license or certification	250.00
(9) Reactivation of license	200.00

(10) Duplicate license or certification .... 25.00.
(1989 (Reg. Sess., 1990), c. 1033, s. 1; 2001-176, s. 1; 2007-489, s. 4.)

Effect of Amendments. — Session Laws 2007-489, s. 4, effective October 1, 2007, rewrote subsection (b).

§ 88A-10. Requirements for licensure as an electrologist.

(a) Any person who desires to be licensed as an "electrologist" pursuant to this Chapter shall:

(1) Submit an application on a form approved by the Board.
(2) Be a resident of North Carolina.
(3) Be 21 years of age or older.
(4) Meet the requirements of subsection (a1) of this section.
(5) Pass an examination given by the Board.
(6) Submit the application and examination fees required in G.S. 88A-9(b).

(a1) An applicant for licensure under this section shall provide:

(1) Proof of graduation from a school certified by the Board pursuant to G.S. 88A-19; or
(2) Proof satisfactory to the Board that, for at least one year prior to the date of application or the date of initial residence in this State, whichever is earlier, the applicant was engaged in the practice of electrology in a state that does not license electrologists.

Subdivision (2) of this subsection applies only to applicants whose residence in this State began on or after January 31, 1994, who do not meet the qualifications of subdivision (1) of this subsection or G.S. 88A-12.

(b) At least twice each year, the Board shall give an examination to applicants for licensure to determine the applicants' knowledge of the basic and clinical sciences relating to the theory and practice of electrology. The Board shall give applicants notice of the date, time, and place of the examination at least 60 days in advance.

(c) When the Board determines that an applicant has met all the requirements for licensure, and has submitted the initial license fee required in G.S. 88A-9(b), the Board shall issue a license to the applicant.

(d) An applicant otherwise qualified for licensure who is not a resident of this State may nevertheless submit a statement of intent to begin practicing electrology in this State and receive a license. The applicant must provide to the Board within six months of receiving a license evidence satisfactory to the Board that the applicant has actually begun to practice electrology in this State. The Board may revoke the license of an applicant who fails to submit this proof or whose proof fails to satisfy the Board. (1989 (Reg. Sess., 1990), c. 1033, s. 1; 1993 (Reg. Sess., 1994), c. 755, s. 1; 2001-176, s. 2; 2007-489, s. 5.)

Effect of Amendments. — Session Laws 2007-489, s. 5, effective October 1, 2007, substituted "21 years" for "18 years" in subdivision (a)(3).

§ 88A-10.1. Temporary license.

The Board may issue a temporary license to practice electrology to an applicant who meets the requirements of G.S. 88A-10(a)(1)- (4). A temporary license may not be valid for more than six months and may be renewed not more than once. The Board may by rule provide for a shorter duration and may prohibit any renewal of a temporary license. The Board shall adopt rules setting the criteria for any renewals. The Board may by rule require that holders of a temporary license practice under supervision and may specify criteria for supervision in its rules, including the setting, amounts of supervision, and qualifications of supervisors. (1993 (Reg. Sess., 1994), c. 755, s. 2.)

§ 88A-11. Licensure without examination.

The Board may issue a license to practice electrology, without examination, to an applicant:

(1) Who was engaged in the practice of electrolysis in this State or another state prior to July 1, 1993, and who submits an application for licensure to the Board on or before January 31, 1994.

(2) Who is certified or licensed in good standing to practice electrolysis in another state, provided that the other state's educational hours of instruction are equal to or greater than the hours required in this State. (1989 (Reg. Sess., 1990), c. 1033, s. 1; 1991 (Reg. Sess., 1992), c. 1003, s. 1; 1993, c. 530, s. 4.)

§ 88A-11.1. Requirements for licensure as a laser hair practitioner; limitations on licensed laser hair practitioners.

(a) Any person seeking licensure by the Board as a laser hair practitioner shall have met the following requirements at the time the license is requested:

(1) Be an electrologist licensed under this Chapter.

(2) Completed a minimum 30-hour laser, light source, or pulsed-light treatment certification course approved by the Board and in accordance with rules adopted by the Board.

(3) Be currently using or anticipate using laser, light source, or pulsed-light devices that the person has been certified by a Board-approved school to operate.

(b) When the Board determines that an applicant has met all the requirements for licensure, and has submitted the initial license fee required in G.S. 88A-9(b), the Board shall issue a license to the applicant.

(c) Each laser hair practitioner shall practice laser, light source, or pulsed-light treatments under the supervision of a physician licensed under Article 1 of Chapter 90 of the General Statutes. The physician shall be readily available, but not required to be on site when the laser, light source, or pulsed-light treatments are being performed. However, the authority to regulate laser clinicians shall remain with the Board.

(d) A laser hair practitioner shall not dispense or administer medication or provide advice regarding the use of medication, whether prescription or over-the-counter, in connection with laser, light source, or pulsed-light treatments.

(e) All laser hair practitioners shall use laser, light source, or pulsed-light devices approved by the federal Food and Drug Administration and comply with all applicable federal and State regulations, rules, and laws. Any licensed laser hair practitioner violating this subsection shall have his or her license revoked by the Board.

(f) Only a licensed physician may use laser, light source, or pulsed-light devices for ablative procedures. (2007-489, s. 6.)

Editor's Note. — Session Laws 2007-489, s. 14, made this section effective October 1, 2007.

Session Laws 2007-489, s. 13, provides: "Any person who submits proof to the Board that he or she has met educational training requirements to practice as a laser hair practitioner in accordance with rules adopted by the North Carolina Board of Electrolysis Examiners shall be licensed without having to satisfy the educational training requirements of G.S. 88A-

11.1, as enacted by Section 6 of this act, but shall comply with all other requirements for licensure under G.S. 88A-11.1, enacted by Section 6 of this act, and otherwise comply with the provisions of Chapter 88A of the General Statutes and rules adopted by the Board."

§ 88A-12. License renewal.

(a) Every electrologist license or laser hair practitioner license issued pursuant to this Chapter must be renewed annually. On or before the date the current license expires, a person who desires to continue to practice electrology or as a laser hair practitioner shall apply for license renewal to the Board on forms approved by the Board, provide evidence of the successful completion of a continuing educational program approved by the Board, meet the criteria for renewal established by the Board, and pay the required fee. The Board may provide for the late renewal of licensure upon payment of a late fee as set by the Board, but late renewal may not be granted more than 90 days after expiration of the license.

(b) Any person who has failed to renew his or her license for more than 90 days after expiration may have it reinstated by applying to the Board for reinstatement on a form approved by the Board, furnishing a statement of the reason for failure to apply for renewal prior to the deadline, and paying the required fee. The Board may require evidence of competency to resume practice before reinstating the applicant's license. (1989 (Reg. Sess., 1990), c. 1033, s. 1; 1993 (Reg. Sess., 1994), c. 755, s. 3; 2007-489, s. 7.)

Effect of Amendments. — Session Laws 2007-489, s. 7, effective October 1, 2007, in subsection (a), inserted "or laser hair practitioner license" in the first sentence and "or as a laser hair practitioner" in the second sentence; and made a gender neutral change in subsection (b).

§ 88A-13. Continuing education.

(a) The Board shall determine the number of hours and subject matter of continuing education required as a condition of license renewal. The Board may offer continuing education to the licensees under this act.

(b) Upon request, the Board may grant approval to a continuing education program or course upon finding that the program or course offers an educational experience designed to enhance the practice of electrology.

(c) The Board shall maintain and distribute, as appropriate, records of the educational course work successfully completed by each licensee, including the subject matter and the number of hours of each course.

(d) Laser hair practitioners are required to complete a minimum of 10 hours of continuing education annually to maintain their licenses pursuant to rules adopted by the Board. (1989 (Reg. Sess., 1990), c. 1033, s. 1; 2007-489, s. 8.)

Effect of Amendments. — Session Laws 2007-489, s. 8, effective October 1, 2007, added subsection (d).

§ 88A-14. Inactive list.

Upon request by a licensee for inactive status, the Board shall place the licensee's name on the inactive list. While on the inactive list, the person shall not be subjected to renewal requirements and shall not practice electrology in North Carolina. When that person desires to be removed from the inactive list and returned to an active list, a reactivation application shall be submitted to the Board on a form furnished by the Board and the fee shall be paid for license reactivation. The Board may require evidence of competency to resume practice before returning the applicant to the active status. Any person whose license has lapsed or expired for a period of five years or more shall be required to take and pass the examination for licensure before the license can be reactivated. (1989 (Reg. Sess., 1990), c. 1033, s. 1; 2001-176, s. 3.)

§ 88A-15. Exemptions from licensure.

The following individuals shall be permitted to practice electrology without a license:

(1) Any physician licensed in accordance with Article 1 and Article 11 of Chapter 90 of the General Statutes.

(2) A student at an approved school of electrology when electrolysis is performed in the course of study.

(3) A person demonstrating on behalf of a manufacturer or distributor any electrolysis equipment or supplies, if such demonstration is performed without charge.

(4) An employee of a hospital licensed under Chapter 131E of the General Statutes and working under the supervision of a physician licensed under Article 1 of Chapter 90 of the General Statutes who is certified by the American Board of Dermatology. (1989 (Reg. Sess., 1990), c. 1033, s. 1; 1993 (Reg. Sess., 1994), c. 755, s. 4.)

§ 88A-15.1. Persons and practices not affected.

The requirements of this Chapter shall not apply to any person licensed or approved by the North Carolina Medical Board to practice medicine or perform medical acts, tasks, or functions pursuant to Article 1 of Chapter 90 of the General Statutes or any person employed and working under the direct supervision of a physician licensed to practice medicine pursuant to Article 1 of Chapter 90 of the General Statutes. (2007-489, s. 9.)

Editor's Note. — Session Laws 2007-489, s. 14, made this section effective on October 1, 2007.

§ 88A-16. Permanent establishment required.

(a) Electrolysis shall be practiced by a licensed person only in a permanent establishment, hereafter referred to as an office. The Board may adopt reasonable rules and regulations concerning the sanitation standards, equipment, and supplies to be used and observed in offices. Offices shall be subject to periodic inspection at any time during business hours by members of the Board or its agents or assistants.

(b) Every electrologist shall notify the Board in writing 30 business days prior to, but no later than 10 business days after, any change of address or opening of a new office.

(c) Every electrologist shall display his license in a conspicuous place in the office.

(d) Every electrologist may make calls outside the office. The Board shall adopt rules and regulations concerning the equipment and instruments to be used by an electrologist when treating patients outside the office. (1989 (Reg. Sess., 1990), c. 1033, s. 1.)

§ 88A-17. Requirements for certification as an electrology instructor.

(a) Any person who desires to be certified as an "electrology instructor" pursuant to this Chapter shall:

(1) Submit an application on a form approved by the Board;
(2) Be a licensed electrologist;
(3) Have practiced electrology actively for at least five years immediately before the application; and,
(4) Pass a written examination given by the Board.

(b) At least twice each year, the Board shall give an examination to applicants for certification as an electrology instructor. The examination shall consist of written and verbal sections testing the applicants' knowledge of the basic and clinical sciences relating to the theory and practice of electrology. The Board shall give applicants notice of the date, time, and place of the examination at least 60 days in advance.

(c) When the Board determines that an applicant has met all the qualifications for certification as an electrology instructor, and has submitted the required fee, the Board shall issue an instructor's certificate to the applicant. (1989 (Reg. Sess., 1990), c. 1033, s. 1.)

§ 88A-17.1. Requirements for licensure as a laser hair practitioner instructor.

(a) Any person who desires licensure as a laser practitioner instructor pursuant to this Chapter shall meet the following requirements:

(1) Submit an application on a form approved by the Board.
(2) Be an electrologist licensed under this Chapter or a physician licensed under Article 1 of Chapter 90 of the General Statutes.
(3) Have practiced laser and light-based treatments actively for at least five years immediately before applying for licensure.
(4) Have at least 100 hours of training in laser and light-based treatments.

(b) When the Board determines that an applicant has met all qualifications for licensure as a laser hair practitioner instructor and has submitted the required fee, the Board shall issue an instructor's license to the applicant. (2007-489, s. 9.)

Editor's Note. — Session Laws 2007-489, s. 14, made this section effective on October 1, 2007.

§ 88A-18. Renewal of instructor's license.

An electrology or laser hair practitioner instructor's license shall be renewed annually. On or before the date the current license expires, the applicant must submit an application for renewal of licensure on a form approved by the Board, meet criteria for renewal established by the Board, and pay the required fee. Any person whose instructor's license has expired for a period of three years or more shall be required to take and pass the instructor's examination before the license can be renewed. (1989 (Reg. Sess., 1990), c. 1033, s. 1; 2007-489, s. 10.)

Effect of Amendments. — Session Laws 2007-489, s. 10, effective October 1, 2007, substituted "license" for "certificate" and "licensure" for "certification" throughout the section and including catchline; inserted "electrology or laser hair practitioner" in the first sentence;

and substituted "three years" for "five years" in the last sentence.

§ 88A-19. Requirements for certification as a Board approved school of electrology.

(a) Any school in this State or another state that desires to be certified as a Board approved school of electrology shall:
(1) Submit an application on a form approved by the Board;
(2) Submit a detailed projected floor plan of the institutional area demonstrating adequate school facilities to accommodate students for purposes of lectures, classroom instruction, and practical demonstration;
(3) Submit a detailed list of the equipment to be used by the students in the practical course of their studies;
(4) Submit a copy of the planned electrology curriculum consisting of the number of hours and subject matter determined by the Board, provided that the number of hours required shall not be less than 120 hours and not more than 600 hours;
(5) Submit a certified copy of the school manual of instruction;
(6) Submit the names and qualifications of the instructors certified in accordance with G.S. 88A-16; and,
(7) Any additional information the Board may require.

(b) When the Board determines that an applicant has met all the qualifications for certification as a Board approved school of electrology, and has submitted the required fee, the Board shall issue a certificate to the applicant.

(c) A school's certification is only valid for the location named in the application. When a school desires to change locations, an application shall be submitted to the Board on a form furnished by the Board and the fee shall be paid for certificate renewal.

(d) A school's certification is not transferrable. Schools must immediately notify the Board in writing of any sale, transfer, or change in ownership or management.

(e) Every school shall display its certification in a manner prescribed by the Board.

(f) All epilators used in the school must be approved by the Food and Drug Administration of the United States Government. (1989 (Reg. Sess., 1990), c. 1033, s. 1; 1993 (Reg. Sess., 1994), c. 755, s. 5.)

§ 88A-19.1. Requirements for certification as a Board-approved school of laser, light source, or pulsed-light treatments.

(a) Any school in this State or another state that desires to be certified as a Board-approved school of laser, light source, or pulsed-light treatments shall:
(1) Submit an application on a form approved by the Board;
(2) Submit a detailed projected floor plan of the institutional area demonstrating adequate school facilities to accommodate students for purposes of lectures, classroom instruction, and practical demonstration;
(3) Submit a detailed list of the equipment to be used by the students in the practical course of their studies;
(4) Submit a copy of the planned laser, light source, or pulsed-light curriculum consisting of the number of hours and subject matter determined by the Board, provided that the number of hours required

shall not be less than 30 hours pursuant to rules adopted by the Board;

(5) Submit a certified copy of the school manual of instruction;

(6) Submit the names and qualifications of the instructors certified; and

(7) Submit any additional information the Board may require.

(b) When the Board determines that an applicant has met all the qualifications for certification as a Board-approved school of laser, light source, or pulsed-light treatments and has submitted the required fee, the Board shall issue a certificate to the applicant.

(c) A school's certification is only valid for the location named in the application. When a school desires to change locations, an application shall be submitted to the Board on a form furnished by the Board, and the fee shall be paid for certificate renewal.

(d) A school's certification is not transferable. Schools shall immediately notify the Board in writing of any sale, transfer, or change in ownership or management.

(e) Every school shall display its certification in a manner prescribed by the Board.

(f) All laser, light source, or pulsed-light devices used in the school shall be approved by the federal Food and Drug Administration. (2007-489, s. 11.)

Editor's Note. — Session Laws 2007-489, s. 14, made this section effective October 1, 2007.

§ 88A-20. Certification renewal.

Every certificate issued pursuant to G.S. 88A-19 or G.S. 88A-19.1 shall be renewed annually. On or before the date the current certificate expires, the applicant must submit an application for renewal of certification on a form approved by the Board, meet criteria for renewal established by the Board, and pay the required fee. Failure to renew the certificate within 90 days after the expiration date shall result in automatic forfeiture of any certification issued pursuant to this Chapter. (1989 (Reg. Sess., 1990), c. 1033, s. 1; 2007-489, s. 12.)

Effect of Amendments. — Session Laws 2007-489, s. 12, effective October 1, 2007, inserted "or G.S. 88A-19.1" in the first sentence.

§ 88A-21. Disciplinary authority of the Board.

(a) Grounds for disciplinary action shall include:

(1) Conviction of, or finding of guilt with respect to, a crime in this State or any other jurisdiction, regardless of adjudication, if any element of the crime directly relates to the practice of electrolysis;

(2) Obtaining, or attempting to obtain, a license to practice electrolysis by bribery or by fraudulent misrepresentation;

(3) Malpractice or the inability to practice electrolysis with reasonable skill and safety;

(4) Disseminating false, deceptive, or misleading advertising;

(5) Judicial determination of mental incompetency;

(6) The revocation, suspension, or denial of the person's license or certification to practice electrolysis in any other state or territory of the United States;

(7) A finding, upon investigation by the Board, that the applicant or licensee is guilty of unprofessional conduct. "Unprofessional conduct"

includes any act which departs from, or fails to conform to, the minimum standards of acceptable and prevailing electrolysis practice;

(8) Assisting, aiding, abetting, or procuring the practice of a person who is not licensed under this Chapter; and,

(9) Violation of any provision of this Chapter, or any rule or regulation of the Board.

(b) In accordance with Chapter 150B of the General Statutes, the Board may require remedial education, issue a letter of reprimand, restrict, revoke, or suspend any license or certification issued pursuant to this Chapter or deny any application for licensure or certification if the Board determines that the applicant or licensee has committed any of the acts listed in subsection (a).

(c) The Board may reinstate a revoked license or remove licensure restrictions when it finds that the reasons for revocation or restriction no longer exist and that the person can reasonably be expected to practice electrology safely and properly. (1989 (Reg. Sess., 1990), c. 1033, s. 1.)

§ 88A-22. Enjoining illegal practices.

(a) If the Board finds that any person is violating any of the provisions of this Chapter, it may apply in its own name to the superior court for an injunction or restraining order to prevent that person from further violation. The court is empowered to grant an injunction regardless of whether any other enforcement action has been or may be instituted. All actions by the Board shall be governed by the North Carolina Rules of Civil Procedure.

(b) The venue for actions brought under this Chapter shall be the superior court in the county where the illegal or unlawful acts are alleged to have been committed, in the county where the defendant resides, or in the county where the Board maintains its offices and records. (1989 (Reg. Sess., 1990), c. 1033, s. 1.)

Editor's Note. — The North Carolina Rules of Civil Procedure, referred to in this section, are codified at G.S. 1A-1.

§ 88A-23. Reports and immunity from suit.

Any person who has reasonable cause to suspect misconduct or incapacity of a licensee, or who has reasonable cause to suspect that any person is in violation of this Chapter, shall report the relevant facts to the Board. Upon the receipt of such charge, or upon its own initiative, the Board may give notice of an administrative hearing or may, after diligent investigation, dismiss unfounded charges. Any person making a report pursuant to this section shall be immune from any criminal prosecution or civil liability resulting therefrom unless such person knew the report was false or acted in reckless disregard of whether the report was false. (1989 (Reg. Sess., 1990), c. 1033, s. 1; 1995, c. 509, s. 36.)

Chapter 88B.

Cosmetic Art.

Sec.
88B-1. Short title.
88B-2. Definitions.
88B-3. Creation and membership of the Board; term of office; removal for cause; officers.
88B-4. Powers and duties of the Board.
88B-5. Meetings and compensation of the Board.
88B-6. Board office, employees, funds, budget requirements.
88B-7. Qualifications for licensing cosmetologists.
88B-8. Qualifications for licensing apprentices.
88B-9. Qualifications for licensing as an esthetician.
88B-10. Qualifications for licensing manicurists.
88B-11. Qualifications for licensing teachers.
88B-12. Temporary employment permit; extensions; limits on practice.
Sec.
88B-13. Applicants licensed in other states.
88B-14. Licensing of cosmetic art shops.
88B-15. Practice outside cosmetic art shops.
88B-16. Licensing cosmetic art schools.
88B-17. Bond required for private cosmetic art schools.
88B-18. Examinations.
88B-19. Expired school credits.
88B-20. Fees required.
88B-21. Renewals; expired licenses; inactive status.
88B-22. Licenses required; criminal penalty.
88B-23. Licenses to be posted.
88B-24. Revocation of licenses and other disciplinary measures.
88B-25. Exemptions.
88B-26. Rules to be posted.
88B-27. Inspections.
88B-28. Restraining orders.
88B-29. Civil penalties.

§ 88B-1. Short title.

This chapter shall be known and may be cited as the North Carolina Cosmetic Art Act. (1998-230, s. 2.)

Editor's Note. — Session Laws 1998-230, ss. 1 and 2, repealed former Chapter 88 and enacted this Chapter in its place. Where appropriate, historical citations and case notes for the sections in the former chapter have been added to corresponding sections in this chapter.

§ 88B-2. Definitions.

The following definitions apply in this Chapter:

(1) Apprentice. — A person who is not a manager or operator and who is engaged in learning the practice of cosmetic art under the direction and supervision of a cosmetologist.
(2) Board. — The North Carolina Board of Cosmetic Art Examiners.
(3) Booth. — A workstation located within a licensed cosmetic art shop that is operated primarily by one individual in performing cosmetic art services for consumers.
(4) Booth renter. — A person who rents a booth in a cosmetic art shop.
(5) Cosmetic art. — All or any part or combination of cosmetology, esthetics, or manicuring, including the systematic manipulation with the hands or mechanical apparatus of the scalp, face, neck, shoulders, hands, and feet. Practices included within this subdivision shall not include the practice of massage or bodywork therapy as set forth in Article 36 of Chapter 90 of the General Statutes.
(6) Cosmetic art school. — Any building or part thereof where cosmetic art is taught.
(7) Cosmetic art shop. — Any building or part thereof where cosmetic art is practiced for pay or reward, whether direct or indirect.
(8) Cosmetologist. — Any individual who is licensed to practice all parts of cosmetic art.

(8a) Cosmetology. — The act of arranging, dressing, curling, waving, cleansing, cutting, singeing, bleaching, coloring, or similar work upon the hair of a person by any means, including the use of hands, mechanical or electrical apparatus, or appliances or by use of cosmetic or chemical preparations or antiseptics.

(9) Cosmetology teacher. — An individual licensed by the Board to teach all parts of cosmetic art.

(10) Esthetician. — An individual licensed by the Board to practice only that part of cosmetic art that constitutes skin care.

(11) Esthetician teacher. — An individual licensed by the Board to teach only that part of cosmetic art that constitutes skin care.

(11a) Esthetics. — Refers to any of the following practices: giving facials; applying makeup; performing skin care; removing superfluous hair from the body of a person by use of creams, tweezers, or waxing; applying eyelashes to a person, including the application of eyelash extensions, brow or lash color; beautifying the face, neck, arms, or upper part of the human body by use of cosmetic preparations, antiseptics, tonics, lotions, or creams; surface manipulation in relation to skin care; or cleaning or stimulating the face, neck, ears, arms, hands, bust, torso, legs, or feet of a person by means of hands, devices, apparatus, or appliances along with the use of cosmetic preparations, antiseptics, tonics, lotions, or creams.

(12) Manicuring. — The care and treatment of the fingernails, toenails, cuticles on fingernails and toenails, and the hands and feet, including the decoration of the fingernails and the application of nail extensions and artificial nails. The term "manicuring" shall not include the treatment of pathologic conditions.

(13) Manicurist. — An individual licensed by the Board to practice only that part of cosmetic art that constitutes manicuring.

(14) Manicurist teacher. — An individual licensed by the Board to teach manicuring.

(15) Shampooing. — The application and removal of commonly used, room temperature, liquid hair cleaning and hair conditioning products. Shampooing does not include the arranging, dressing, waving, coloring, or other treatment of the hair. (1933, c. 179, ss. 2-4, 8, 9; 1963, c. 1257, s. 1; 1981, c. 615, ss. 3, 7; 1993, c. 22, s. 1; 1998-230, s. 2; 2006-212, s. 1.)

Effect of Amendments. — Session Laws 2006-212, s. 1, effective August 8, 2006, rewrote subdivision (5); and added subdivisions (8a) and (11a).

§ 88B-3. Creation and membership of the Board; term of office; removal for cause; officers.

(a) The North Carolina Board of Cosmetic Art Examiners is established. The Board shall consist of six members who shall be appointed as follows:

(1) The General Assembly, upon the recommendation of the President Pro Tempore of the Senate, shall appoint a cosmetologist.

(2) The General Assembly, upon the recommendation of the Speaker of the House of Representatives, shall appoint a cosmetologist.

(3) The Governor shall appoint two cosmetologists, a cosmetology teacher, and a member of the public who is not licensed under this Chapter.

(b) Each cosmetologist member shall have practiced all parts of cosmetic art in this State for at least five years immediately preceding appointment to the Board and shall not have any connection with any cosmetic art school while serving on the Board. The cosmetology teacher member shall be currently employed as a teacher by a North Carolina public school, community college, or other public or private cosmetic art school and shall have practiced or taught cosmetic art for at least five years immediately preceding appointment to the Board.

(c) Cosmetologist members of the Board shall serve staggered terms of three years. No Board member shall serve more than two consecutive terms, except that each member shall serve until a successor is appointed and qualified. All other board members shall serve three-year terms, but they shall not be staggered.

(d) The Governor may remove any member of the Board for cause.

(e) A vacancy shall be filled in the same manner as the original appointment, except that unexpired terms in seats appointed by the General Assembly shall be filled in accordance with G.S. 120-122. Appointees to fill vacancies shall serve the remainder of the unexpired term and until their successors have been duly appointed and qualified.

(f) The Board shall elect a chair, a vice-chair, and other officers as deemed necessary by the Board to carry out the purposes of this Chapter. All officers shall be elected annually by the Board for one-year terms and shall serve until their successors are elected and qualified.

(g) The Board shall not issue a teacher's license to any Board member during that member's term on the Board.

(h) No Board member may be employed by the Board for at least one year after that member's term expires. (1933, c. 179, ss. 13, 14, 23; 1935, c. 54, ss. 2, 5; 1943, c. 354, s. 1; 1957, c. 1184, s. 1; 1969, c. 844, s. 4; 1971, c. 355, s. 1; c. 616, ss. 1, 2; 1973, c. 476, s. 128; c. 1360, s. 1; 1975, c. 857, ss. 2, 3, 9; 1981, c. 614, s. 1; c. 615, ss. 10, 14; c. 884, s. 7; 1987, c. 211, s. 1; 1989, c. 650, s. 1; 1995, c. 490, s. 13; (Reg. Sess., 1996), c. 605, s. 16; 1998-230, s. 2.)

CASE NOTES

Relator Must Show Interest in Action to Vacate Office. — It was necessary that a relator in an action to vacate an office under prior similar provision have some interest in the action, though it was not required that he be a contestant of the office. State ex rel. Associated Cosmetologists v. Ritchie, 206 N.C. 808, 175 S.E. 308 (1934), decided under former statutory provisions.

§ 88B-4. Powers and duties of the Board.

(a) The Board shall have the following powers and duties:

(1) To administer and interpret this Chapter.

(2) To adopt, amend, and repeal rules to carry out the provisions of this Chapter.

(3) To examine and determine the qualifications and fitness of applicants for licensure under this Chapter.

(4) To issue, renew, deny, restrict, suspend, or revoke licenses.

(5) To conduct investigations of alleged violations of this Chapter or the Board's rules.

(6) To collect fees required by G.S. 88B-20 and any other monies permitted by law to be paid to the Board.

(7) To approve new cosmetic art schools.

(7a) To adopt rules for cosmetic art schools.

(8) To inspect cosmetic art schools and shops.

(9) To adopt rules for the sanitary management and physical requirements of cosmetic art shops and cosmetic art schools.

(10) To establish a curriculum for each course of study required for the issuance of a license issued under this Chapter.

(11) To employ an executive director and any additional professional, clerical, or special personnel necessary to carry out the provisions of this Chapter, and to purchase or rent necessary office space, equipment, and supplies.

(12) To adopt a seal.

(13) To carry out any other actions authorized by this Chapter.

(b) A member of the Board shall have the authority to inspect cosmetic art shops and cosmetic art schools at any reasonable hour to determine compliance with the provisions of this Chapter if the inspection is made: (i) at the request of the Board, or with the approval of the chair or the executive director as the result of a complaint made to the Board or a problem reported by an inspector, or (ii) at the request of an inspector who deems it necessary to request the assistance of a Board member and who has the prior approval of the chair or executive director to do so. A Board member who makes an inspection pursuant to this subsection shall file a report with the Board before requesting reimbursement for expenses.

(c) The Board shall keep a record of its proceedings relating to the issuance, renewal, denial, restriction, suspension, and revocation of licenses. This record shall also contain each licensee's name, business and home addresses, license number, and the date the license was issued. (1933, c. 179, ss. 1, 14, 15, 17, 23, 29; 1935, c. 54, ss. 3-5; 1941, c. 234, s. 2; 1943, c. 354, ss. 1, 2; 1957, c. 1184, ss. 1, 2; 1969, c. 844, s. 5; 1971, c. 355, ss. 1-3; c. 616, ss. 1-3; 1973, c. 476, s. 128; c. 1360, ss. 2-4; c. 1481, ss. 1, 2; 1975, c. 7, s. 1; c. 857, ss. 1, 3-5, 9; 1977, cc. 155, 472; 1981, c. 614, s. 1; c. 615, ss. 1, 2, 11, 14; c. 884, s. 7; 1983, c. 913, s. 9; (Reg. Sess., 1984), c. 990; 1985, c. 125; (Reg. Sess., 1986), c. 833; 1987 (Reg. Sess., 1988), c. 965; 1989, c. 650, ss. 2, 3; (Reg. Sess., 1990), s. 1013, s. 1; 1991 (Reg. Sess., 1992), c. 1030, s. 20; 1993, c. 22, s. 2; c. 54, s. 1; 1995, c. 541, s. 2; (Reg. Sess., 1996), c. 605, ss. 15, 16; 1998-230, s. 2; 1999-348, s. 1.)

§ 88B-5. Meetings and compensation of the Board.

(a) Each member of the Board shall receive compensation for services and expenses as provided in G.S. 93B-5, but shall be limited to payment for services deemed official business of the Board when such business exceeds three continuous hours per day. Official business of the Board includes meetings called by the chair and time spent inspecting cosmetic art shops and schools as permitted by this Chapter. No payment for per diem or travel expenses shall be authorized or paid for Board meetings other than those called by the chair. The Board may annually select one member to attend a national state board of cosmetic arts meeting on official business of the Board. No other Board members shall be authorized to attend trade shows or to travel out-of-state at the Board's expense.

(b) The Board shall hold four regular meetings a year in the months of January, April, July, and October. The chair may call additional meetings whenever necessary. (1933, c. 179, ss. 15, 17; 1935, c. 54, ss. 3, 4; 1941, c. 234, s. 2; 1943, c. 354, s. 2; 1957, c. 1184, s. 2; 1971, c. 355, ss. 2, 3; c. 616, ss. 1, 3; 1973, c. 1360, ss. 2-4; 1975, c. 857, ss. 4, 5; 1981, c. 615, s. 11; 1983, c. 913, s. 9; 1989, c. 650, ss. 2, 3; 1995, c. 541, s. 2; 1998-230, s. 2.)

§ 88B-6. Board office, employees, funds, budget requirements.

(a) The Board shall maintain its office in Raleigh, North Carolina.

(b) The Board shall employ an executive director who shall not be a member of the Board. The executive director shall keep all records of the Board, issue all necessary notices, and perform any other duties required by the Board.

(c) With the approval of the Director of the Budget and the Office of State Personnel, the Board may employ as many inspectors, investigators, and other staff as necessary to perform inspections and other duties prescribed by the Board. Inspectors and investigators shall be experienced in all parts of cosmetic art and shall have authority to examine cosmetic art shops and cosmetic art schools during business hours to determine compliance with this Chapter.

(d) The salaries of all employees of the Board, including the executive director, shall be subject to the State Personnel Act.

(e) The executive director may collect in the Board's name and on its behalf the fees prescribed in this Chapter and shall turn these and any other monies paid to the Board over to the State Treasurer. These funds shall be credited to the Board and shall be held and expended under the supervision of the Director of the Budget only for the administration and enforcement of this Chapter. Nothing in this Chapter shall authorize any expenditure in excess of the amount credited to the Board and held by the State Treasurer as provided in this subsection.

(f) The Executive Budget Act and the State Personnel Act apply to the administration of this Chapter. (1933, c. 179, ss. 14, 15; 1935, c. 54, s. 3; 1941, c. 234, s. 2; 1943, c. 354, ss. 1, 2; 1957, c. 1184, ss. 1, 2; 1969, c. 844, s. 4; 1971, c. 355, ss. 1-3; c. 616, ss. 1-3; 1973, c. 1360, s. 2; 1975, c. 857, ss. 3, 4; 1981, c. 615, s. 11; c. 884, s. 7; 1983, c. 913, s. 9; 1989, c. 650, s. 2.; 1998-230, s. 2.)

CASE NOTES

Applied in N.C. Sch. Bds. Ass'n v. Moore, 160 N.C. App. 253, 585 S.E.2d 418 (2003).

§ 88B-7. Qualifications for licensing cosmetologists.

The Board shall issue a license to practice as a cosmetologist to any individual who meets all of the following requirements:

(1) Successful completion of at least 1,500 hours of a cosmetology curriculum in an approved cosmetic art school, or at least 1,200 hours of a cosmetology curriculum in an approved cosmetic art school and completion of an apprenticeship for a period of at least six months under the direct supervision of a cosmetologist, as certified by sworn affidavit of three licensed cosmetologists or by other evidence satisfactory to the Board.
(2) Passage of an examination conducted by the Board.
(3) Payment of the fees required by G.S. 88B-20. (1933, c. 179, s. 12; 1953, c. 1304, s. 3; 1973, c. 450, s. 2; 1977, c. 899, s. 1; 1981, c. 615, s. 9; 1985, c. 559, s. 5; 1998-230, s. 2.)

§ 88B-8. Qualifications for licensing apprentices.

The Board shall issue a license to practice as an apprentice to any individual who meets all of the following requirements:

(1) Successful completion of at least 1,200 hours of a cosmetology curriculum in an approved cosmetic art school.
(2) Passage of an examination conducted by the Board.
(3) Payment of the fees required by G.S. 88B-20. (1933, c. 179, s. 10; 1941, c. 234, s. 1; 1953, c. 1304, ss. 1, 2; 1963, c. 1257, s. 2; 1973, c. 450, s. 1; 1981, c. 615, s. 8; 1998-230, s. 2.)

§ 88B-9. Qualifications for licensing as an esthetician.

The Board shall issue a license to practice as an esthetician to any individual who meets all of the following requirements:

(1) Successful completion of at least 600 hours of an esthetics curriculum in an approved cosmetic art school.
(2) Passage of an examination conducted by the Board.
(3) Payment of the fees required by G.S. 88B-20. (1998-230, s. 2; 2006-212, s. 3.)

Effect of Amendments. — Session Laws 2006-212, s. 3, effective August 8, 2006, substituted "esthetics" for "esthetician" in subdivision (1).

§ 88B-10. Qualifications for licensing manicurists.

The Board shall issue a license to practice as a manicurist to any individual who meets all of the following requirements:

(1) Successful completion of at least 300 hours of a manicurist curriculum in an approved cosmetic art school.
(2) Passage of an examination conducted by the Board.
(3) Payment of the fees required by G.S. 88B-20. (1963, c. 1257, s. 4; 1973, c. 450, s. 4; 1981, c. 615, s. 19; 1985, c. 559, s. 4; 1998-230, ss. 2, 2.1.)

§ 88B-11. Qualifications for licensing teachers.

(a) Applicants for any teacher's license issued by the Board shall meet all of the following requirements:

(1) Possession of a high school diploma or a high school graduation equivalency certificate.
(2) Payment of the fees required by G.S. 88B-20.

(b) The Board shall issue a license to practice as a cosmetology teacher to any individual who meets the requirements of subsection (a) of this section and who meets all of the following:

(1) Holds in good standing a cosmetologist license issued by the Board.
(2) Submits proof of either practice of cosmetic art in a cosmetic art shop, or any Board-approved employment capacity in the cosmetic arts industry, for a period equivalent to five years of full-time work immediately prior to application or successful completion of at least 800 hours of a cosmetology teacher curriculum in an approved cosmetic art school.
(3) Passes an examination for cosmetology teachers conducted by the Board.

(c) The Board shall issue a license to practice as an esthetician teacher to any individual who meets the requirements of subsection (a) of this section and who meets all of the following:

(1) Holds in good standing a cosmetologist or an esthetician license issued by the Board.
(2) Submits proof of either practice as an esthetician in a cosmetic art shop, or any Board-approved employment capacity in the cosmetic arts industry, for a period equivalent to three years of full-time work immediately prior to application or successful completion of at least 650 hours of an esthetician teacher curriculum in an approved cosmetic art school.
(3) Passes an examination for esthetician teachers conducted by the Board.

(d) The Board shall issue a license to practice as a manicurist teacher to any individual who meets the requirements of subsection (a) of this section and who meets all of the following:

(1) Holds in good standing a cosmetologist or manicurist license issued by the Board.
(2) Submits proof of either practice as a manicurist in a cosmetic art shop, or any Board-approved employment capacity in the cosmetic arts industry, for a period equivalent to two years of full-time work immediately prior to application or successful completion of at least 320 hours of a manicurist teacher curriculum in an approved cosmetic art school.
(3) Passes an examination for manicurist teachers conducted by the Board. (1998-230, s. 2; 2006-212, s. 5.)

Effect of Amendments. — Session Laws 2006-212, s. 5, effective August 8, 2006, inserted "or any Board-approved employment capacity in the cosmetic arts industry" following "cosmetic art shop" in subdivisions (b)(2), (c)(2), and (d)(2).

§ 88B-12. Temporary employment permit; extensions; limits on practice.

(a) The Board shall issue a temporary employment permit to an applicant for licensure as an apprentice, cosmetologist, esthetician, or manicurist who meets all of the following:
(1) Has completed the required hours of a cosmetic art school curriculum in the area in which the applicant wishes to be licensed.
(2) Has applied to take the examination within three months of completing the required hours.
(3) Is qualified to take the examination.

(b) A temporary employment permit shall expire six months from the date of graduation from a cosmetic art school and shall not be renewed.

(c) The holder of a temporary employment permit may practice cosmetic art only under the supervision of a licensed cosmetologist, manicurist, or esthetician, as appropriate, and may not operate a cosmetic art shop. (1989 (Reg. Sess., 1990), c. 1013, s. 1; 1991 (Reg. Sess., 1992), c. 1030, s. 20; 1998-230, s. 2.)

§ 88B-13. Applicants licensed in other states.

(a) The Board shall issue a license to an applicant licensed as an apprentice, cosmetologist, esthetician, or manicurist in another state if the applicant shows:
(1) The applicant is an active practitioner in good standing.
(2) The applicant has practiced at least one of the three years immediately preceding the application for a license.
(3) There is no disciplinary proceeding or unresolved complaint pending against the applicant at the time a license is to be issued by this State.
(4) The licensure requirements in the state in which the applicant is licensed are substantially equivalent to those required by this State.

(b) Instead of meeting the requirements in subsection (a) of this section, any applicant who is licensed as a cosmetologist, esthetician, or manicurist in another state shall be admitted to practice in this State under the same reciprocity or comity provisions that the state in which the applicant is licensed grants to persons licensed in this State.

(c) The Board may establish standards for issuing a license to an applicant who is licensed as a teacher in another state. These standards shall include a requirement that the licensure requirements in the state in which the teacher is licensed shall be substantially equivalent to those required in this State and that the applicant shall be licensed by the Board to practice in the area in which the applicant is licensed to teach. (1933, c. 179, s. 19; 1953, c. 1304, s. 4; 1957, c. 1184, s. 3; 1963, c. 1257, s. 3; 1973, c. 256, s. 1; 1981, c. 615, s. 12; c. 967; 1983, c. 438; 1998-230, s. 2.)

§ 88B-14. Licensing of cosmetic art shops.

(a) The Board shall issue a license to operate a cosmetic art shop to any applicant who submits a properly completed application, on a form approved by the Board, pays the required fee, and is determined, after inspection, to be in compliance with the provisions of this Chapter and the Board's rules.

(b) The applicant shall list all licensed cosmetologists who practice cosmetic art in the shop and shall identify each as an employee or a booth renter.

(c) A cosmetic art shop shall be allowed to operate for a period of 30 days while the Board inspects and determines the shop's compliance with this Chapter and the Board's rules. If the Board is unable to complete the inspection within 30 days, the shop will be authorized to operate until such an inspection can be completed.

(d) A license to operate a cosmetic art shop shall not be transferable from one location to another or from one owner to another. (1933, c. 179, s. 1; 1973, c. 1481, ss. 1, 2; 1975, c. 7; c. 857, s. 1; 1977, cc. 155, 472; 1981, c. 615, ss. 1, 2; 1983 (Reg. Sess., 1984), c. 990; 1985, c. 125; 1985 (Reg. Sess., 1986), c. 833; 1987 (Reg. Sess., 1988), c. 965; 1993, c. 22, s. 2; c. 54, s. 1; 1995 (Reg. Sess., 1996), c. 605, s. 15; 1998-230, s. 2.)

§ 88B-15. Practice outside cosmetic art shops.

(a) Any individual licensed under this Chapter may visit the residences of individuals who are sick or disabled and confined to their places of residence in order to attend to their cosmetic needs. A licensed individual may also visit hospitals, nursing homes, rest homes, retirement homes, mental institutions, correctional facilities, funeral homes, and similar institutions to attend to the cosmetic needs of those in these institutions.

(b) An individual licensed under this Chapter may practice in a licensed barbershop as permitted by G.S. 86A-14. (1933, c. 179, s. 1; 1973, c. 1481, ss. 1, 2; 1975, c. 7; c. 857, s. 1; 1977, cc. 155, 472; 1981, c. 615, ss. 1, 2, 6; 1983 (Reg. Sess., 1984), c. 990; 1985, c. 125; 1985 (Reg. Sess., 1986), c. 833; 1987 (Reg. Sess., 1988), c. 965; 1993, c. 22, s. 2; c. 54, s. 1; 1995 (Reg. Sess., 1996), c. 605, s. 15; 1998-230, s. 2.)

§ 88B-16. Licensing cosmetic art schools.

(a) The Board shall issue a license to any cosmetic art school that submits a properly completed application, on a form approved by the Board, pays the required license fee, and is determined by the Board, after inspection, to be in compliance with the provisions of this Chapter and the Board's rules.

(b) No one may open or operate a cosmetic art school before the Board has approved a license for the school. The Board shall not issue a license before a cosmetic art school has been inspected and determined to be in compliance with the provisions of this Chapter and the Board's rules.

(c) Cosmetic art schools located in this State shall be licensed by the Board before any credit may be given for curriculum hours taken in the school. The Board may establish standards for approving hours from schools in other states that are licensed. (1933, c. 179, s. 23; 1935, c. 54, s. 5; 1973, c. 476, s. 128; 1975, c. 857, s. 9; 1981, c. 614, s. 1; c. 615, s. 14; 1995 (Reg. Sess., 1996), c. 605, s. 16.; 1998-230, s. 2.)

§ 88B-17. Bond required for private cosmetic art schools.

(a) Each private cosmetic art school shall provide a guaranty bond unless the school has already provided a bond or an alternative to a bond under G.S. 115D-95. The Board may restrict, suspend, revoke, or refuse to renew or reinstate the license of a school that fails to maintain a bond or an alternative to a bond pursuant to this section or G.S. 115D-95.

(b)(1) The applicant shall file the guaranty bond with the clerk of superior court in the county in which the school is located. The bond shall be in favor of the students. The bond shall be executed by the applicant as principal and by a bonding company authorized to do business in this State. The bond shall be conditioned to provide indemnification to any student or the student's parent or guardian who has suffered loss of tuition or any fees by reason of the failure of the school to offer or complete student instruction, academic services, or other goods and services as related to course enrollment for any reason, including suspension, revocation, or nonrenewal of a school's approval, bankruptcy, foreclosure, or the school's ceasing to operate.

(2) The bond amount shall be at least equal to the maximum amount of prepaid tuition held at any time by the school during the last fiscal year, but in no case shall be less than ten thousand dollars ($10,000). Each application for license or license renewal shall include a letter signed by an authorized representative of the school showing the calculations made and the method of computing the amount of the bond in accordance with rules prescribed by the Board. If the Board finds that the calculations made and the method of computing the amount of the bond are inaccurate or that the amount of the bond is otherwise inadequate to provide indemnification under the terms of the bond, the Board may require the applicant to provide an additional bond.

(3) The bond shall remain in force and effect until canceled by the guarantor. The guarantor may cancel the bond upon 30 days' notice to the Board. Cancellation of the bond shall not affect any liability incurred or accrued prior to the termination of the notice period.

(c) An applicant who is unable to secure a bond may seek from the Board a waiver of the guaranty bond requirement and approval of one of the guaranty bond alternatives set forth in this subsection. With the approval of the Board, an applicant may file one of the following instead of a bond with the clerk of court in the county in which the school is located:

(1) An assignment of a savings account in an amount equal to the bond required that is in a form acceptable to the Board, and is executed by the applicant and a state or federal savings and loan association, state bank, or national bank that is doing business in this State and whose accounts are insured by a federal depositor's corporation, and access to the account is subject to the same conditions as those for a bond in subsection (b) of this section.

(2) A certificate of deposit that is executed by a state or federal savings and loan association, state bank, or national bank that is doing business in this State and whose accounts are insured by a federal depositor's corporation and access to the certificate of deposit is subject to the same conditions as those for a bond in subsection (b) of this section. (1989 (Reg. Sess., 1990), c. 824, s. 4; 1991, c. 636, s. 5; 1998-230, s. 2.)

§ 88B-18. Examinations.

(a) Repealed by Session Laws 2006-212, s. 2, effective August 8, 2006.

(b) Each examination shall have both a practical and a written portion.

(c) Examinations for applicants for apprentice, cosmetologist, teacher, esthetician, and manicurist licenses shall be given in at least three locations in the State that are geographically scattered. The examinations shall be administered in Board-approved facilities.

(d) An applicant for a cosmetologist, esthetician, manicurist, or teacher's license who fails to pass the examination three times may not reapply to take the examination again until after the applicant has successfully completed any additional requirements prescribed by the Board. (1933, c. 179, ss. 16, 17; 1935, c. 54, s. 4; 1973, c. 1360, ss. 3, 4; 1975, c. 857, s. 5; 1985, c. 559, s. 1; 1989, c. 650, s. 3; 1995, c. 541, s. 2; 1998-230, s. 2; 2006-212, s. 2.)

Effect of Amendments. — Session Laws 2006-212, s. 2, effective August 8, 2006, repealed subsection (a), relating to filing an application for examination; in subsection (c), rewrote the former last two sentences as the present last sentence; and substituted "cosmetologist, esthetician, manicurist, or teacher's license" for "cosmetologist" in subsection (d).

§ 88B-19. Expired school credits.

No credit shall be approved by the Board if five years or more have elapsed from the date a person enrolled in a cosmetic art school unless the person completed the required number of hours and filed an application to take an examination administered by the Board. (1933, c. 179, s. 12; 1953, c. 1304, s. 3; 1973, c. 450, s. 2; 1977, c. 899, s. 1; 1981, c. 615, s. 9; 1985, c. 559, s. 5; 1998-230, s. 2.)

§ 88B-20. Fees required.

(a) The Board may charge the applicant the actual cost of preparation, administration, and grading of examinations for cosmetologists, apprentices, manicurists, estheticians, or teachers, in addition to its other fees.

(b) The Board may charge application fees as follows:

(1) Inspection of a newly established cosmetic art shop	$ 25.00
(2) Reciprocity applicant under G.S. 88B-13	$ 15.00.

(c) The Board may charge license fees as follows:

(1) Cosmetologist	$ 39.00 every 3 years
(2) Apprentice	$ 10.00 per year
(3) Esthetician	$ 10.00 per year
(4) Manicurist	$ 10.00 per year
(5) Teacher	$ 10.00 every 2 years
(6) Cosmetic art shop per active booth	$ 3.00 per year
(7) Cosmetic art school	$ 50.00 per year
(8) Duplicate license	$ 1.00.

(d) The Board may require payment of late fees and reinstatement fees as follows:

(1) Apprentice, cosmetologist, esthetician, manicurist, and teacher late renewal	$ 10.00
(2) Cosmetic art schools and shops late renewal	$ 10.00
(3) Reinstatement — cosmetic art schools and shops	$ 25.00.

(e) The Board may prorate fees as appropriate. (1933, c. 179, ss. 1, 21; 1955, c. 1265; 1973, c. 256, s. 2; c. 1481, ss. 1, 2; 1975, c. 7; c. 857, ss. 1, 6; 1977, cc. 155, 472; 1981, c. 615, ss. 1, 2, 13; 1983, c. 523; (Reg. Sess., 1984), c. 990; 1985, c. 125; 1985, c. 559, s. 2; (Reg. Sess., 1986), c. 833; 1987 (Reg. Sess., 1988), c. 965; 1993, c. 22, s. 2; c. 54, s. 1; 1995, c. 541, s. 1; (Reg. Sess., 1996), c. 605, s. 15; 1998-230, s. 2; 1999-348, s. 2.)

Editor's Note. — Session Law 1998-230, s. 5, effective November 1, 1998, and applicable to applications made and acts occurring on or after that date, provides that until the Board adopts a staggered license renewal plan under G.S. 88B-21(b), any cosmetologist who applies for licensure in a year other than the year all other cosmetologist licenses are due for renewal shall pay the annual fee provided in G.S. 88B-20, on or before October 1 of each year until the year all other cosmetologist licenses are again due for renewal. Any license not renewed shall expire on October 1 of that year.

§ 88B-21. Renewals; expired licenses; inactive status.

(a) Each license to operate a cosmetic art shop shall be renewed on or before the first day of February of each year. As provided in G.S. 88B-20, a late fee shall be charged for licenses renewed after February 1. Any license not renewed by March 1 of each year shall expire. A cosmetic art shop whose license has been expired for one year or less shall have the license reinstated immediately upon payment of the reinstatement fee, the late fee, and all unpaid license fees. The licensee shall submit to the Board, as a part of the renewal process, a list of all licensed cosmetologists who practice cosmetic art in the shop and shall identify each as an employee or a booth renter.

(b) Cosmetologist licenses shall be renewed on or before October 1 every three years beginning October 1, 1998. A late fee shall be charged for renewals after that date. Any license not renewed shall expire on October 1 of the year that renewal is required. The Board may develop and implement a plan for staggered license renewal and may prorate license fees to implement such a plan.

(c) Apprentice, esthetician, and manicurist licenses shall be renewed annually on or before October 1 of each year. A late fee shall be charged for the renewal of licenses after that date. Any license not renewed shall expire on October 1 of that year.

(d) Teacher licenses shall be renewed every two years on or before October 1. A late fee shall be charged for the renewal of licenses after that date. Any license not renewed shall expire on October 1 of that year.

(e) Prior to renewal of a license, a teacher, cosmetologist, esthetician, or manicurist shall annually complete eight hours of Board-approved continuing education for each year of the licensing cycle. A cosmetologist may complete up to 24 hours of required continuing education at any time within the cosmetologist's three-year licensing cycle. Licensees shall submit written documentation to the Board showing that they have satisfied the requirements of this subsection. A licensee who is in active practice as a cosmetologist, esthetician, or manicurist, has practiced for at least 10 consecutive years in that profession and is 60 years of age or older does not have to meet the continuing education requirements of this subsection. A licensee who is in active practice as a cosmetologist and has at least 20 consecutive years of experience as a cosmetologist, does not have to meet the continuing education requirements of this subsection, but shall report any continuing education classes completed to the Board, whether the continuing education classes are Board-approved or not. Promotion of products and systems shall be allowed at continuing education given in-house or at trade shows. Continuing education classes may also be offered in secondary languages as needed. No member of the Board may offer continuing education courses as required by this section.

(f) If an apprentice, cosmetologist, esthetician, manicurist, or teacher fails to renew his or her license within five years following the expiration date, the licensee shall be required to pass an examination as prescribed by the Board before the license will be reinstated.

(g) Cosmetic art school licenses shall be renewed on or before October 1 of each year. A late fee shall be charged for licenses renewed after that date. Any license not renewed by November 1 of that year shall expire. A cosmetic art school whose license has been expired for one year or less shall have its license reinstated upon payment of the reinstatement fee, the late fee, and all unpaid license fees.

(h) Upon request by a licensee for inactive status, the Board may place the licensee's name on the inactive list so long as the licensee is in good standing with the Board. An inactive licensee is not required to complete continuing education requirements. An inactive licensee shall not practice cosmetic art for consideration. However, the inactive licensee may continue to purchase supplies as accorded an active licensee. When the inactive licensee desires to be removed from the inactive list and return to active practice, the inactive licensee shall notify the Board of his or her desire to return to active status and pay the required fee as determined by the Board. As a condition of returning to active status, the Board may require the licensee to complete eight to 24 hours of continuing education pursuant to subsection (e) of this section. (1933, c. 179, ss. 1, 25; 1957, c. 1184, s. 4; 1973, c. 256, s. 3; c. 450, s. 3; c. 1481, ss. 1, 2; 1975, c. 7; c. 857, ss. 1, 7; 1977, cc. 155, 472; 1981, c. 615, ss. 1, 2; 1983 (Reg. Sess., 1984), c. 990; 1985, c. 125; 1985, c. 559, s. 3; (Reg. Sess., 1986), c. 833; 1987 (Reg. Sess., 1988), c. 965; 1993, c. 22, s. 2; c. 54, s. 1; 1995 (Reg. Sess., 1996), c. 605, s. 15; 1998-230, s. 2; 2004-142, s. 1; 2006-212, s. 6; 2007-198, s. 1.)

Editor's Note. — Session Laws 1998-230, s. 3, effective November 1, 1998, and applicable to applications made and acts occurring on or after that date, provides that until the Board adopts a staggered license renewal plan under G.S. 88B-21(b), any cosmetologist who applies for licensure in a year other than the year all other cosmetologist licenses are due for renewal shall pay the annual fee provided in G.S. 88B-20, on or before October 1 of each year until the year all other cosmetologist licenses are again due for renewal. Any license not renewed shall expire on October 1 of that year.

Effect of Amendments. — Session Laws 2006-212, s. 6, effective August 8, 2006, inserted the fourth sentence in subsection (e).

Session Laws 2007-198, s. 1, effective July 8, 2007, deleted "as of October 1, 2007," following "cosmetologist and" in the fifth sentence of subsection (e).

CASE NOTES

Subdivision (1) of prior mandatory duty, and the Board of Cosmetic Art Examiners had no discretionary power to refuse to issue a similar provision prescribed certificate in such instance; therefore a complaint in suit for mandamus alleging full compliance with the provisions of the statute and the refusal of the Board to issue the certificate to plaintiff, was not demurrable. Poole v. State Bd. of Cosmetic Art Exmrs., 221 N.C. 199, 19 S.E.2d 635 (1942), decided under former statutory provisions.

Applied in N.C. Sch. Bds. Ass'n v. Moore, 160 N.C. App. 253, 585 S.E.2d 418 (2003).

§ 88B-22. Licenses required; criminal penalty.

(a) Except as provided in this Chapter, no person may practice or attempt to practice cosmetic art for pay or reward in any form, either directly or indirectly, without being licensed as an apprentice, cosmetologist, esthetician, or manicurist by the Board.

(b) Except as provided in this Chapter, no person may practice cosmetic art or any part of cosmetic art, for pay or reward in any form, either directly or indirectly, outside of a licensed cosmetic art shop.

(c) No person may open or operate a cosmetic art shop in this State unless a license has been issued by the Board for that shop.

(d) An individual licensed as an esthetician or manicurist may practice only that part of cosmetic art for which the individual is licensed.

(d1) No person may teach cosmetic art in a Board-approved cosmetic art school unless the person is a teacher licensed under this Chapter. A guest lecturer may be exempt from the requirements of this subsection upon approval by the Board.

(e) An apprentice licensed under the provisions of this Chapter shall apprentice under the direct supervision of a cosmetologist. An apprentice shall not operate a cosmetic art shop.

(f) A violation of this Chapter is a Class 3 misdemeanor. (1933, c. 179, ss. 1, 11, 28; 1949, c. 505, s. 2; 1973, c. 476, s. 128; c. 1481, ss. 1, 2; 1975, c. 7; c. 857, ss. 1, 8; 1977, cc. 155, 472; 1981, c. 614, s. 2; c. 615, ss. 1, 2, 17; 1983 (Reg. Sess., 1984), c. 990; 1985, c. 125; 1985 (Reg. Sess., 1986), c. 833; 1987 (Reg. Sess., 1988), c. 965; 1989 (Reg. Sess., 1990), c. 1013, s. 3; 1993, c. 22, s. 2; c. 54, s. 1; c. 539, s. 608; 1994, Ex. Sess., c. 24, s. 14(c); 1995 (Reg. Sess., 1996), c. 605, s. 15; 1998-230, s. 2; 2006-212, s. 4.)

Effect of Amendments. — Session Laws 2006-212, s. 4, effective August 8, 2006, added subsection (d1).

CASE NOTES

Editor's Note. — *The cases below were decided under former statutory provisions.*

Former Chapter 88 did not alter common-law rules governing liability of employer of an apprentice cosmetologist for the consequences of the employee's acts in the course of her employment. Johnson v. Lamb, 273 N.C. 701, 161 S.E.2d 131 (1968).

Liability of Cosmetologist. — Like the physician, or other person undertaking to perform professional services, the cosmetologist is not an insurer against injury from the treatment she undertakes to render, nor is she liable for the consequences of every error of judgment. Johnson v. Lamb, 273 N.C. 701, 161 S.E.2d 131 (1968).

Employer Need Not Personally Direct Each Act of Apprentice. — It was not the intent of prior similar provision to impose upon the employer of an apprentice cosmetologist a duty, owed to customers of the establishment, to stand at the side of the apprentice and personally direct each act performed in the rendering of each service to each customer. Johnson v. Lamb, 273 N.C. 701, 161 S.E.2d 131 (1968).

Assignment of Customer to Inexperienced Apprentice. — The proprietor of a beauty salon may not, by the assignment of a customer to an inexperienced apprentice, nothing else appearing, reduce the undertaking of the proprietor to bring to the performance of the service the degree of professional skill and ability ordinarily possessed by those engaged in the trade in the particular locality or area. If, however, the apprentice performing the service possesses such skill, exercises reasonable care in the application of it to the customer's case, and uses her best judgment in the performance of the service, there can be no liability for injury upon either the apprentice or the proprietor of a salon on the basis of negligence in the performance of the service. Johnson v. Lamb, 273 N.C. 701, 161 S.E.2d 131 (1968).

§ 88B-23. Licenses to be posted.

(a) Every apprentice, cosmetologist, esthetician, manicurist, and teacher licensed under this Chapter shall display the certificate of license issued by the Board within the shop in which the person works.

(b) Every certificate of license to operate a cosmetic art shop or school shall be conspicuously posted in the shop or school for which it is issued. (1933, c. 179, s. 24; 1998-230, s. 2.)

§ 88B-24. Revocation of licenses and other disciplinary measures.

The Board may restrict, suspend, revoke, or refuse to issue, renew, or reinstate any license for any of the following:

(1) Conviction of a felony shown by certified copy of the record of the court of conviction.

(2) Gross malpractice or gross incompetency as determined by the Board.

(3) Advertising by means of knowingly false or deceptive statements.

(4) Permitting any individual to practice cosmetic art without a license or temporary employment permit, with an expired license or temporary employment permit, or with an invalid license or temporary employment permit.
(5) Obtaining or attempting to obtain a license for money or other thing of value other than the required fee or by fraudulent misrepresentation.
(6) Practicing or attempting to practice by fraudulent misrepresentation.
(7) Willful failure to display a certificate of license as required by G.S. 88B-23.
(8) Willful violation of the rules adopted by the Board.
(9) Violation of G.S. 86A-15 by a cosmetologist, esthetician, or manicurist licensed by the Board and practicing cosmetic art in a barber shop. (1933, c. 179, ss. 23, 26, 28; 1935, c. 54, s. 5; 1941, c. 234, s. 4; 1949, c. 505, s. 2; 1973, c. 476, s. 128; 1975, c. 857, ss. 8, 9; 1981, c. 614, ss. 1, 2; c. 615, ss. 14, 15, 17; 1989 (Reg. Sess., 1990), c. 1013, ss. 2, 3; 1993, c. 539, 608; 1994, Ex. Sess., c. 24, s. 14(c); 1995 (Reg. Sess., 1996), c. 605, s. 16.; 1998-230, s. 2.)

CASE NOTES

Variance. — Where defendant was tried upon a warrant charging that she permitted persons in her employ to practice as apprentices without certificate of registration as registered apprentices or registered cosmetologists, and the jury returned a special verdict to the effect that defendant permitted unlicensed students to work in her school, there was a fatal variance between the warrant and the special verdict and a failure of proof, and the adjudication that the defendant was not guilty was affirmed. State v. McIver, 216 N.C. 734, 6 S.E.2d 493 (1940), decided under former statutory provisions.

§ 88B-25. Exemptions.

The following persons are exempt from the provisions of this Chapter while engaged in the proper discharge of their professional duties:
(1) Undertakers and funeral establishments licensed under G.S. 90-210.25.
(2) Persons authorized to practice medicine or surgery under Chapter 90 of the General Statutes.
(3) Nurses licensed under Chapter 90 of the General Statutes.
(4) Commissioned medical or surgical officers of the United States Army, Air Force, Navy, Marine, or Coast Guard.
(5) A person employed in a cosmetic art shop to shampoo hair. (1933, c. 179, ss. 1, 22; 1973, c. 1481, ss. 1, 2; 1975, c. 7; c. 857, s. 1; 1977, cc. 155, 472; 1981, c. 615, ss. 1, 2; 1983 (Reg. Sess., 1984), c. 990; 1985, c. 125; 1985 (Reg. Sess., 1986), c. 833; 1987 (Reg. Sess., 1988), c. 965; 1993, c. 22, s. 2; c. 54, s. 1; 1995 (Reg. Sess., 1996), c. 605, s. 15; 1998-230, s. 2.)

§ 88B-26. Rules to be posted.

(a) The Board shall furnish a copy of its rules relating to sanitary management of cosmetic art shops and cosmetic art schools to each shop and school licensed by the Board. Each shop and school shall post the rules in a conspicuous place.

(b) The Board shall furnish a copy of its rules relating to curriculum and schools to each licensed cosmetic art school. Each cosmetic art school shall make these rules available to all teachers and students. (1933, c. 179, s. 23; 1935, c. 54, s. 5; 1973, c. 476, s. 128; 1975, c. 857, s. 9; 1981, c. 614, s. 1; c. 615, s. 14; 1995 (Reg. Sess., 1996), c. 605, s. 16; 1998-230, s. 2.)

§ 88B-27. Inspections.

Any inspector or other authorized representative of the Board may enter any cosmetic art shop or school to inspect it for compliance with this Chapter and the Board's rules. All persons practicing cosmetic art in a shop or school shall, upon request, present satisfactory proof of identification. Satisfactory proof shall be in the form of a photographic driver's license or photographic identification card issued by any state, federal, or other government entity. The Board may require a cosmetic art shop or school to be inspected as a condition for license renewal. (1933, c. 179, ss. 15, 23; 1935, c. 54, ss. 3, 5; 1941, c. 234, s. 2; 1943, c. 354, s. 2; 1957, c. 1184, s. 2; 1971, c. 355, ss. 2, 3; c. 616, ss. 1, 3; 1973, c. 476, s. 128; c. 1360, s. 2; 1975, c. 857, ss. 4, 9; 1981, c. 614, s. 1; c. 615, ss. 11, 14; 1983, c. 913, s. 9; 1989, c. 650, s. 2; 1995 (reg. Sess., 1996), c. 605, s. 16; 1998-230, s. 2.)

§ 88B-28. Restraining orders.

The Board, the Department of Health and Human Services, or any county or district health director may apply to the superior court for an injunction to restrain any person from violating the provisions of this Chapter or the Board's rules. Actions under this section shall be brought in the county where the defendant resides or maintains his or her principal place of business or where the alleged acts occurred. (1949, c. 505, s. 1; 1973, c. 476, s. 128; 1975, c. 857, s. 10; 1981, c. 614, s. 3; c. 615, s. 18; 1997-443, s. 11A.118(a); 1997-502, s. 8; 1998-230, s. 2.)

§ 88B-29. Civil penalties.

(a) Authority to Assess Civil Penalties. — In addition to taking any of the actions permitted under G.S. 88B-24, the Board may assess a civil penalty not in excess of one thousand dollars ($1,000) for the violation of any section of this Chapter or the violation of any rules adopted by the Board. The clear proceeds of any civil penalty assessed under this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(b) Consideration Factors. — Before imposing and assessing a civil penalty and fixing the amount thereof, the Board shall, as a part of its deliberations, take into consideration the following factors:

(1) The nature, gravity, and persistence of the particular violation.
(2) The appropriateness of the imposition of a civil penalty when considered alone or in combination with other punishment.
(3) Whether the violation was willful and malicious.
(4) Any other factors that would tend to mitigate or aggravate the violations found to exist.

(c) Schedule of Civil Penalties. — The Board shall establish a schedule of civil penalties for violations of this Chapter. The schedule shall indicate for each type of violation whether the violation can be corrected. Penalties shall be assessed for the first, second, and third violations of specified sections of this Chapter and for specified rules.

(d) Costs. — The Board may in a disciplinary proceeding charge costs, including reasonable attorneys' fees, to the licensee against whom the proceedings were brought. (1998-230, s. 2; 2004-142, s. 2.)

CASE NOTES

Variance. — Where defendant was tried upon a warrant charging that she permitted persons in her employ to practice as apprentices without certificate of registration as registered apprentices or registered cosmetologists, and the jury returned a special verdict to the effect that defendant permitted unlicensed students to work in her school, there was a fatal variance between the warrant and the special verdict and a failure of proof, and the adjudication that the defendant was not guilty was affirmed. State v. McIver, 216 N.C. 734, 6 S.E.2d 493 (1940), decided under former statutory provisions.

Table of Comparable Sections for Chapters 88 and 88B

Prepared by Legislative Services Office

Former Section	Present Section
88-1(a)	88B-22(a), (b), 88B-15(b)
(b)	88B-25(5)
(c)	88B-4(a), 88B-14(a), (b) 88B-20(b)(1) 88B-22(c)
(d)	None
(e)	88B-21(a), 88B-14(d)
88-2	88B-2
88-3	88B-2
88-4	88B-2
88-5	None
88-6	None
88-7	None
88-7.1	88B-15(a)
88-8	88B-2
88-9	88B-2
88-10	88B-8
88-11	88B-22(e)
88-12(a)	88B-7
(b)	88B-19
88-12.1(a)-(d)	88B-12
(e)	88B-4(a)
88-13	88B-3(a)-(e)
88-14	88B-3(f), 88B-4(a), 88B-6(a), (b), (d), (e)
88-15	88B-4(a), 88B-5(a) 88B-6(c), (d), (f) 88B-27, 88B-4(b)
88-16	88B-18(a), (d)
88-17	88B-4(a), 88B-5(b) 88B-18(b), (c)
88-18	None
88-19	88B-13(a), (b)
88-20	None
88-21	88B-20, 88B-21
88-22	88B-25(1)-(4)
88-23(a)(1)	88B-4, 88B-16, 88B-24, 88B-26, 88B-27
(a)(2)	None
(b)	88B-3(g), (h)
88-23.1	88B-17
88-24	88B-23
88-25	88B-21
88-26	88B-24
88-27	None
88-28	88B-22(f), 88-24
88-28.1	88B-28
88-29	88B-4(c)
88-30	88B-10

Chapter 89.

Engineering and Land Surveying.

§§ 89-1 through 89-16: Recodified as G.S. 89C-1 through 89C-28.

Editor's Note. — This Chapter was rewritten by Session Laws 1975, c. 681, s. 1, and has been recodified as Chapter 89C.

Chapter 89A.

Landscape Architects.

Sec.
89A-1. Definitions.
89A-2. Practice of landscape architecture or use of title "landscape architect" without registration prohibited; use of seal.
89A-3. North Carolina Board of Landscape Architects; appointments.
Sec.
89A-3.1. Board's powers and duties.
89A-4. Application, examination, certificate.
89A-5. Annual renewal of certificate.
89A-6. Fees.
89A-7. Disciplinary actions.
89A-8. Violation a misdemeanor; injunction to prevent violation.

§ 89A-1. Definitions.

The following definitions apply in this Chapter:

(1) Board. — The North Carolina Board of Landscape Architects.

(2) Landscape architect. — A person who, on the basis of demonstrated knowledge acquired by professional education or practical experience, or both, has been granted, and holds a current certificate entitling him or her to practice "landscape architecture" and to use the title "landscape architect" in North Carolina under the authority of this Chapter.

(3) Landscape architecture or the practice of landscape architecture. — The performance of services in connection with the development of land areas where, and to the extent that the dominant purpose of the services is the preservation, enhancement or determination of proper land uses, natural land features, ground cover and planting, naturalistic and aesthetic values, the settings, approaches or environment for structures or other improvements, natural drainage and the consideration and determination of inherent problems of the land relating to the erosion, wear and tear, blight or other hazards. This practice shall include the preparation of plans and specifications and supervising the execution of projects involving the arranging of land and the elements set forth in this subsection used in connection with the land for public and private use and enjoyment, embracing the following, all in accordance with the accepted professional standards of public health, safety and welfare:

a. The location and orientation of buildings and other similar site elements.

b. The location, routing and design of public and private streets, residential and commercial subdivision roads, or roads in and providing access to private or public developments. This does not include the preparation of construction plans for proposed roads classified as major thoroughfares or a higher classification.

c. The location, routing and design of private and public pathways and other travelways.

d. The preparation of planting plans.

e. The design of surface or incidental subsurface drainage systems, soil conservation and erosion control measures necessary to an overall landscape plan and site design. (1969, c. 672, s. 1; 1997-406, s. 1; 2001-496, s. 12.1(a).)

Cross References. — As to limited liability companies and their powers, see G.S. 57C-2-01 et seq.

Editor's Note. — Session Laws 2001-496, s. 12.1(b), provides: "The State Board of Examiners for Engineers and Surveyors and the Board of Landscape Architects shall agree to a Memorandum of Understanding that identifies areas of overlap or common practice regarding the scope of their respective professions and means for resolving disputes concerning standards of practice, qualifications, and jurisdiction regarding the identified areas of overlap. The parties shall send a joint written report to the General Assembly no later than April 30, 2002, concerning the Memorandum of Understanding and whether the changes in Section 13.1(a) of this act [s. 12.1(a) of Session Laws 2001-496] should be repealed or modified, and the General Assembly may consider and take action on the report during its session in 2002 or at any other time as it may consider appropriate."

Legal Periodicals. — For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

OPINIONS OF ATTORNEY GENERAL

Preparation of Construction Drawings. — A town may not, under its land use ordinance, require that all construction drawings submitted for approval be prepared and sealed by a licensed professional engineer, to the exclusion of licensed professional architects. Such a restriction would be in excess of the powers granted the town. See opinion of Attorney General to Mr. Michael B. Brough, Carrboro Town Attorney, 59 N.C.A.G. 58 (1989).

Street Design and Storm Drainage Systems. — The detailed drawings and accompanying calculations of street design and storm drainage systems, including subsurface systems and component structures, fall within the definition of the practice of engineering and not within the definition of landscape architecture. See opinion of Attorney General to Jerry T. Carter, Executive Director, N.C. Board of Examiners for Engineers and Surveyors, 2001 N.C. AG LEXIS 8 (3/22/2001).

§ 89A-2. Practice of landscape architecture or use of title "landscape architect" without registration prohibited; use of seal.

(a) No person shall use the designation "landscape architect," "landscape architecture," or "landscape architectural," or advertise any title or description tending to convey the impression that he or she is a landscape architect or shall engage in the practice of landscape architecture unless the person is registered as a landscape architect in the manner hereinafter provided and thereafter complies with the provisions of this Chapter. Every holder of a certificate shall display it in a conspicuous place in his or her principal office, place of business or employment.

(a1) No firm, partnership, or corporation shall engage in the practice of landscape architecture unless the firm, partnership, or corporation registered with the Board and has paid the fee required by G.S. 89A-6. All landscape architecture performed by a firm, partnership, or corporation shall be under the direct supervision of an individual who is registered under this Chapter.

(b) Nothing in this Chapter shall be construed (i) to authorize a landscape architect to engage in the practice of architecture, engineering, or land surveying, (ii) to restrict from the practice of landscape architecture or otherwise affect the rights of any person licensed to practice architecture under Chapter 83A, or engineering or land surveying under Chapter 89C of the General Statutes if the person does not use the title landscape architect, landscape architecture, or landscape architectural, (iii) to restrict any person from engaging in the occupation of grading lands whether by hand tools or machinery, (iv) to restrict the planting, maintaining, or marketing of plants or plant materials or the drafting of plans or specifications related to the location of plants on a site, (v) to require a certificate for the preparation, sale, or furnishing of plans, specifications and related data, or for the supervision of construction pursuant thereto, where the project involved is a single family residential site, or a residential, institutional, or commercial site of one acre or less, or the project involved is a site of more than one acre where only planting and mulching is required, or (vi) to prevent any individual from making plans or data for their own building site or for the supervision of construction pursuant thereto.

(c) Each landscape architect shall, upon registration, obtain a seal of the design authorized by the Board, bearing the name of the registrant, number of certificate and the legend "N.C. Registered Landscape Architect". Such seal may be used only while the registrant's certificate is in full force and effect.

Nothing in this Chapter shall be construed as authorizing the use or acceptance of the seal of a landscape architect instead of or as a substitute for the seal of an architect, engineer, or land surveyor. (1969, c. 672, s. 2; 1989, c. 673, s. 3; 1997-406, s. 2.)

§ 89A-3. North Carolina Board of Landscape Architects; appointments.

(a) There is created the North Carolina Board of Landscape Architects, consisting of seven members appointed by the Governor for four-year staggered terms. Five members of the Board shall have been engaged in the practice of landscape architecture in North Carolina at least five years at the time of their respective appointments. Two members of the Board shall not be landscape architects and shall represent the interest of the public at large. Each member shall hold office until the appointment and qualification of his or her successor. Vacancies occurring prior to the expiration of the term shall be filled by appointment for the unexpired term. No member shall serve more than two complete consecutive terms.

The Board shall be subject to the provisions of Chapter 93B of the General Statutes.

(b) The Board shall elect annually from its members a chair and a vice-chair and shall hold such meetings during the year as it may determine to be necessary, one of which shall consist of the annual meeting. A quorum of the Board shall consist of not less than three members.

(b1) The members of the Board shall not be compensated. However, members shall be entitled to be reimbursed from Board funds for all proper traveling and incidental expenses incurred in carrying out the provisions of this Chapter.

(c), (d) Repealed by Session Laws 1997-406, s. 3. (1969, c. 672, s. 3; 1979, c. 872, s. 1; 1997-406, s. 3.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 89A-3.1. Board's powers and duties.

The Board shall have the following powers and duties:

(1) Administer and enforce the provisions of this Chapter.

(2) Adopt rules to administer and enforce the provisions of this Chapter.

(3) Examine and determine the qualifications and fitness of applicants for registration and renewal of registration.

(4) Determine the qualifications of firms, partnerships, or corporations applying for a certificate of registration.

(5) Issue, renew, deny, suspend, or revoke certificates of registration and conduct any disciplinary actions authorized by this Chapter.

(6) Establish and approve continuing education requirements for persons registered under this Chapter.

(7) Receive and investigate complaints from members of the public.

(8) Conduct investigations for the purpose of determining whether violations of this Chapter or grounds for disciplining registrants exist.
(9) Conduct administrative hearings in accordance with Article 3 of Chapter 150B of the General Statutes.
(10) Maintain a record of all proceedings conducted by the Board and make available to registrants and other concerned parties an annual report of all Board action.
(11) Employ and fix the compensation of personnel that the Board determines is necessary to carry out the provisions of this Chapter and incur other expenses necessary to perform the duties of the Board.
(12) Adopt and publish a code of professional conduct for all registrants.
(13) Adopt a seal containing the name of the Board for use on all certificates of registration and official reports issued by the Board.
(14) Retain private counsel subject to G.S. 114-2.3. (1997-406, s. 4; 1997-456, s. 27; 2002-168, s. 7.)

§ 89A-4. Application, examination, certificate.

(a) Any person hereafter desiring to be registered and licensed to use the title "landscape architect" and to practice landscape architecture in the State, shall make a written application for examination to the Board, on a form prescribed by the Board, together with such evidence of his or her qualifications as may be prescribed by rules of the Board. Minimum qualifications under such rules shall require that the applicant:
(1) Shall be at least 18 years of age.
(2) Shall be of good moral character.
(3) Shall be a graduate of a Landscape Architect's Accreditation Board (LAAB) accredited collegiate curriculum in landscape architecture as approved by the Board.
(4) Shall have at least four years' experience in landscape architecture.

(a1) Notwithstanding the requirements of subdivisions (a)(3) and (4) of this section, any person who has had a minimum of 10 years of education and experience in landscape architecture, in any combination deemed suitable by the Board, may make application to the Board for examination.

(b) If the application is satisfactory to the Board, and is accompanied by the fees required by this Chapter, then the applicant shall be entitled to an examination to determine his or her qualifications. If the result of the examination of any applicant shall be satisfactory to the Board, then the Board shall issue to the applicant a certificate to use the title "landscape architect" and to practice landscape architecture in North Carolina. Examinations shall be held at least once a year at a time and place to be fixed by the Board which shall determine the subjects and scope of the examination. The Board may adopt rules for administering the examination in one or more parts at the same time or at different times.

(c) The Board, within its discretion, may issue licenses without examination and licenses by reciprocity or comity to persons holding a license or certificate in landscape architecture from any legally constituted board of examiners in another state or country whose registration requirements are deemed to be equal or equivalent to those of this State.

(d) Repealed by Session Laws 1997-406, s. 5.

(e) The Board, within its discretion, may grant an honorific title license to persons who have held for a minimum of 20 years a license or certificate in landscape architecture issued by the Board or a legally constituted board of examiners in another state or country whose registration requirements are equal or equivalent to those of this State. The honorific title license shall allow the person to use the title "landscape architect emeritus", but the person shall not practice landscape architecture or provide expert testimony as a landscape architect in this State unless the person complies with the provisions of this Chapter. There shall be no fee charged for an honorific title license. (1969, c. 672, s. 4; 1971, c. 162; 1979, c. 872, ss. 2, 3; 1997-406, s. 5.)

§ 89A-5. Annual renewal of certificate.

Every registrant under this Chapter shall, on or before the first day of July in each year, obtain a renewal of a certificate for the ensuing year, by application, accompanied by the required fee. Upon failure to renew, the certificate shall be automatically revoked. The certificate may be renewed at any time within one year after its expiration if the applicant pays the required renewal fee and late renewal penalty, and the Board finds that the applicant has not used his or her certificate or title or engaged in the practice of landscape architecture after notice of revocation and is otherwise eligible for registration under the provisions of this Chapter. When necessary to protect the public health, safety, or welfare, the Board shall require such evidence as it deems necessary to establish the continuing competency of licensees as a condition of license renewal. (1969, c. 672, s. 5; 1979, c. 872, s. 4; 1997-406, s. 6.)

§ 89A-6. Fees.

Fees are to be determined by the Board, but shall not exceed the amounts specified herein, however; fees must reflect actual expenses of the Board.

Application	$100.00
License by reciprocity or comity	250.00
Annual license renewal	100.00
Late renewal penalty	50.00
Reissue of certificate	25.00
Corporate certificate	250.00

In all instances where the Board uses the services of a testing service for preparation, administration, or grading of examinations, the Board may charge the applicant the actual cost of the examination services, in addition to its other fees. Fees shall be paid to the Board at the times specified by the Board. (1969, c. 672, s. 6; 1979, c. 872, s. 5; 1989, c. 673, s. 4; 1997-406, s. 7; 1999-315, s. 1.)

§ 89A-7. Disciplinary actions.

(a) The Board may deny or refuse to renew a certificate of registration, suspend, or revoke a certificate of registration if the registrant or applicant:

(1) Obtains a certificate of registration by fraudulent misrepresentation.
(2) Uses or attempts to use another's certificate of registration to practice landscape architecture.
(3) Uses or attempts to use another's name for purposes of obtaining a certificate of registration or practicing landscape architecture.
(4) Has demonstrated gross malpractice or gross incompetency as determined by the Board.
(5) Has been convicted of or pled guilty or no contest to a crime that indicates that the person is unfit or incompetent to practice landscape architecture or that indicates the person has deceived or defrauded the public.
(6) Has been declared mentally incompetent by a court of competent jurisdiction.

(7) Has willfully violated any of the provisions of this Chapter or the Board's rules.

(b) The Board may require a registrant to take a written or oral examination if the Board finds evidence that the person is not competent to practice landscape architecture as defined in this Chapter.

(c) The Board may take any of the actions authorized in subsection (a) of this section against any firm, partnership, or corporation registered with the Board.

(d) In addition to taking any of the actions authorized in subsection (a) of this section, the Board may assess a civil penalty not in excess of two thousand dollars ($2,000) for the violation of any section of this Chapter or the violation of any rules adopted by the Board. All civil penalties collected by the Board shall be remitted to the school fund of the county in which the violation occurred. Before imposing and assessing a civil penalty and fixing the amount thereof, the Board shall, as a part of its deliberations, take into consideration the following factors:

(1) The nature, gravity, and persistence of the particular violation.
(2) The appropriateness of the imposition of a civil penalty when considered alone or in combination with other punishment.
(3) Whether the violation was willful.
(4) Any other factors that would tend to mitigate or aggravate the violations found to exist. (1969, c. 672, s. 7; 1973, c. 1331, s. 3; 1987, c. 827, ss. 1, 71; 1997-406, s. 8.)

§ 89A-8. Violation a misdemeanor; injunction to prevent violation.

(a) It shall be a Class 2 misdemeanor for any person to use, or to hold himself or herself out as entitled to practice under the title of landscape architect or landscape architecture or to practice landscape architecture unless he or she is duly registered under the provisions of this Chapter.

(b) The Board may appear in its own name in the courts of the State and apply for injunctions to prevent violations of this Chapter. (1969, c. 672, s. 8; 1973, c. 1331, s. 3; 1987, c. 827, s. 72; 1993, c. 539, s. 610; 1994, Ex. Sess., c. 24, s. 14(c); 1997-406, s. 9.)

Chapter 89B.

Foresters.

Sec.
89B-1. General provisions.
89B-2. Definitions.
89B-3. State Board of Registration for Foresters; appointment of members; terms.
89B-4. Compensation and expenses of Board members.
89B-5. Organization and meetings of the Board.
89B-6. Powers of the Board.
89B-7. Receipts and disbursements.

Sec.
89B-8. Records and reports.
89B-9. General requirements for registration.
89B-10. Application and registration fees.
89B-11. Expiration and renewals; continuing education.
89B-12. Examinations.
89B-13. Revocations and reissuance of registration.
89B-14. Roster of registered foresters; consulting forester affidavit.
89B-15. Violation.

§ 89B-1. General provisions.

(a) No person shall use the designation “forester”, “registered forester”, or any other descriptive terms that include the words “forester” or “registered forester” and that directly convey that the person is a forester without first having been registered under this Chapter.

(b) This Chapter benefits and protects the public by improving the standards for the practice of professional forestry in North Carolina. (1975, c. 531, s. 1; 1998-157, s. 1.)

Cross References. — As to limited liability companies and their powers, see G.S. 57C-2-01 et seq.

§ 89B-2. Definitions.

As used in this Chapter:

(1) “Board” means the State Board of Registration for Foresters, provided for by this Chapter.

(2) “Forester” means a person who by reason of special knowledge and training in natural sciences, mathematics, silviculture, forest protection, forest mensuration, forest management, forest economics, and forest utilization is qualified to engage in the practice of forestry.

(2a) “Forestry” means the professional practice embracing the science, business, and the art of creating, conserving, and managing forests and forestlands for the sustained use and enjoyment of their resources, material, or other forest produce.

(3) “Practice of forestry” means rendering professional forestry services, including but not limited to, consultation, investigation, evaluation, planning, or other forestry activities requiring knowledge, training, and experience in forestry principles and techniques.

(4) “Registered forester” means a person who has been registered pursuant to this Chapter.

(5) “Consulting forester” means a registered forester who:

a., b., c. Repealed by Session Laws 1998-157, s. effective January 1, 1999.

d. Is competent to practice forest management, appraisal, development, marketing, protection, and utilization for the benefit of the general public on a fee, contractual, or contingency basis;

e. Has not engaged in any practice that constitutes a conflict of interest or in any way diminishes his ability to represent the best interests of his clients; and

f. Has filed annually an affidavit with the Board in accordance with G.S. 89B-14(b).

(6) "Urban forester" means a person who engages in the practice of forestry in an urban setting that involves municipal ownership, homesteads, parks and woodlots, and similar urban properties. (1975, c. 531, s. 2; 1989, c. 169; 1998-157, s. 1.)

Editor's Note. — Subdivision (5) is set out in the format above at the direction of the Revisor of Statutes.

§ 89B-3. State Board of Registration for Foresters; appointment of members; terms.

(a) A State Board of Registration for Foresters is created to administer the provisions of this Chapter. The Board shall have five members as follows:

(1) Four duly practicing registered foresters, at least three of whom hold a bachelors or higher degree from an accredited forestry school, and

(2) One public member.

Each member shall be appointed by the Governor for a three-year term. No member may serve more than two complete consecutive terms.

(b) Each member of the Board shall be a citizen of the United States and a resident of North Carolina.

(c) Vacancies in the membership of the Board shall be filled by appointment by the Governor for the unexpired term.

(d) The Board shall elect annually the following officers: a chairman, and a vice-chairman, who shall be members of the Board, and a secretary who may be a member of the Board. A quorum of the Board shall consist of not less than three voting members of the Board. (1975, c. 531, s. 3; 1983, c. 103, s. 1; 1998-157, s. 1.)

§ 89B-4. Compensation and expenses of Board members.

Each member of the Board shall receive per diem and allowances as provided by G.S. 93B-5. (1975, c. 531, s. 4; 1998-157, s. 1.)

§ 89B-5. Organization and meetings of the Board.

The Board shall meet at least twice each year. In addition, special meetings may be held in accordance with the rules of the Board. (1975, c. 531, s. 5; 1998-157, s. 1.)

§ 89B-6. Powers of the Board.

The Board may adopt rules in accordance with Chapter 150B of the General Statutes for the proper performance of its duties and the regulation of the proceedings before it. The Board shall adopt an official seal. Any member of the Board may administer oaths or affirmations to witnesses appearing before the Board.

The Board may establish fees, subject to the maximum amounts prescribed by this Chapter. (1975, c. 531, s. 6; 1998-157, s. 1.)

§ 89B-7. Receipts and disbursements.

The secretary of the Board shall receive and account for all moneys derived under this Chapter, and shall keep these moneys in a separate fund known as the "Registered Foresters' Fund." Moneys in the Fund shall be expended to carry out the purposes of the Board. The secretary of the Board shall give surety bond to the Board in an amount determined by the Board. The premium for the surety bond is a proper expense of the Board and shall be paid from the Registered Foresters' Fund.

The Board may employ and fix the compensation of necessary clerical and other assistants. The compensation of these assistants shall be paid out of the Registered Foresters' Fund. (1975, c. 531, s. 7; 1998-157, s. 1.)

§ 89B-8. Records and reports.

The Board shall keep a record of its proceedings and a register of all applications for registration. The register shall show the name, age and residence of each applicant; the date of the application; the applicant's place of business; the applicant's educational and other qualifications; whether or not examination was required; whether the application was rejected or registration was granted; the date of action by the Board; and other information deemed necessary by the Board. Each July 1 the Board shall submit to the Governor a report of its transactions of the preceding year. (1975, c. 531, s. 8; 1998-157, s. 1.)

§ 89B-9. General requirements for registration.

(a) An applicant for registration shall be registered upon satisfactory proof to the Board that the applicant is of good moral character and meets one of the following requirements:

(1) Graduation with a bachelors or higher degree in a forestry curriculum from a school or college of forestry approved by the Board, passage of a comprehensive written examination, and the completion of two or more years' experience in forestry.

(2) Passage of a comprehensive written examination designed to show knowledge approximating that obtained through graduation from a four-year curriculum in forestry in a university or college approved by the Board and the completion of six or more years of active practice in forestry work immediately prior to the application. The work must be of a character acceptable to the Board. Graduation with an Associate Applied Science degree in a forestry curriculum in a school or college approved by the Board is the equivalent of one year of experience. The completion of the junior year of a curriculum in forestry in a college or school approved by the Board is the equivalent of two years of experience. The completion of the senior year of a curriculum in forestry in a school or college approved by the Board is equivalent to three years of experience.

(3) Registration in good standing as a registered forester with the Board as of January 1, 1999.

(4) Practice of urban forestry for six years immediately prior to January 1, 1999, if the applicant meets all of the following conditions:
   a. The applicant is a North Carolina resident at the time of filing the application.
   b. The applicant practiced under the title "urban forester" during the six-year period.
   c. The applicant, prior to June 30, 1999, applies to the Board for registration and submits an affidavit under oath to the Board

showing experience and education equivalent to that of a forester, as determined by the Board.

(b) Registration shall be determined upon the basis of individual personal qualification. No firm, company, partnership, corporation or public agency shall be registered as a registered forester.

(b1) The Board may issue a forester-in-training certificate to an applicant who has completed the educational requirements under subdivision (a)(1) of this section.

(c) A nonresident of North Carolina may become a registered forester under this Chapter by complying with its terms, and by filing a consent as to service of process and pleadings upon the Board secretary. In connection with the practice of forestry by such nonresident in North Carolina, the consent as to service of process and pleadings shall be held binding and valid in all courts, as if due service had been made personally upon said nonresident by the Board, when such process has been served upon the Board secretary.

(d) A nonresident or person who has moved to North Carolina recently and who is registered as a registered forester in another jurisdiction may be registered under this Chapter, by written application to the Board, if that jurisdiction provides for the same or substantially the same registration for North Carolina foresters who are registered under this Chapter.

(e) A nonresident of North Carolina may use the term “registered forester” or other titles otherwise prohibited by this Chapter in North Carolina without becoming registered under this Chapter if registered in another state which will reciprocate with the provision of this Chapter. (1975, c. 531, s. 9; 1998-157, s. 1.)

§ 89B-10. Application and registration fees.

(a) Applications for registration shall be made on forms prescribed and furnished by the Board. The application fee for a certificate of registration as a registered forester shall be in an amount determined by the Board, not to exceed fifty dollars ($50.00), which shall accompany the application. An additional fee, not to exceed forty dollars ($40.00), shall be paid upon issuance of the certificate of registration. An applicant that does not remit the certificate fee within 30 days after being notified of qualification forfeits the right to have the certificate issued, and the applicant may be required again to submit an original application fee. If the Board denies a certificate of registration to any applicant, the initial application fee deposited by the applicant shall be retained by the Board.

(b) It is unlawful for any person to provide false or forged information to the Board or a member of the Board in obtaining a certificate of registration. (1975, c. 531, s. 10; 1989, c. 245, s. 1; 1998-157, s. 1.)

§ 89B-11. Expiration and renewals; continuing education.

(a) Registrations shall expire on the last day of June following issuance or renewal and shall become invalid after that date unless renewed. The secretary of the Board shall notify every person registered under this Chapter, at the person’s last registered address, of the date of the expiration of registration and the amount of fee required for its renewal for one year. The notices shall be mailed at least 30 days prior to the expiration date of the registrations. The annual renewal fee for certificates shall be in an amount established by the Board, not to exceed fifty dollars ($50.00). The fee for issuance of replacement certificates of registration shall be five dollars ($5.00).

Any registration which has expired may be renewed by paying the registration fee plus one-twelfth of the annual renewal fee per calendar month from the date of expiration. Charges above the renewal fee shall not exceed an amount equal to the renewal fee.

(b) The Board shall require registered foresters to attend continuing education courses approved by the Board, not to exceed 12 hours per year, as a condition of renewal. (1975, c. 531, s. 11; 1989, c. 245, s. 2; 1998-157, s. 1.)

§ 89B-12. Examinations.

When written examinations are required, they shall be held at the time and places in the State of North Carolina as the Board shall determine. The methods of procedure will be described by the Board. A candidate failing an examination may apply for reexamination after six months and will be reexamined with payment of an additional fee established by the Board, not to exceed fifty dollars ($50.00). Subsequent examinations will be granted upon payment of this fee for each examination. The Board may limit an applicant to three examinations. (1975, c. 531, s. 12; 1998-157, s. 1.)

§ 89B-13. Revocations and reissuance of registration.

The Board may revoke or suspend the certificate of registration of any registrant who it finds has committed gross negligence, fraud, deceit or flagrant misconduct in the practice of forestry or has demonstrated incompetence as a practicing forester. The Board may designate a person or persons to investigate and report to it upon any charges of fraud, deceit, gross negligence, incompetency or other misconduct by a registrant in the practice of forestry.

Any person may prefer charges against a registrant. The charges shall be in writing, sworn to by the person making them, and filed with the secretary of the Board. The time and place for a hearing before the Board shall be fixed by the Board. At any hearing the accused may appear in person or by counsel. The Board may reissue a certificate of registration to any person whose certificate of registration has been revoked or suspended. (1975, c. 531, s. 13; 1998-157, s. 1.)

§ 89B-14. Roster of registered foresters; consulting forester affidavit.

(a) A roster showing the names, registration numbers, and places of business residence of all registrants under this Chapter shall be prepared annually by the secretary of the Board. Copies of this roster shall be placed on file with the Secretary of State of North Carolina and each clerk of superior court in North Carolina. A copy shall be sent to each registrant, and copies may be furnished to the public upon request and upon payment of a fee set by the Board.

(b) Each consulting forester shall annually file with the Board an affidavit of its compliance with this Chapter. (1975, c. 531, s. 14; 1998-157, s. 1.)

§ 89B-15. Violation.

A violation of this Chapter is a Class 3 misdemeanor. (1975, c. 531, s. 15; 1993, c. 539, s. 611; 1994, Ex. Sess., c. 24, s. 14(c); 1998-157, s. 1.)

Chapter 89C.

Engineering and Land Surveying.

Sec.
89C-1. Short title.
89C-2. Declarations; prohibitions.
89C-3. Definitions.
89C-4. State Board of Examiners for Engineers and Surveyors; appointment; terms.
89C-5. Board members; qualifications.
89C-6. Compensation and expenses of Board members.
89C-7. Vacancies; removal of member.
89C-8. Organization of the Board; meetings; election of officers.
89C-9. Executive director; duties and liabilities.
89C-10. Board powers.
89C-11. Secretary; duties and liabilities; expenditures.
89C-12. Records and reports of Board; evidence.
89C-13. General requirements for licensure.
89C-14. Application for licensure; license fees.
89C-15. Examinations.
89C-16. Certificates of licensure; effect; seals.
89C-17. Expirations and renewals of certificates.
89C-18. Duplicate certificates.
89C-18.1. Licensing of nonresidents.
Sec.
89C-19. Public works; requirements where public safety involved.
89C-19.1. Engineer who volunteers during an emergency or disaster; qualified immunity.
89C-20. Rules of professional conduct.
89C-21. Disciplinary action — Reexamination, revocation, suspension, reprimand, or civil penalty.
89C-22. Disciplinary action — Charges; procedure.
89C-23. Unlawful to practice engineering or land surveying without licensure; unlawful use of title or terms; penalties; Attorney General to be legal adviser.
89C-24. Licensure of corporations and business firms that engage in the practice of engineering or land surveying.
89C-25. Limitations on application of Chapter.
89C-25.1. Supervision of unlicensed individuals by licensed person.
89C-25.2. Program of licensure by discipline.
89C-26. [Repealed.]
89C-27. Invalid sections; severability.
89C-28. Existing licensure not affected.

§ 89C-1. Short title.

This Chapter shall be known and may be cited as "The North Carolina Engineering and Land Surveying Act." (1951, c. 1084, s. 1; 1975, c. 681, s. 1.)

Local Modification. — New Hanover: 1983, c. 365.

Cross References. — As to limited liability companies and their powers, see G.S. 57C-2-01 et seq.

Editor's Note. — This Chapter is former Chapter 89 as rewritten by Session Laws 1975, c. 681, s. 1, and recodified. Where appropriate, the historical citations to the sections in the former Chapter have been added to corresponding sections in the new Chapter.

Legal Periodicals. — For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

CASE NOTES

Constitutionality of Former Chapter 89. — See State v. Covington, 34 N.C. App. 457, 238 S.E.2d 794 (1977), cert. denied, 294 N.C. 184, 241 S.E.2d 519 (1978).

Chapter Not Admission That Former Guidelines Inadequate. — This Chapter, which redefines "the practice of engineering," cannot be considered an admission by the legislature that the former statute set forth inadequate guidelines. State v. Covington, 34 N.C. App. 457, 238 S.E.2d 794 (1977), cert. denied, 294 N.C. 184, 241 S.E.2d 519 (1978).

OPINIONS OF ATTORNEY GENERAL

Preparation of Construction Drawings. — A town may not, under its land use ordinance, require that all construction drawings submitted for approval be prepared and sealed by a licensed professional engineer, to the exclusion of licensed professional architects. Such a restriction would be in excess of the powers granted the town. See opinion of Attorney General to Mr. Michael G. Brough, Carrboro Town Attorney, 59 N.C.A.G. 58 (1989).

§ 89C-2. Declarations; prohibitions.

In order to safeguard life, health, and property, and to promote the public welfare, the practice of engineering and the practice of land surveying in this State are hereby declared to be subject to regulation in the public interest. It shall be unlawful for any person to practice or to offer to practice engineering or land surveying in this State, as defined in the provisions of this Chapter, or to use in connection with the person's name or otherwise assume or advertise any title or description tending to convey the impression that the person is either a professional engineer or a professional land surveyor, unless the person has been duly licensed. The right to engage in the practice of engineering or land surveying is a personal right, based on the qualifications of the person as evidenced by the person's certificate of licensure, which shall not be transferable. (1921, c. 1, s. 1; C.S., s. 6055(b); 1951, c. 1084, s. 1; 1975, c. 681, s. 1; 1998-118, s. 1.)

CASE NOTES

Legislative Intent. — The Chapter, when read as a whole, makes it clear that the legislature's intent in the "representation," "conveying" and "holding out" provisions of the Chapter was to protect the public from misrepresentations of professional status or expertise. North Carolina State Bd. of Registration v. IBM Corp., 31 N.C. App. 599, 230 S.E.2d 552 (1976).

This Section and G.S. 89C-23 Must Be Read Together. — G.S. 89C-23, the part of the Chapter prescribing penalties, must be read subject to the basic prohibitory section of the Chapter, this section, which makes it unlawful "to use in connection with his name or otherwise or advertise any title or description tending to convey the impression that he is . . . a professional engineer . . . unless such person has been duly registered as such." North Carolina State Bd. of Registration v. IBM Corp., 31 N.C. App. 599, 230 S.E.2d 552 (1976).

This section and G.S. 89C-23 authorize the Board to prohibit only those uses of the title engineer which imply or represent professional engineering status or expertise. North Carolina State Bd. of Registration v. IBM Corp., 31 N.C. App. 599, 230 S.E.2d 552 (1976).

The mere use of the term "Customer Engineer" on business cards and in a newspaper article does not constitute the offering to practice engineering or the representation of professional engineering status or expertise in violation of this section. North Carolina State Bd. of Registration v. IBM Corp., 31 N.C. App. 599, 230 S.E.2d 552 (1976).

Trial court erred by relying on G.S. 89C-2 and G.S. 89C-3 to determine the standard of care that a surveying company owed to a general contractor when it marked the location of columns that were installed to support a building; but because the evidence introduced by the contractor supported its claim that the surveying company was negligent, the error was harmless. Associated Indus. Contrs., Inc. v. Fleming Eng'g, Inc., 162 N.C. App. 405, 590 S.E.2d 866, 2004 N.C. App. LEXIS 182 (2004), aff'd, — N.C. —, 608 S.E.2d 757 (2005).

§ 89C-3. Definitions.

The following definitions apply in this Chapter:

(1) Board. — The North Carolina State Board of Examiners for Engineers and Surveyors provided for by this Chapter.

(1a) Business firm. — A partnership, firm, association, or another organization or group that is not a corporation and is acting as a unit.

(2) Engineer. — A person who, by reason of special knowledge and use of the mathematical, physical and engineering sciences and the principles and methods of engineering analysis and design, acquired by engineering education and engineering experience, is qualified to practice engineering.

(3) Engineering intern. — A person who complies with the requirements for education, experience and character, and has passed an examination in the fundamental engineering subjects, as provided in this Chapter.

(3a) Inactive licensee. — Licensees who are not engaged in the practice of engineering or land surveying in this State.

(4) Land surveyor intern. — A person who has qualified for, taken, and passed an examination on the basic disciplines of land surveying as provided in this Chapter.

(5) Person. — Any natural person, firm, partnership, corporation or other legal entity.

(6) Practice of engineering. —

a. Any service or creative work, the adequate performance of which requires engineering education, training, and experience, in the application of special knowledge of the mathematical, physical, and engineering sciences to such services or creative work as consultation, investigation, evaluation, planning, and design of engineering works and systems, planning the use of land and water, engineering surveys, and the observation of construction for the purposes of assuring compliance with drawings and specifications, including the consultation, investigation, evaluation, planning, and design for either private or public use, in connection with any utilities, structures, buildings, machines, equipment, processes, work systems, projects, and industrial or consumer products or equipment of a mechanical, electrical, hydraulic, pneumatic or thermal nature, insofar as they involve safeguarding life, health or property, and including such other professional services as may be necessary to the planning, progress and completion of any engineering services.

A person shall be construed to practice or offer to practice engineering, within the meaning and intent of this Chapter, who practices any branch of the profession of engineering; or who, by verbal claim, sign, advertisement, letterhead, card, or in any other way represents the person to be a professional engineer, or through the use of some other title implies that the person is a professional engineer or that the person is licensed under this Chapter; or who holds the person out as able to perform, or who does perform any engineering service or work not exempted by this Chapter, or any other service designated by the practitioner which is recognized as engineering.

b. The term "practice of engineering" shall not be construed to permit the location, description, establishment or reestablishment of property lines or descriptions of land boundaries for conveyance. The term does not include the assessment of an underground storage tank required by applicable rules at closure or change in service unless there has been a discharge or release of the product from the tank.

(7) Practice of land surveying. —

a. Providing professional services such as consultation, investigation, testimony, evaluation, planning, mapping, assembling, and interpreting reliable scientific measurements and information relative to the location, size, shape, or physical features of the earth, improvements on the earth, the space above the earth, or any part of the earth, whether the gathering of information for the providing of these services is accomplished by conventional ground measurements, by aerial photography, by global positioning via satellites, or by a combination of any of these methods, and the utilization and development of these facts and interpretations into an orderly survey map, plan, report, description, or project. The practice of land surveying includes the following:

1. Locating, relocating, establishing, laying out, or retracing any property line, easement, or boundary of any tract of land;
2. Locating, relocating, establishing, or laying out the alignment or elevation of any of the fixed works embraced within the practice of professional engineering;
3. Making any survey for the subdivision of any tract of land, including the topography, alignment and grades of streets and incidental drainage within the subdivision, and the preparation and perpetuation of maps, record plats, field note records, and property descriptions that represent these surveys;
4. Determining, by the use of the principles of land surveying, the position for any survey monument or reference point, or setting, resetting, or replacing any survey monument or reference point;
5. Determining the configuration or contour of the earth's surface or the position of fixed objects on the earth's surface by measuring lines and angles and applying the principles of mathematics or photogrammetry;
6. Providing geodetic surveying which includes surveying for determination of the size and shape of the earth both horizontally and vertically and the precise positioning of points on the earth utilizing angular and linear measurements through spatially oriented spherical geometry; and
7. Creating, preparing, or modifying electronic or computerized data, including land information systems and geographic information systems relative to the performance of the practice of land surveying.

b. The term "practice of land surveying" shall not be construed to permit the design or preparation of specifications for (i) major highways; (ii) wastewater systems; (iii) wastewater or industrial waste treatment works; (iv) pumping or lift stations; (v) water supply, treatment, or distribution systems; (vi) streets or storm sewer systems except as incidental to a subdivision.

(8) Professional engineer. — A person who has been duly licensed as a professional engineer by the Board established by this Chapter.

(8a) Professional engineer, retired. — A person who has been duly licensed as a professional engineer by the Board and who chooses to relinquish or not to renew a license and who applies to and is approved by the Board to be granted the use of the honorific title "Professional Engineer, Retired".

(9) Professional land surveyor. — A person who, by reason of special knowledge of mathematics, surveying principles and methods, and legal requirements which are acquired by education and/or practical experience, is qualified to engage in the practice of land surveying, as attested by the person's licensure as a professional land surveyor by the Board.

(9a) Professional land surveyor, retired. — A person who has been duly licensed as a professional land surveyor by the Board and who chooses to relinquish or not to renew a license and who applies to and is approved by the Board to be granted the use of the honorific title "Professional Land Surveyor, Retired".

(10) Responsible charge. — Direct control and personal supervision, either of engineering work or of land surveying, as the case may be. (1951, c. 1084, s. 1; 1953, c. 999, s. 1; 1973, c. 449; 1975, c. 681, s. 1; 1993 (Reg. Sess., 1994), c. 671, s. 1; 1996, 2nd Ex. Sess., c. 18, s. 7.10(i); 1998-118, s. 2.)

CASE NOTES

Use of Word "Engineer" Does Not Represent Professional Engineering Status. — It is clear from the definition in subdivision (8) that the use of the word "engineer" without being modified by "professional," "registered" or "licensed," or some word of like import does not represent that one is "duly registered and licensed by the Board" and therefore cannot represent that one is a professional engineer as that term is defined in subdivision (8). Since such usage does not represent professional engineering status, it cannot constitute the practice of engineering as that term is defined in paragraph (6)a. North Carolina State Bd. of Registration v. IBM Corp., 31 N.C. App. 599, 230 S.E.2d 552 (1976).

Therefore, such usage is not a violation of those provisions of this section and G.S. 89C-23 which prohibit the practice or offer to practice engineering without proper registration. North Carolina State Bd. of Registration v. IBM Corp., 31 N.C. App. 599, 230 S.E.2d 552 (1976).

Trial court erred by relying on G.S. 89C-2 and G.S. 89C-3 to determine the standard of care that a surveying company owed to a general contractor when it marked the location of columns that were installed to support a building; but because the evidence introduced by the contractor supported its claim that the surveying company was negligent, the error was harmless. Associated Indus. Contrs., Inc. v. Fleming Eng'g, Inc., 162 N.C. App. 405, 590 S.E.2d 866, 2004 N.C. App. LEXIS 182 (2004), aff'd, — N.C. —, 608 S.E.2d 757 (2005).

Cited in In re Trulove, 54 N.C. App. 218, 282 S.E.2d 544 (1981).

OPINIONS OF ATTORNEY GENERAL

The specific provisions of subdivision (6) of this section should prevail over the more general provisions of G.S. 74C-3(a)(8); to interpret Chapter 74C as requiring licensed professional engineers to obtain a private investigator's license would defeat the intent of subdivision (6), which allows licensed professional engineers to conduct investigations. See opinion of Attorney General to Mr. Montgomery T. Speir, Executive Secretary, State Board of Registration for Professional Engineers and Land Surveyors, 57 N.C.A.G. 47 (Oct. 6, 1987).

The legislature has made it clear that licensed professional engineers need not be licensed as private investigators in order to engage in "investigation and consultation" that is included within the definition of the "practice of engineering" as defined by subdivision (6) of this section. See opinion of Attorney General to Mr. Montgomery T. Speir, Executive Secretary, State Board of Registration for Professional Engineers and Land Surveyors, 57 N.C.A.G. 47 (Oct. 6, 1987).

Street Design and Storm Drainage Systems. — The detailed drawings and accompanying calculations of street design and storm drainage systems, including subsurface systems and component structures, fall within the definition of the practice of engineering and not within the definition of landscape architecture. See opinion of Attorney General to Jerry T. Carter, Executive Director, N.C. Board of Examiners for Engineers and Surveyors, 2001 N.C. AG LEXIS 8 (3/22/2001).

§ 89C-4. State Board of Examiners for Engineers and Surveyors; appointment; terms.

A State Board of Examiners for Engineers and Surveyors, whose duty it is to administer the provisions of this Chapter, is created. The Board shall consist of four licensed professional engineers, three licensed professional land surveyors and two public members, who are neither professional engineers nor professional land surveyors. Of the land surveyor members, one and only one may hold dual licenses as a professional land surveyor and professional engineer. All of the members shall be appointed by the Governor. Appointments of the engineer and land surveyor members shall preferably, but not necessarily, be made from a list of nominees submitted by the professional societies for engineers and land surveyors in this State. Each member of the Board shall receive a certificate of appointment from the Governor and shall file with the Secretary of State a written oath or affirmation for the faithful discharge of the duties.

Members of the Board serve for staggered five-year terms, and no member may be appointed for more than two full terms. Members serve until the expiration of their respective terms and until their respective successors are appointed. If a vacancy occurs during a term, the Governor shall appoint a successor from the same classification as the person causing the vacancy to serve for the remainder of the unexpired term. If the vacancy is not filled within 90 days after it occurs, the Board may appoint a provisional member to serve until the appointment by the Governor becomes effective. The provisional member during his tenure has all the powers and duties of a regular member. (1921, c. 1, ss. 3-6; C.S., ss. 6055(d)-6055(g); 1951, c. 1084, s. 1; 1957, c. 1060, s. 1; 1963, c. 843; 1965, c. 940; 1975, c. 681, s. 1; 1979, c. 819, s. 1; 1998-118, s. 3.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

CASE NOTES

Cited in North Carolina State Bd. of Registration v. IBM Corp., 31 N.C. App. 599, 230 S.E.2d 552 (1976); North Carolina State Bd. of Registration for Professional Eng'rs & Land Surveyors v. FTC, 615 F. Supp. 1155 (E.D.N.C. 1985).

§ 89C-5. Board members; qualifications.

Each engineer member of the Board shall be a resident of North Carolina and shall be a licensed professional engineer engaged in the lawful practice of engineering in North Carolina for at least six years.

Each land surveyor member of the Board shall be a resident of North Carolina and shall be a licensed professional land surveyor engaged in the lawful practice of land surveying in North Carolina for at least six years.

Each public member of the Board shall be a resident of North Carolina. (1921, c. 1, ss. 3-6; C.S., ss. 6055(d)-6055(g); 1951, c. 1084, s. 1; 1957, c. 1060, s. 1; 1963, c. 843; 1965, c. 940; 1975, c. 681, s. 1; 1979, c. 819, s. 2; 1989, c. 108; 1998-118, s. 4.)

§ 89C-6. Compensation and expenses of Board members.

Each member of the Board, when attending to the work of the Board or any of its committees, shall receive as compensation for services the per diem and, in addition, shall be reimbursed for travel expenses and incidentals not exceeding the maximum set forth by law. In addition to per diem allowances, travel and incidentals, the secretary of the Board may, with the approval of the Board, receive such reasonable additional compensation as is compatible with the actual hours of work required by the duties of the office. (1921, c. 1, ss. 3-6; C.S., ss. 6055(d)-6055(g); 1951, c. 1084, s. 1; 1957, c. 1060, s. 1; 1963, c. 843; 1965, c. 940; 1975, c. 681, s. 1; 1998-118, s. 5.)

§ 89C-7. Vacancies; removal of member.

The Governor may remove any member of the Board for misconduct, incompetency, neglect of duty, or any sufficient cause, in the manner prescribed by law for removal of State officials. Vacancies in the membership of the Board shall be filled for the unexpired term by appointment by the Governor as provided in G.S. 89C-4. (1921, c. 1, ss. 3-6; C.S., ss. 6055(d)-6055(g); 1951, c. 1084, s. 1; 1957, c. 1060, s. 1; 1963, c. 843; 1965, c. 940; 1975, c. 681, s. 1.)

§ 89C-8. Organization of the Board; meetings; election of officers.

The Board shall hold at least two regular meetings each year. Special meetings may be held at such times and upon such notice as the rules and regulations of the Board may provide. The Board shall elect annually from its members a chair, a vice-chair, and a secretary. A quorum of the Board shall consist of not less than five members. The Board shall operate under its rules and regulations supplemented by Robert's Rules of Order. (1921, c. 1, ss. 3-6; C.S., ss. 6055(d)-6055(g); 1951, c. 1084, s. 1; 1957, c. 1060, s. 1; 1963, c. 843; 1965, c. 940; 1975, c. 681, s. 1; 1998-118, s. 6.)

§ 89C-9. Executive director; duties and liabilities.

The Board shall employ an executive director who is not a member of the Board. The executive director shall be a full-time employee of the Board and perform the duties assigned to the director by the secretary subject to the approval of the Board. The executive director shall receive a salary and compensation fixed by the Board. The executive director shall give a surety bond satisfactory to the Board conditioned upon the faithful performance of the director's duties assigned. The premium on the bond shall be a necessary and proper expense of the Board. (1921, c. 1, ss. 3-6; C.S., ss. 6055(d)-6055(g); 1951, c. 1084, s. 1; 1957, c. 1060, s. 1; 1963, c. 843; 1965, c. 940; 1975, c. 681, s. 1; 1998-118, s. 7.)

§ 89C-10. Board powers.

(a) The Board may adopt and amend all rules and rules of procedure as may be reasonably necessary for the proper performance of its duties, the regulation of its procedures, meetings, records, the administration of examinations, and the authority to enforce the rules of professional conduct as may be adopted by the Board pursuant to G.S. 89C-20.

The action by the Board in carrying out any of the powers specified in this section shall be binding upon all persons licensed under this Chapter, including corporations and business firms holding certificates of authorization.

(b) The Board shall adopt and have an official seal, which shall be affixed to each certificate issued.

(c) The Board may in the name of the State apply for relief, by injunction, in the established manner provided in cases of civil procedure, without bond, to enforce the provisions of this Chapter, or to restrain any violation of the provisions of this Chapter. In proceedings for injunctive relief, it shall not be necessary to allege or prove either that an adequate remedy at law does not exist, or that substantial or irreparable damage would result from the continued violation of the provisions of this Chapter. The members of the Board shall not be personally liable under this proceeding.

(d) The Board may subject an applicant for licensure to any examination necessary to determine the applicant's qualifications.

(e) The Board may issue an appropriate certificate of licensure to any applicant who, in the opinion of the Board, has met the requirements of this Chapter.

(f) It shall be the responsibility and duty of the Board to conduct a regular program of investigation concerning all matters within its jurisdiction under the provisions of this Chapter. The investigation of a licensee is confidential until the Board issues a citation to the licensee. The Board may expend its funds for salaries, fees, and per diem expenses, in connection with its investigations, provided that no funds other than per diem expenses shall be paid to any member of the Board in connection with its investigations, nor may any member of the Board give testimony and later sit in deciding on any matter which may directly involve punitive action for the testimony.

(g) The Board may use its funds to establish and conduct instructional programs for persons who are currently licensed to practice engineering or land surveying, as well as refresher courses for persons interested in obtaining adequate instruction or programs of study to qualify them for licensure to practice engineering or land surveying. The Board may expend its funds for these purposes and may not only conduct, sponsor, and arrange for instructional programs, but also may carry out instructional programs through extension courses or other media. The Board may enter into plans or agreements with community colleges, public or private institutions of higher learning, State and county boards of education, or with the governing authority of any industrial education center for the purpose of planning, scheduling or arranging courses, instruction, extension courses, or in assisting in obtaining courses of study or programs in the field of engineering and land surveying. The Board shall encourage the educational institutions in this State to offer courses necessary to complete the educational requirements of this Chapter. For the purpose of carrying out these objectives, the Board may adopt rules as may be necessary for the educational programs, instruction, extension services, or for entering into plans or contracts with persons or educational and industrial institutions.

(h) The Board may license sponsors of continuing professional competency activities who agree to conduct programs in accordance with standards adopted by the Board. Sponsors shall pay a license fee established by the Board, not to exceed two hundred fifty dollars ($250.00) for licensure under this subsection. The license fee shall accompany the application. Sponsors shall renew their licenses annually on a form provided by the Board.

(i) The Board shall have the power to acquire, hold, rent, encumber, alienate, and otherwise deal with real property in the same manner as a private person or corporation, subject only to approval of the Governor and the Council of State. Collateral pledged by the Board for an encumbrance is limited to the assets, income, and revenues of the Board. (1921, c. 1, ss. 3-6; C.S., ss. 6055(d)-6055(g); 1951, c. 1084, s. 1; 1957, c. 1060, s. 1; 1963, c. 843; 1965, c. 940; 1975, c. 681, s. 1; 1985 (Reg. Sess., 1986), c. 977, s. 16; 1993 (Reg. Sess., 1994), c. 671, s. 8; 1998-118, s. 8; 2003-347, s. 1.)

OPINIONS OF ATTORNEY GENERAL

The Board is vested with jurisdiction over State officials and employees who are registered professional engineers in the performance of their assigned duties, to the extent that those duties fall within the practice of engineering. See opinion of Attorney General to Mr. Jerry T. Carter, Executive Secretary, North Carolina State Board of Registration for Professional Engineers and Land Surveyors, 1998 N.C.A.G. 8 (2/11/98).

§ 89C-11. Secretary; duties and liabilities; expenditures.

The secretary of the Board shall receive and account for all moneys derived from the operation of the Board as provided in this Chapter, and shall deposit them in one or more special funds in banks or other financial institutions carrying deposit insurance and authorized to do business in North Carolina. The fund or funds shall be designated as "Fund of the Board of Examiners for Engineers and Surveyors" and shall be drawn against only for the purpose of implementing provisions of this Chapter as herein provided. All expenses certified by the Board as properly and necessarily incurred in the discharge of its duties, including authorized compensation, shall be paid out of this fund on the warrant signed by the secretary of the Board. At no time shall the total of warrants issued exceed the total amount of funds accumulated under this Chapter. The secretary of the Board shall give a surety bond satisfactory to the State Board of Examiners for Engineers and Surveyors, conditioned upon the faithful performance of the duties assigned. The premium on the bond is a proper and necessary expense of the Board. The secretary of the Board may delegate to the executive director certain routine duties, such as receipt and disbursement of funds in stated amounts by a written authorization, which has the unanimous approval of the Board. (1921, c. 1, s. 7; C.S., s. 6055(h); 1951, c. 1084, s. 1; 1959, c. 617; 1975, c. 681, s. 1; 1998-118, s. 9.)

§ 89C-12. Records and reports of Board; evidence.

The Board shall keep a record of its proceedings and a register of all applicants for licensure, showing for each the date of application, name, age, education, and other qualifications, place of business and place of residence, whether the applicant was rejected or a certificate of licensure granted, and the date licensure was rejected or granted. The books and register of the Board shall be prima facie evidence of all matters recorded by the Board, and a copy duly certified by the secretary of the Board under seal shall be admissible in evidence as if the original were produced. A roster showing the names and places of business and of residence of all licensed professional engineers and all licensed professional land surveyors shall be prepared by the secretary of the Board current to the month of January of each year. The roster shall be printed by the Board out of the Board's fund and distributed as described in the Board's rules. On or before the first day of May of each year, the Board shall submit to the Governor a report on its transactions for the preceding year, and shall file with the Secretary of State a copy of the report, together with a complete statement of the receipts and expenditures of the Board attested by the chair and the secretary and a copy of the roster of licensed professional engineers and professional land surveyors. (1921, c. 1, s. 8; C.S., s. 6055(i); 1951, c. 1084, s. 1; 1975, c. 681, s. 1; 1998-118, s. 10; 2000-140, s. 18.)

§ 89C-13. General requirements for licensure.

(a) Engineer Applicant. — To be eligible for licensure as a professional engineer, an applicant must be of good character and reputation. An applicant desiring to take the examination in the fundamentals of engineering must submit three character references, one of whom shall be a professional engineer. An applicant desiring to take the examination in the principles and practice of engineering must submit five references, two of whom shall be professional engineers having personal knowledge of the applicant's engineering experiences.

The following shall be considered as minimum evidence satisfactory to the Board that the applicant is qualified for licensure:

(1) As a professional engineer (shall meet one):

a. Licensure by Comity or Endorsement. — A person holding a certificate of licensure to engage in the practice of engineering, on the basis of comparable qualifications, issued to the person by a proper authority of a state, territory, or possession of the United States, the District of Columbia, or of Canada, who completes an application for licensure and submits five references, two of which shall be from professional engineers having personal knowledge of the applicant's engineering experience, and who, in the opinion of the Board, meets the requirements of this Chapter, based on verified evidence may, upon application, be licensed without further examination.

A person holding a certificate of qualification issued by the Committee on National Engineering Certification of the National Council of Examiners for Engineering and Surveying whose qualifications meet the requirements of this Chapter, may upon application, be licensed without further examination.

b. E.I. Certificate, Experience, and Examination. — A holder of a certificate of engineering intern issued by the Board, and with a specific record of an additional four years or more of progressive experience on engineering projects of a grade and character which indicates to the Board that the applicant may be competent to practice engineering, shall be admitted to the principles and practice of engineering examination. Upon passing the examination, the applicant shall be granted a certificate of licensure to practice professional engineering in this State, provided the applicant is otherwise qualified.

c. Graduation, Experience, and Examination. — A graduate of an engineering curriculum of four years or more approved by the Board as being of satisfactory standing, and with a specific record of an additional four years or more of progressive experience on engineering projects of a grade and character which indicates to the Board that the applicant may be competent to practice engineering, shall be admitted to the fundamentals of engineering examination, and the principles and practice of engineering examination. Upon passing the examinations, the applicant shall be granted a certificate of licensure to practice professional engineering in this State, provided the applicant is otherwise qualified.

d. Graduation, Experience, and Examination. — A graduate of an engineering or related science curriculum of four years or more, other than the ones approved by the Board as being of satisfactory standing or with an equivalent education and engineering experience satisfactory to the Board and with a specific record of eight years or more of progressive experience on engineering projects of a grade and character which indicates to the Board that the applicant may be competent in the fundamentals of engineering, shall be admitted to the fundamentals of engineering examination and the principles and practice of engineering examination. Upon passing the examinations, the applicant shall be granted a certificate of licensure to practice professional engineering in this State, provided the applicant is otherwise qualified.

e. Long-Established Practice. — A person with a specific record of 20 years or more of progressive experience on engineering projects of a grade and character which indicates to the Board that the applicant may be competent to practice engineering shall be admitted to the principles and practice of engineering examination. Upon passing the examination, the applicant shall be granted a certificate of licensure to practice professional engineering in this State, provided the applicant is otherwise qualified.

At its discretion the Board may require an applicant to submit exhibits, drawings, designs, or other tangible evidence of engineering work which the applicant personally accomplished or supervised.

The following shall be considered as minimum evidence that the applicant is qualified for certification:

(2) As an engineering intern (shall meet one):

a. Graduation and Examination. — A graduate of an engineering curriculum or related science curriculum of four years or more, approved by the Board as being of satisfactory standing, or a student who has attained senior status in an accredited engineering program, shall be admitted to the fundamentals of engineering examination. The applicant shall be notified if the examination was passed or not passed and if passed he shall be certified as an engineering intern if the applicant is otherwise qualified.

b. Graduation, Experience, and Examination. — A graduate of an engineering or related science curriculum of four years or more, other than the ones approved by the Board as being of satisfactory standing, or with equivalent education and engineering experience satisfactory to the Board and with a specific record of four or more years of progressive experience on engineering projects of a grade and character satisfactory to the Board, shall be admitted to the fundamentals of engineering examination. The applicant shall be notified if the examination was passed or not passed and if passed, the applicant shall be certified as an engineering intern if the applicant is otherwise qualified.

(b) Land Surveyor Applicant. — To be eligible for admission to examination for land surveyor intern or professional land surveyor, an applicant must be of good character and reputation and shall submit five references with the application for licensure as a land surveyor, two of which references shall be professional land surveyors having personal knowledge of the applicant's land surveying experience, or in the case of an application for certification as a land surveyor intern by three references, one of which shall be a licensed land surveyor having personal knowledge of the applicant's land surveying experience.

The evaluation of a land surveyor applicant's qualifications shall involve a consideration of the applicant's education, technical and land surveying experience, exhibits of land surveying projects with which the applicant has been associated, and recommendations by references. The land surveyor applicant's qualifications may be reviewed at an interview if the Board determines it necessary. Educational credit for institute courses, correspondence courses, or other courses shall be determined by the Board.

The following shall be considered a minimum evidence satisfactory to the Board that the applicant is qualified for licensure as a professional land surveyor or for certification as a land surveyor intern respectively:

(1) As a professional land surveyor (shall meet one):

a. Rightful possession of a bachelor of science degree in surveying or other equivalent curricula, all approved by the Board and a record satisfactory to the Board of two years or more of progressive practical experience, one year of which shall have been under a practicing professional land surveyor if the applicant has successfully passed the first examination (Fundamentals of Surveying) on or before January 1, 2013, or if the applicant has not successfully passed the first examination on or before January 1, 2013, two years of which shall have been under a practicing professional land surveyor, and satisfactorily passing any oral and written examination required by the Board, all of which shall determine and indicate that the applicant is competent to practice land surveying. Upon passing the first examination and successful completion of the experience required by this subdivision, the applicant may apply to take the second examination (Principles and Practice of Land Surveying). An applicant who passes both examinations and completes the educational and experience requirements of this subdivision shall be granted licensure as a professional land surveyor.

b. Rightful possession of an associate degree in surveying technology approved by the Board and a record satisfactory to the Board of four years of progressive practical experience, three years of which shall have been under a practicing licensed land surveyor if the applicant has successfully passed the first examination (Fundamentals of Surveying) on or before January 1, 2013, or if the applicant has not successfully passed the first examination on or before January 1, 2013, eight years of progressive practical experience, four years of which shall have been under a practicing professional land surveyor, and satisfactorily passing any written and oral examination required by the Board, all of which shall determine and indicate that the applicant is competent to practice land surveying. If the applicant has not successfully completed the first examination on or before January 1, 2013, the applicant may apply to the Board to take the first examination after obtaining the associate degree and completing four years of practical experience, two years of which shall have been under a practicing professional land surveyor at the first regularly scheduled examination thereafter. Upon passing the first examination and successfully completing the practical experience required under this subdivision, the applicant may apply to the Board to take the second examination (Principles and Practice of Land Surveying). An applicant who passes both examinations and successfully completes the educational and experience requirements of this subdivision shall be granted licensure as a professional land surveyor.

c. Repealed by Session Laws 1998-118, s. 11.

d. Graduation from a high school or the completion of a high school equivalency certificate and a record satisfactory to the Board of seven years of progressive practical experience, six years of which shall have been under a practicing licensed land surveyor if the applicant has successfully passed the first examination (Fundamentals of Surveying) on or before January 1, 2013, or if the applicant has not successfully passed the first examination on or before January 1, 2013, 16 years of progressive practical experience, nine years of which shall have been under a practicing professional land surveyor, and satisfactorily passing any oral and written examinations required by the Board, all of which shall determine and indicate that the candidate is competent to practice land surveying. If the applicant has not successfully passed the first examination on or before January 1, 2013, the applicant may be qualified by the Board to take the first examination upon graduation from high school or the completion of a high school equivalency certificate and successfully completing 10 years of progressive practice experience, six of which shall have been under a practicing licensed land surveyor.

e. Repealed by Session Laws 1985 (Regular Session, 1986), c. 977, s. 7.

f. Licensure by Comity or Endorsement. — A person holding a certificate of licensure to engage in the practice of land surveying issued on comparable qualifications from a state, territory, or possession of the United States will be given comity considerations. However, the applicant may be asked to take any examinations as the Board requires to determine the applicant's qualifications, but in any event, the applicant shall be required to pass an examination which shall include questions on laws, procedures, and practices pertaining to the practice of land surveying in North Carolina.

g. A licensed professional engineer who can satisfactorily demonstrate to the Board that the professional engineer's formal academic training in acquiring a degree and field experience in engineering includes land surveying, to the extent necessary to reasonably qualify the applicant in the practice of land surveying, may apply for and may be granted permission to take the principles and practice of land surveying examination and the fundamentals of land surveying examination. Upon satisfactorily passing the examinations, the applicant shall be granted a license to practice land surveying in the State of North Carolina.

h. Professional Engineers in Land Surveying. — Any person presently licensed to practice professional engineering under this Chapter shall upon application be licensed to practice land surveying, providing a written application is filed with the Board within one year next after June 19, 1975.

i. Photogrammetrists. — Any person presently practicing photogrammetry with at least seven years of experience in the profession, two or more of which shall have been in responsible charge of photogrammetric mapping projects meeting National Map Accuracy Standards shall, upon application, be licensed to practice land surveying, provided:

1. The applicant submit certified proof of graduation from high school, high school equivalency, or higher degree;
2. The applicant submit proof of employment in responsible charge as a photogrammetrist practicing within the State of North Carolina to include itemized reports detailing methods, procedures, amount of applicant's personal involvement and the name, address, and telephone numbers of the client for five projects completed by the applicant with the State. A final map for one of the five projects shall also be submitted;
3. Five references to the applicant's character and quality of work, three of which shall be from professional land surveyors, are submitted to the Board; and
4. The application is submitted to the Board by July 1, 1999. After July 1, 1999, no photogrammetrist shall be licensed without meeting the same requirements as to education, length of experience, and testing required of all land surveying applicants.

The Board shall require an applicant to submit exhibits, drawings, plats or other tangible evidence of land surveying work executed by the applicant under proper supervision and which the applicant has personally accomplished or supervised.

Land surveying encompasses a number of disciplines including geodetic surveying, hydrographic surveying, cadastral surveying, engineering surveying, route surveying, photogrammetric (aerial) surveying, and topographic surveying. A professional land surveyor shall practice only within the surveyor's area of expertise.

(2) As a land surveyor intern (shall meet one):

a. Rightful possession of an associate degree in surveying technology approved by the Board, a record satisfactory to the Board of four years of progressive practical experience, two years of which shall have been under a practicing professional land surveyor, and satisfactorily passing a written and oral examination as required by the Board.

b. Repealed by Session Laws 2005-296, s. 1.

c. Graduation from high school or the completion of a high school equivalency certificate and a record satisfactory to the Board of 10 years of progressive, practical experience, six years of which shall have been under a practicing licensed land surveyor and satisfactorily passing any oral and written examinations required by the Board.

d. Graduation and examination. — A graduate of a surveying curriculum or other equivalent curriculum in surveying approved by the Board or a student who has attained senior status in an accredited surveying program of four years or more shall be admitted to the fundamentals of surveying examination. The applicant shall be notified if the examination was passed or not passed, and if passed the applicant shall be certified as a surveying intern if the applicant is otherwise qualified.

The Board shall require an applicant to submit exhibits, drawings, plats, or other tangible evidence of land surveying work executed by the applicant under proper supervision and which the applicant has personally accomplished or supervised. (1921, c. 1, s. 9; C.S., s. 6055(j); 1951, c. 1084, s. 1; 1953, c. 999, s. 2; 1957, c. 1060, ss. 2, 3; 1975, c. 681, s. 1; 1985 (Reg. Sess., 1986), c. 977, ss. 1-15; 1993 (Reg. Sess., 1994), c. 671, s. 2; 1995, c. 509, s. 36.1; 1998-118, s. 11; 1998-217, s. 41; 2005-296, s. 1.)

CASE NOTES

Requirement for Obtaining of License as Land Surveyor by Professional Engineer. — Subsection (b)(1)h., as enacted in 1975, does not require that a person theretofore licensed as a professional engineer show that he had actually engaged in the practice of, or that he had experience in, land surveying as a condition to obtaining a license as a registered land surveyor. Loughlin v. North Carolina State Bd. of Registration, 32 N.C. App. 351, 232 S.E.2d 219, cert. denied, 292 N.C. 467, 233 S.E.2d 922 (1977).

§ 89C-14. Application for licensure; license fees.

(a) Application for licensure as a professional engineer or professional land surveyor shall be on a form prescribed and furnished by the Board. It shall contain statements made under oath, showing the applicant's education and a detailed summary of the applicant's technical and engineering or land surveying experience, and shall include the names and complete mailing addresses of the references, none of whom may be immediate members of the applicant's family or members of the Board.

The Board may accept the certified information on the copy of a current formal certificate of qualifications issued by the National Council of Examiners for Engineering and Surveying in lieu of the same information that is required for the form prescribed and furnished by the Board.

(b) An applicant for licensure who is required to take the written examination shall pay to the Board an application fee not to exceed one hundred dollars ($100.00). The Board may charge any fee necessary to defray the cost of any required examinations. The fee shall accompany the application. The fee for comity licensure of engineers and land surveyors who hold unexpired certificates in another state or a territory of the United States or in Canada shall be the total current fee as fixed by the Board.

(c) The certification fee for a corporation is the amount set by the Board but shall not exceed one hundred dollars ($100.00). The fee shall accompany the application. The certification fee for a business firm is the same as the fee for a corporation. The fee for renewal of a certificate of licensure of a corporation is the amount set by the Board but shall not exceed seventy-five dollars ($75.00). The fee for renewal of a certificate of licensure for a business firm is the same as the renewal fee for a corporation.

(d) Should the Board deny the issuance of a certificate of licensure to any applicant, the unobligated portion of fees paid shall be returned by the Board to the applicant.

(e) A candidate failing an examination may apply, and be considered by the Board, for reexamination at the end of six months. The Board shall make such reexamination charge as is necessary to defray the cost of the examination.

A candidate with a combination of three failures or unexcused absences on an examination shall only be eligible after submitting a new application with appropriate application fee and documented evidence of actions taken by the candidate to enhance the candidate's prospects for passing the exam. A candidate with a combination of three failures or unexcused absences may only be considered by the Board for reexamination at the end of 12 months following the third failure or unexcused absence. After the end of the 12-month period, the applicant may take the examination no more than once every calendar year. (1921, c. 1, s. 9; C.S., s. 6055(j); 1951, c. 1084, s. 1; 1953, c. 999, s. 2; 1957, c. 1060, ss. 2, 3; 1975, c. 681, s. 1; 1981, c. 230; 1983, c. 183, ss. 1, 2; 1993 (Reg. Sess., 1994), c. 671, s. 5; 1996, 2nd Ex. Sess., c. 18, s. 7.10(k); 1998-118, s. 12; 2000-115, s. 1.)

§ 89C-15. Examinations.

(a) The examinations will be held at the times and places as the Board directs. The Board shall determine the passing grade on examinations. All examinations shall be approved by the entire Board.

(b) Written examinations will be given in sections and may be taken only after the applicant has met the other minimum requirements as given in G.S. 89C-13 and has been approved by the Board for admission to the examination as follows:

(1) Engineering Fundamentals. — Consists of an eight-hour examination on the fundamentals of engineering. Passing this examination qualifies the applicant for an engineering intern certificate, provided the applicant has met all other requirements for licensure required by this Chapter.

(2) Principles and Practice of Engineering. — Consists of an eight-hour examination on applied engineering. Passing this examination qualifies the applicant for licensure as a professional engineer, provided the applicant has met the other requirements for registration required by this Chapter.

(3) Surveying Fundamentals. — Consists of an eight-hour examination on the elementary disciplines of land surveying. Passing this examina-

tion qualifies the applicant for a land surveyor intern certificate provided the applicant has met all other requirements for certification required by this Chapter.

(4) Principles and Practices of Land Surveying. — Consists of a six-hour examination on the basic and applied disciplines of land surveying and a two-hour examination on requirements specific to the practice of land surveying in North Carolina. Passing each of these examinations qualifies the applicant for a professional land surveyor certificate provided the applicant has met all other requirements for certification required by this Chapter. (1975, c. 681, s. 1; 1998-118, s. 13.)

§ 89C-16. Certificates of licensure; effect; seals.

(a) The Board shall issue to any applicant, who, in the opinion of the Board, has met the requirements of this Chapter, a certificate of licensure giving the licensee proper authority to practice the profession in this State. The certificate of licensure for a professional engineer shall carry the designation "professional engineer," and for a land surveyor, "professional land surveyor," shall give the full name of the licensee with the Board designated licensure number and shall be signed by the chair and the secretary under the seal of the Board.

(b) This certificate shall be prima facie evidence that the person named on the certificate is entitled to all rights, privileges and responsibilities of a professional engineer or a professional land surveyor, while the certificate of licensure remains unrevoked or unexpired.

(c) Each licensee shall upon licensure obtain a seal of a design authorized by the Board bearing the licensee's name, license number, and the legend, "professional engineer," or "professional land surveyor." Final drawings, specifications, plans and reports prepared by a licensee shall, when issued, be certified and stamped with the seal or facsimile of the seal unless the licensee is exempt under the provisions of G.S. 89C-25(7). It shall be unlawful for a licensee to affix, or permit the licensee's seal and signature or facsimile of the seal and signature to be affixed to any drawings, specifications, plans or reports after the expiration of a certificate or for the purpose of aiding or abetting any other person to evade or attempt to evade any provision of this Chapter. A professional engineer practicing land surveying shall use the licensee's land surveyor seal. (1921, c. 1, s. 11; C.S., s. 6055(m); 1951, c. 1084, s. 1; 1957, c. 1060, s. 6; 1975, c. 681, s. 1; 1998-118, s. 14.)

CASE NOTES

Cited in In re Trulove, 54 N.C. App. 218, 282 S.E.2d 544 (1981).

OPINIONS OF ATTORNEY GENERAL

Direct Control by Registrant Required. — For a registrant to be able to legally seal and sign plans prepared by others, it is necessary that the documents be prepared under his direct supervision, meaning a person employed by and under control of the registrant. See opinion of Attorney General to Mr. B.A. Saholsky, 41 N.C.A.G. 423 (1971).

§ 89C-17. Expirations and renewals of certificates.

Certificates for licensure of corporations and business firms that engage in the practice of engineering or land surveying shall expire on the last day of the month of June following their issuance or renewal and shall become invalid on that date unless renewed. All other certificates for licensure shall expire on the last day of the month of December next following their issuance or renewal, and shall become invalid on that date unless renewed. When necessary to protect the public health, safety, or welfare, the Board shall require any evidence necessary to establish the continuing competency of engineers and land surveyors as a condition of renewal of licenses. When the Board is satisfied as to the continuing competency of an applicant, it shall issue a renewal of the certificate upon payment by the applicant of a fee fixed by the Board but not to exceed seventy-five dollars ($75.00). The secretary of the Board shall notify by mail every person licensed under this Chapter of the date of expiration of the certificate, the amount of the fee required for its renewal for one year, and any requirement as to evidence of continued competency. The notice shall be mailed at least one month in advance of the expiration date of the certificate. Renewal shall be effected at any time during the month immediately following the month of expiration, by payment to the secretary of the Board of a renewal fee, as determined by the Board, which shall not exceed seventy-five dollars ($75.00). Failure on the part of any licensee to renew the certificate annually in the month immediately following the month of expiration, as required above, shall deprive the licensee of the right to practice until reinstatement of the license. The license may be reinstated at anytime during the first 12 months immediately following the date the license became invalid by payment of a reinstatement fee of one hundred dollars ($100.00) in addition to the established renewal fee. Failure of a licensee to reinstate the license during the first 12 months immediately following the date the license became invalid shall require the individual, prior to resuming practice in North Carolina, to submit an application on the prescribed form, and to meet all other requirements for licensure as set forth in Chapter 89C. The secretary of the Board is instructed to remove from the official roster of engineers and land surveyors the names of all licensees who have not effected their renewal by the first day of the month immediately following the renewal period. The Board may adopt rules to provide for renewals in distress or hardship cases due to military service, prolonged illness, or prolonged absence from the State, where the applicant for renewal demonstrates to the Board that the applicant has maintained active knowledge and professional status as an engineer or land surveyor, as the case may be. It shall be the responsibility of each licensee to inform the Board promptly concerning change in address. A licensee may request and be granted inactive status. No inactive licensee may practice in this State unless otherwise exempted in this Chapter. A licensee granted inactive status shall pay annual renewal fees but shall not be subject to annual continuing professional competency requirements. A licensee granted inactive status may return to active status by meeting all requirements of the Board, including demonstration of continuing professional competency as a condition of reinstatement. (1921, c. 1, s. 9; C.S., s. 6055(k); 1951, c. 1084, s. 1; 1953, c. 1041, s. 9; 1957, c. 1060, s. 4; 1973, c. 1321; c. 1331, s. 3; 1975, c. 681, s. 1; 1979, c. 819, ss. 3, 4; 1985, c. 373; 1998-118, s. 15; 2000-115, s. 2; 2003-347, s. 3.)

§ 89C-18. Duplicate certificates.

The Board may issue a duplicate certificate of licensure or certificate of authorization to replace any certificate that has been lost, destroyed, or mutilated and may charge a fee of up to twenty-five dollars ($25.00) for issuing the certificate. (1921, c. 1, s. 10; C.S., s. 6055(l); 1939, c. 218, s. 2; 1951, c. 1084, s. 1; 1953, c. 1041, s. 10; 1957, c. 1060, s. 5; 1973, c. 1331, s. 3; 1975, c. 681, s. 1; 1993 (Reg. Sess., 1994), c. 671, s. 3; 1998-118, s. 16.)

§ 89C-18.1. Licensing of nonresidents.

(a) Definitions. — The following definitions apply in this section:

- (1) Delinquent income tax debt. — The amount of income tax due as stated in a final notice of assessment issued to a taxpayer by the Secretary of Revenue when the taxpayer no longer has the right to contest the amount.
- (2) Foreign corporation. — Defined in G.S. 55-1-40.
- (3) Foreign entity. — A foreign corporation, a foreign limited liability company, or a foreign partnership.
- (4) Foreign limited liability company. — Defined in G.S. 57C-1-03.
- (5) Foreign partnership. — Either of the following that does not have a permanent place of business in this State:
  - a. A foreign limited partnership as defined in G.S. 59-102.
  - b. A general partnership formed under the laws of a jurisdiction other than this State.

(b) Licensing. — The Board shall not renew a certificate of licensure for a foreign corporation unless the corporation has obtained a certificate of authority from the Secretary of State pursuant to Article 15 of Chapter 55 of the General Statutes. The Board shall not renew a certificate of licensure for a foreign limited liability company unless the company has obtained a certificate of authority from the Secretary of State pursuant to Article 7 of Chapter 57C of the General Statutes.

(c) Information. — Upon request, the Board shall provide the Secretary of Revenue on an annual basis the name, address, and tax identification number of every nonresident individual and foreign entity licensed by the Board. The information shall be provided in the format required by the Secretary of Revenue.

(d) Delinquents. — If the Secretary of Revenue determines that any nonresident individual or foreign corporation licensed by the Board, a member of any foreign limited liability company licensed by the Board, or a partner in any foreign partnership licensed by the Board, owes a delinquent income tax debt, the Secretary of Revenue may notify the Board of these nonresident individuals and foreign entities and instruct the Board not to renew their certificates of licensure. The Board shall not renew the certificate of licensure of such a nonresident individual or foreign entity identified by the Secretary of Revenue unless the Board receives a written statement from the Secretary that the debt either has been paid or is being paid pursuant to an installment agreement. (1998-162, ss. 7, 13.)

§ 89C-19. Public works; requirements where public safety involved.

This State and its political subdivisions such as counties, cities, towns, or other political entities or legally constituted boards, commissions, public utility companies, or authorities, or officials, or employees of these entities shall not engage in the practice of engineering or land surveying involving either public or private property where the safety of the public is directly involved without the project being under the supervision of a professional engineer for the preparations of plans and specifications for engineering projects, or a professional land surveyor for land surveying projects, as provided for the practice of the respective professions by this Chapter.

An official or employee of the State or any political subdivision specified in this section, holding the positions set out in this section as of June 19, 1975, shall be exempt from the provisions of this section so long as such official or employee is engaged in substantially the same type of work as is involved in the present position.

Nothing in this section shall be construed to prohibit inspection, maintenance and service work done by employees of the State of North Carolina, any political subdivision of the State, or any municipality including construction, installation, servicing, and maintenance by regular full-time employees of, secondary roads and drawings incidental to work on secondary roads, streets, street lighting, traffic-control signals, police and fire alarm systems, waterworks, steam, electric and sewage treatment and disposal plants, the services of superintendents, inspectors or foremen regularly employed by the State of North Carolina or any political subdivision of the State, or municipal corporation.

The provisions in this section shall not be construed to alter or modify the requirements of Article 1 of Chapter 133 of the General Statutes. (1975, c. 681, s. 1; 1998-118, s. 17.)

§ 89C-19.1. Engineer who volunteers during an emergency or disaster; qualified immunity.

(a) A professional engineer who voluntarily, without compensation, provides structural, electrical, mechanical, or other engineering services at the scene of a declared disaster or emergency, declared under federal law or in accordance with the provisions of Article 1 of Chapter 166A of the General Statutes or Article 36A of Chapter 14 of the General Statutes, at the request of a public official, law enforcement official, public safety official, or building inspection official, acting in an official capacity, shall not be liable for any personal injury, wrongful death, property damage, or other loss caused by the professional engineer's acts or omissions in the performance of the engineering services.

(b) The immunity provided in subsection (a) of this section applies only to an engineering service:

(1) For any structure, building, piping, or other engineered system, either publicly or privately owned.

(2) That occurs within 45 days after the declaration of the emergency or disaster, unless the 45-day immunity period is extended by an executive order issued by the Governor under the Governor's emergency executive powers.

(c) The immunity provided in subsection (a) of this section does not apply if it is determined that the personal injury, wrongful death, property damage, or other loss was caused by the gross negligence, wanton conduct, or intentional wrongdoing of the professional engineer, or arose out of the operation of a motor vehicle.

(d) As used in this section:

(1) "Building inspection official" means any appointed or elected federal, State, or local official with overall executive responsibility to coordinate building inspection in the jurisdiction in which the emergency or disaster is declared.

(2) "Law enforcement official" means any appointed or elected federal, State, or local official with overall executive responsibility to coordinate law enforcement in the jurisdiction in which the emergency or disaster is declared.

(3) "Public official" means any federal, State, or locally elected official with overall executive responsibility in the jurisdiction in which the emergency or disaster is declared.

(4) "Public safety official" means any appointed or elected federal, State, or local official with overall executive responsibility to coordinate public safety in the jurisdiction in which the emergency or disaster is declared. (1995, c. 416, s. 1.)

§ 89C-20. Rules of professional conduct.

In the interest of protecting the safety, health, and welfare of the public, the Board shall adopt rules of professional conduct applicable to the practice of engineering and land surveying. These rules, when adopted, shall be construed to be a reasonable exercise of the police power vested in the Board of Examiners for Engineers and Land Surveyors. Every person licensed by the Board shall subscribe to and observe the adopted rules as the standard of professional conduct for the practice of engineering and land surveying and shall cooperate fully with the Board in the course of any investigation. In the case of violation of the rules of professional conduct, the Board shall proceed in accordance with G.S. 89C-22. (1975, c. 681, s. 1; 1987, c. 827, s. 73; 1998-118, s. 18.)

CASE NOTES

Cited in North Carolina State Bd. of Registration for Professional Eng'rs & Land Surveyors v. FTC, 615 F. Supp. 1155 (E.D.N.C. 1985).

§ 89C-21. Disciplinary action — Reexamination, revocation, suspension, reprimand, or civil penalty.

(a) The Board may reprimand the licensee, suspend, refuse to renew, or revoke the certificate of licensure, or, as appropriate, require reexamination, for any engineer or land surveyor, who is found:

(1) Guilty of the practice of any fraud or deceit in obtaining a certificate of licensure or certificate of authorization.

(2) Guilty of any gross negligence or misconduct in the practice of the profession.

(3) Guilty of any felony or any crime involving moral turpitude.

(4) Guilty of violation of the Rules of Professional Conduct, as adopted by the Board.

(5) To have been declared insane or incompetent by a court of competent jurisdiction and has not later been lawfully declared sane or competent.

(6) Guilty of professional incompetence. In the event the Board finds that a certificate holder is incompetent the Board may, in its discretion, require oral or written examinations, or other indication of the certificate holder's fitness to practice engineering or land surveying and suspend the license during any such period.

(b) The Board may (i) revoke a certificate of authorization, or (ii) to suspend a certificate of authorization for a period of time not exceeding two years, of any corporation or business firm where one or more of its officers or directors have committed any act or have been guilty of any conduct which would authorize a revocation or suspension of their certificates of licensure under the provision of this section.

(c) The Board may levy a civil penalty not in excess of five thousand dollars ($5,000) for any engineer or not in excess of two thousand dollars ($2,000) for any land surveyor who violates any of the provisions of subdivisions (1) through (4) of subsection (a) of this section. The clear proceeds of all civil penalties collected by the Board, including civil penalties collected pursuant to G.S. 89C-22(c), shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(d) Before imposing and assessing a civil penalty and fixing the amount, the Board shall, as a part of its deliberation, take into consideration the following factors:

(1) The nature, gravity, and persistence of the particular violations;

(2) The appropriateness of the imposition of a civil penalty when considered alone or in combination with other punishment;

(3) Whether the violation(s) were done willfully and maliciously; and

(4) Any other factors which would tend to either mitigate or aggravate the violation(s) found to exist. (1921, c. 1, s. 10; C.S., s. 6055(l); 1939, c. 218, s. 2; 1951, c. 1084, s. 1; 1953, c. 1041, s. 10; 1957, c. 1060, s. 5; 1973, c. 1331, s. 3; 1975, c. 681, s. 1; 1989, c. 669, s. 1; 1993 (Reg. Sess., 1994), c. 671, s. 6; 1998-118, s. 19; 1998-215, s. 134; 2003-347, s. 2.)

CASE NOTES

Multiple Sanctions. — Under former version of this section, providing that the Board "may suspend, refuse to renew, or revoke the certificate of registration, require reexamination, or levy a fine not in excess of five hundred dollars," the Board was authorized to suspend, etc., an engineer's certificate of registration, or to fine him up to $500, but was not authorized to do both. In re Bruce, 97 N.C. App. 138, 387 S.E.2d 82 (1990).

Lack of Notice and Opportunity for Hearing as to Suspension of License. — Where although petitioner was given notice of alleged facts supporting reprimand and fine, he had no notice that the same facts would warrant suspension of his license, and where additionally, petitioner did not have an opportunity at hearing to show compliance with the requirements for retaining his license since he was unaware that the proceeding could result in the suspension, the Board's suspension of petitioner's license did not comply with the procedures mandated in G.S. 150B-3(b). Miller v. North Carolina State Bd. of Registration, 86 N.C. App. 91, 356 S.E.2d 793 (1987), aff'd, 322 N.C. 465, 368 S.E.2d 605 (1988).

Board Precluded from Suspending License. — The Notice of Action Without Hearing sent to petitioner by the board informing petitioner that the board's intended action was a reprimand and fine was misleading, lulling him into believing that his conduct would, at most, result in a reprimand or fine — not suspension of his license — and the board was precluded from imposing the greater sanction of license suspension. Miller v. North Carolina State Bd. of Registration for Professional Eng'rs & Land Surveyors, 322 N.C. 465, 368 S.E.2d 605 (1988).

Applied in Adams v. North Carolina State Bd. of Registration, 129 N.C. App. 292, 501 S.E.2d 660 (1998).

Cited in In re Bruce, 103 N.C. App. 81, 404 S.E.2d 480 (1991).

§ 89C-22. Disciplinary action — Charges; procedure.

(a) Any person may prefer charges of fraud, deceit, gross negligence, incompetence, misconduct, or violation of the rules of professional conduct, against any Board registrant. The charges shall be in writing and shall be sworn to by the person or persons making them and shall be filed with the Board.

(b) All charges, unless dismissed by the Board as unfounded or trivial, shall be heard by the Board as provided under the requirements of Chapter 150B of the General Statutes.

(c) If, after a hearing, a majority of the Board votes in favor of sustaining the charges, the Board shall reprimand, levy a civil penalty, suspend, refuse to renew, or revoke the licensee's certificate.

(d) A licensee who is aggrieved by a final decision of the Board may appeal for judicial review as provided by Article 4 of Chapter 150B.

(e) The Board may, upon petition of an individual or an entity whose certificate has been revoked, for sufficient reasons as it may determine, reissue a certificate of licensure or authorization, provided that a majority of the members of the Board vote in favor of such issuance. (1921, c. 1, s. 10; C.S., s. 6055(l); 1939, c. 218, s. 2; 1951, c. 1084, s. 1; 1953, c. 1041, s. 10; 1957, c. 1060, s. 5; 1973, c. 1331, s. 3; 1975, c. 681, s. 1; 1981, c. 789; 1989, c. 669, s. 2; 1993 (Reg. Sess., 1994), c. 671, s. 7; 1998-118, s. 20.)

CASE NOTES

"Person Aggrieved" Defined. — "Person aggrieved" means one who is adversely affected in respect of legal rights, or is suffering from an infringement or denial of legal rights. Carter v. North Carolina State Bd. of Registration, 86 N.C. App. 308, 357 S.E.2d 705 (1987), decided under § 150B-43.

Discretion of Board as to Need for Disciplinary Hearing. — The determination of whether charges are "unfounded or trivial" or are of sufficient substance to merit a disciplinary hearing is a decision necessarily committed to the sound discretion of the Board. Carter v. North Carolina State Bd. of Registration, 86 N.C. App. 308, 357 S.E.2d 705 (1987), decided under § 150B-43.

Lack of Notice and Opportunity for Hearing as to Suspension of License. — Where although petitioner was given notice of alleged facts supporting reprimand and fine, he had no notice that the same facts would warrant suspension of his license, and where additionally, petitioner did not have an opportunity at hearing to show compliance with the requirements for retaining his license since he was unaware that the proceeding could result in the suspension, the Board's suspension of petitioner's license did not comply with the procedures mandated in G.S. 150B-3(b). Miller v. North Carolina State Bd. of Registration, 86 N.C. App. 91, 356 S.E.2d 793, aff'd, 322 N.C. 465, 368 S.E.2d 605 (1988).

Cited in In re Trulove, 54 N.C. App. 218, 282 S.E.2d 544 (1981); Miller v. North Carolina State Bd. of Registration for Professional Eng'rs & Land Surveyors, 322 N.C. 465, 368 S.E.2d 605 (1988); In re Bruce, 103 N.C. App. 81, 404 S.E.2d 480 (1991).

§ 89C-23. Unlawful to practice engineering or land surveying without licensure; unlawful use of title or terms; penalties; Attorney General to be legal adviser.

Any person who shall practice, or offer to practice, engineering or land surveying in this State without first being licensed in accordance with the provisions of this Chapter, or any person, firm, partnership, organization, association, corporation, or other entity using or employing the words "engineer" or "engineering" or "professional engineer" or "professional engineering" or "land surveyor" or "land surveying," or any modification or derivative of those words in its name or form of business or activity except as licensed under this Chapter or in pursuit of activities exempted by this Chapter, or any person presenting or attempting to use the certificate of licensure or the seal of another, or any person who shall give any false or forged evidence of any kind to the Board or to any member of the Board in obtaining or attempting to obtain a certificate of licensure, or any person who shall falsely impersonate any other licensee of like or different name, or any person who shall attempt to use an expired or revoked or nonexistent certificate of licensure, or who shall practice or offer to practice when not qualified, or any person who falsely claims that the person is registered under this Chapter, or any person who shall violate any of the provisions of this Chapter, in addition to injunctive procedures set out hereinbefore, shall be guilty of a Class 2 misdemeanor. In no event shall there be representation of or holding out to the public of any engineering expertise by unlicensed persons. It shall be the duty of all duly constituted officers of the State and all political subdivisions of the State to enforce the provisions of this Chapter and to prosecute any persons violating them.

The Attorney General of the State or an assistant shall act as legal adviser to the Board and render any legal assistance necessary to carry out the provisions of this Chapter. The Board may employ counsel and necessary assistance to aid in the enforcement of this Chapter, and the compensation and expenses for the assistance shall be paid from funds of the Board. (1921, c. 1, s. 12; C.S., s. 6055(n); 1951, c. 1084, s. 1; 1975, c. 681, s. 1; 1993, c. 539, s. 612; 1994, Ex. Sess., c. 24, s. 14(c); 1998-118, s. 21.)

CASE NOTES

This Section and G.S. 89C-2 Must Be Read Together. — This section, the part of the Chapter prescribing penalties, must be read subject to the basic prohibitory section of this Chapter, G.S. 89C-2, which makes it unlawful "to use in connection with his name or otherwise or advertise any title or description tending to convey the impression that he is . . . a professional engineer . . . unless such person has been duly registered as such." North Carolina State Bd. of Registration v. IBM Corp., 31 N.C. App. 599, 230 S.E.2d 552 (1976).

G.S. 89C-2 and this section authorize the Board to prohibit only those uses of the title engineer which imply or represent professional engineering status or expertise. North Carolina State Bd. of Registration v. IBM Corp., 31 N.C. App. 599, 230 S.E.2d 552 (1976).

Use of Word "Engineer" Does Not Represent Professional Engineering Status. — It is clear from the definition in G.S. 89C-3(8) that the use of the word "engineer" without being modified by "professional," "registered" or "licensed," or some word of like import does not represent that one is "duly registered and licensed by the Board" and therefore cannot represent that one is a professional engineer as that term is defined in G.S. 89C-3(8). Since such usage does not represent professional engineering status, it cannot constitute the practice of engineering as that term is defined in G.S. 89C-3(6)a. North Carolina State Bd. of Registration v. IBM Corp., 31 N.C. App. 599, 230 S.E.2d 552 (1976).

Therefore, such usage is not a violation of those provisions of G.S. 89C-2 and this section which prohibit the practice or offer to practice engineering without proper registration. North Carolina State Bd. of Registration v. IBM Corp., 31 N.C. App. 599, 230 S.E.2d 552 (1976).

Cited in Loughlin v. North Carolina State Bd. of Registration, 32 N.C. App. 351, 232 S.E.2d 219 (1977).

§ 89C-24. Licensure of corporations and business firms that engage in the practice of engineering or land surveying.

A corporation or business firm may not engage in the practice of engineering or land surveying in this State unless it is licensed by the Board and has paid an application fee established by the Board in an amount not to exceed one hundred dollars ($100.00). A corporation or business firm is subject to the same duties and responsibilities as an individual licensee. Licensure of a corporation or business firm does not affect the requirement that all engineering or land surveying work done by the corporation or business firm be performed by or under the responsible charge of individual registrants, nor does it relieve the individual registrants within a corporation or business firm of their design and supervision responsibilities. The Board may adopt rules regulating the operation of offices and places of business of corporations and business firms licensed under this section to ensure that professional engineering and land surveying services are performed under the supervision of licensed professional engineers and land surveyors.

This section applies to every corporation that is engaged in the practice of engineering or land surveying, regardless of when it was incorporated. A corporation that is not exempt from Chapter 55B of the General Statutes by application of G.S. 55B-15 must be incorporated under that Chapter. (1921, c. 1, s. 14; C.S., s. 6055(p); 1951, c. 1084, s. 1; 1969, c. 718, s. 18; 1975, c. 681, s. 1; 1993 (Reg. Sess., 1994), c. 671, s. 4; 1998-118, s. 22; 2000-115, s. 3.)

OPINIONS OF ATTORNEY GENERAL

Registration Requirement Applies to Non-Profit Corporations. — The registration requirement contained in this section applies to any corporation, including a non-profit corporation, if the corporation is engaged in the practice of engineering as defined by the statute. See opinion of Attorney General to Mr. Jerry T. Carter, Executive Director, North Carolina Board of Examiners for Engineers and Surveyors, 1999 N.C. AG LEXIS 25 (11/16/99).

§ 89C-25. Limitations on application of Chapter.

This Chapter shall not be construed to prevent or affect:

(1) The practice of architecture, landscape architecture, or contracting or any other legally recognized profession or trade.

(2) The practice of professional engineering or land surveying in this State or by any person not a resident of this State and having no established place of business in this State when this practice does not aggregate more than 90 days in any calendar year, whether performed in this State or elsewhere, or involve more than one specific project; provided, however, that the person is licensed to practice the profession in the person's own state or country, in which the requirements and qualifications for obtaining a certificate of licensure are satisfactory to the Board; in which case the person shall apply for and the Board will issue a temporary permit.

(3) The practice of professional engineering or land surveying in this State not to aggregate more than 90 days by any person residing in this State, but whose residence has not been of sufficient duration for the Board to grant or deny licensure; provided, however, the person shall have filed an application for licensure as a professional engineer or professional land surveyor and shall have paid the fee provided for in G.S. 89C-14, and provided that the person is licensed to practice professional engineering or professional land surveying in the person's own state or country in which the requirements and qualifications for obtaining a certificate of licensure are satisfactory to the Board, in which case the person shall apply for and the Board will issue a temporary permit.

(4) Engaging in engineering or land surveying as an employee or assistant under the responsible charge of a professional engineer or professional land surveyor or as an employee or assistant of a nonresident professional engineer or a nonresident professional land surveyor provided for in subdivisions (2) and (3) of this section, provided that the work as an employee may not include responsible charge of design or supervision.

(5) The practice of professional engineering or land surveying by any person not a resident of, and having no established place of business in this State, as a consulting associate of a professional engineer or professional land surveyor licensed under the provisions of this Chapter; provided, the nonresident is qualified for performing the professional service in the person's own state or country.

(6) Practice by members of the armed forces; employees of the government of the United States while engaged in the practice of engineering or land surveying solely for the government on government-owned works and projects; or practice by those employees of the Natural Resources Conservation Service, county employees, or employees of the Soil and Water Conservation Districts who have federal engineering job approval authority that involves the planning, designing, or implementation of best management practices on agricultural lands.

(7) The internal engineering or surveying activities of a person, firm or corporation engaged in manufacturing, processing, or producing a product, including the activities of public service corporations, public utility companies, authorities, State agencies, railroads, or membership cooperatives, or the installation and servicing of their product in the field; or research and development in connection with the manufacture of that product or their service; or of their research affiliates; or their employees in the course of their employment in connection

with the manufacture, installation, or servicing of their product or service in the field, or on-the-premises maintenance of machinery, equipment, or apparatus incidental to the manufacture or installation of the product or service of a firm by the employees of the firm upon property owned, leased or used by the firm; inspection, maintenance and service work done by employees of the State of North Carolina, any political subdivision of the State, or any municipality including construction, installation, servicing, maintenance by regular full-time employees of streets, street lighting, traffic-control signals, police and fire alarm systems, waterworks, steam, electric and sewage treatment and disposal plants; the services of superintendents, inspectors or foremen regularly employed by the State of North Carolina or any political subdivision of the State or a municipal corporation; provided, however, that the internal engineering or surveying activity is not a holding out to or an offer to the public of engineering or any service thereof as prohibited by this Chapter. Engineering work, not related to the foregoing exemptions, where the safety of the public is directly involved shall be under the responsible charge of a licensed professional engineer, or in accordance with standards prepared or approved by a licensed professional engineer.

(8) The (i) preparation of fire sprinkler planning and design drawings by a fire sprinkler contractor licensed under Article 2 of Chapter 87 of the General Statutes, or (ii) the performance of internal engineering or survey work by a manufacturing or communications common carrier company, or by a research and development company, or by employees of those corporations provided that the work is in connection with, or incidental to products of, or nonengineering services rendered by those corporations or their affiliates.

(9) The routine maintenance or servicing of machinery, equipment, facilities or structures, the work of mechanics in the performance of their established functions, or the inspection or supervision of construction by a foreman, superintendent, or agent of the architect or professional engineer, or services of an operational nature performed by an employee of a laboratory, a manufacturing plant, a public service corporation, or governmental operation.

(10) The design of land application irrigation systems for an animal waste management plan, required by G.S. 143-215.10C, by a designer who exhibits, by at least three years of relevant experience, proficiency in soil science and basic hydraulics, and who is thereby listed as an Irrigation Design Technical Specialist by the North Carolina Soil and Water Conservation Commission. (1921, c. 1, s. 13; C.S., s. 6055(o); 1951, c. 1084, s. 1; 1975, c. 681, s. 1; 1995, c. 146, s. 1; 1995 (Reg. Sess., 1996), c. 742, s. 35; 1997-454, s. 1; 1998-118, s. 23; 2007-536, s. 1.)

Effect of Amendments. — Session Laws 2007-536, s. 1, effective August 31, 2007, substituted "Service, county employees, or employees of the Soil and Water Conservation Districts who have" for "Service having" following "Natural Resources Conservation" in subdivision (6); and made a minor stylistic change.

CASE NOTES

Applied in North Carolina State Bd. of Registration v. IBM Corp., 31 N.C. App. 599, 230 S.E.2d 552 (1976).

OPINIONS OF ATTORNEY GENERAL

Preparation of Construction Drawings. — A town may not, under its land use ordinance, require that all construction drawings submitted for approval be prepared and sealed by a licensed professional engineer, to the exclusion of licensed professional architects. Such a restriction would be in excess of the powers granted the town. See opinion of Attorney General to Mr. Michael B. Brough, Carrboro Town Attorney, 59 N.C.A.G. 58 (1989).

§ 89C-25.1. Supervision of unlicensed individuals by licensed person.

In all circumstances in which unlicensed individuals are permitted under this Chapter to perform engineering or land surveying work, or both, under the supervision of a licensed engineer, land surveyor, or both, the Board may by regulation establish a reasonable limit on the number of unlicensed individuals which a licensee of the Board may directly or personally supervise at one time. (1979, c. 819, s. 5; 1998-118, s. 24.)

§ 89C-25.2. Program of licensure by discipline.

The Board shall submit to the legislative committees of reference by July 1, 1981, a program of licensure by discipline and an analysis of the costs and merits thereof in order to permit the General Assembly to make a decision on the establishment of such a program. The “committees of reference” shall be the Senate and House Committees on State Government respectively or such other committees as the respective presiding officers may determine. (1979, c. 819, s. 5.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 89C-26: Repealed by Session Laws 1997-309, s. 10.

§ 89C-27. Invalid sections; severability.

If any of the provisions of this Chapter, or if any rule, regulation or order thereunder, or if the application of such provision to any person or circumstance shall be held invalid, the remainder of this Chapter and the application of such provision of this Chapter or rule, regulation or order to persons or circumstances, other than those as to which it is held valid, shall not be affected thereby. (1975, c. 681, s. 1.)

§ 89C-28. Existing licensure not affected.

Nothing in this Chapter shall be construed as affecting the status of licensure of any professional engineer or land surveyor who is rightfully in possession of a certificate of licensure duly issued by the Board and valid as of July 1, 1975. (1951, c. 1084, s. 1; 1959, c. 1236, s. 2; 1975, c. 681, s. 1; 1998-118, s. 25.)

Chapter 89D.

Landscape Contractors.

Sec.
89D-1. Certificate required.
89D-2. Definition.
89D-3. Application of Chapter.
89D-4. Landscape Contractors' Registration Board created; membership; compensation; power, etc.
89D-5. Application for certificate; examination; renewal.
Sec.
89D-6. Registers of applicants and certificate holders.
89D-7. Denial, revocation or suspension of certificate.
89D-8. Out-of-state applicants.
89D-9. Persons in practice prior to July 1, 1976.
89D-10. Injunctions for violation of Chapter.

§ 89D-1. Certificate required.

On and after December 1, 1975, it shall be unlawful for any person, partnership, association or corporation in this State to use the title "landscape contractor," or to advertise as such without first obtaining a certificate issued by the North Carolina Landscape contractors' Registration Board under provisions of this Chapter. (1975, c. 741, s. 1.)

§ 89D-2. Definition.

A "landscape contractor" within the meaning of this Chapter is any person, partnership, association or corporation who for compensation or valuable consideration or promise thereof engages in the business requiring the art, experience, ability, knowledge, science and skill to install, plant, repair and maintain gardens, lawns, shrubs, vines, bushes, trees and other decorative vegetation including the grading and preparation of plots and areas of land for decorative treatment and arrangement; who constructs or installs garden pools, fountains, pavilions, conservatories, hothouses and greenhouses, incidental retaining walls, fences, walks, drainage and sprinkler systems; or who engages in incidental construction in connection therewith, or does any part thereof in such a manner that, under an agreed specification, an acceptable landscaping project can be executed. (1975, c. 741, s. 2.)

§ 89D-3. Application of Chapter.

The provisions of this Chapter shall not apply to and shall not include any person, partnership, association or corporation who shall perform any of the acts aforesaid in G.S. 89D-2 with reference to any property, so long as that person, partnership, association or corporation shall not use the title "landscape contractor." (1975, c. 741, s. 3.)

§ 89D-4. Landscape Contractors' Registration Board created; membership; compensation; power, etc.

(a) There is created the North Carolina Landscape Contractors' Registration Board (hereinafter called the Board) which shall issue registration certificates of title to landscape contractors. The Board shall be composed of nine members appointed as follows: Two by the Governor to represent the public at large; two by the Commissioner of Agriculture; two practicing nurserymen operating a nursery certified by the North Carolina Department of Agriculture and Consumer Services Plant Pest Inspection Program appointed by the Board of Directors of the North Carolina Association of

Nurserymen, Inc.; two registered landscape contractors in the business of landscape contracting appointed by the Board of Directors of the North Carolina Landscape Contractors' Association, Inc.; and one registered landscape architect appointed by the Board of Directors of the North Carolina Chapter of the American Society of Landscape Architects. All appointments shall be for three-year terms and no member shall serve more than two complete consecutive terms.

Any vacancy on the Board created by death, resignation or otherwise shall be filled for the unexpired term by the initial appointing authority and all members shall serve until their successors are appointed and qualify.

(b) From its funds, the Board shall pay its members at the rate set out in G.S. 93B-5: Provided, that at no time shall the expense exceed the cash balance on hand.

(c) The Board shall have power to make such rules and regulations as are not inconsistent with the provisions of this Chapter and the laws of North Carolina. The Board shall not make rules or regulations regulating commissions, salaries, or fees to be charged by registrants under this Chapter. The Board shall adopt a seal for its use, which shall bear thereon the words "North Carolina Landscape Contractors' Registration Board."

(d) The Board may employ a secretary-treasurer and such clerical assistance as may be necessary to carry out the provisions of this Chapter and to put into effect such rules and regulations as the Board may promulgate. The Board shall fix salaries for employees and shall require employees to make good and sufficient surety bond for the faithful performance of their duties.

(e) The Board shall be entitled to the services of the Attorney General of North Carolina in connection with the affairs of the Board or may, on approval of the Attorney General, employ an attorney to assist or represent it in the enforcement of this Chapter, but the fee paid for such service shall be approved by the Attorney General. (1975, c. 741, s. 4; 1983, c. 108, s. 1; 1997-261, s. 109.)

Editor's Note. — Session Laws 1983, c. 108, which rewrote subsection (a), in s. 4, provided a schedule of initial appointments in order to stagger the terms of board member.

§ 89D-5. Application for certificate; examination; renewal.

(a) Any person, partnership, association or corporation hereinafter desiring to register and be titled as a landscape contractor shall make written application for a certificate of title to the Board on such forms as are prescribed by the Board. Each applicant for a certificate of title as a landscape contractor shall be at least 18 years of age. Prior to July 1, 1976, each applicant for a certificate shall have been actively engaged as an untitled landscape contractor for at least one year prior to date of application. After July 1, 1976, an applicant shall furnish evidence satisfactory to the Board of three years' experience in landscape contracting or the completion of a study or combination of study and experience in landscape contracting equivalent to three years' experience under a landscape contractor.

(b) Any person who applies to the Board to be registered and titled as a landscape contractor shall be required to take an oral or written examination to determine his qualifications. Each application for registration by examination shall be accompanied by an application fee of seventy-five dollars ($75.00).

The Board shall compile a manual from which the examination will be prepared. The examination fee shall not exceed seventy-five dollars ($75.00). Any one failing to pass an examination may be reexamined upon payment of the same fee as that charged to persons taking the examination for the first time, in accordance with such rules as the Board may adopt pertaining to examinations and reexaminations.

If the results of the examination are satisfactory, the Board shall issue the applicant a certificate authorizing him to be titled as a landscape contractor in the State of North Carolina upon payment of the initial certification fee as outlined in subsection (c).

(c) All certificates granted and issued by the Board under the provisions of this Chapter shall expire annually on December 31. Renewal of such certificates may be effected at any time during the month preceding the expiration date of such certificates upon proper application to the Board accompanied by the payment to the secretary-treasurer of the Board of a renewal fee, as set by the Board, of not more than seventy-five dollars ($75.00). The fee for an initial certificate shall be the same as for a renewal certificate and is in addition to the application fee. All certificates reinstated after expiration date thereof shall be subject to a late filing fee of twenty-five dollars ($25.00). In the event a registrant fails to obtain a reinstatement of such certificate within 12 months from the date of expiration thereof, the Board may, in its discretion, consider such registrant subject to the provisions of this Chapter relating to the issuance of an original certificate. Duplicate certificates may be issued by the Board upon payment of a fee not to exceed five dollars ($5.00) by the registrant. The Board may charge a fee not to exceed thirty-five dollars ($35.00) for issuance of a duplicate parchment certificate. (1975, c. 741, s. 5; 1983, c. 108, ss. 2, 3; 1991, c. 180, s. 1; 2007-426, s. 1.)

Effect of Amendments. — Session Laws 2007-426, s. 1, effective August 23, 2007, substituted "seventy-five dollars ($75.00)" for "fifty dollars ($50.00)," in subsection (b); in subsection (c), substituted "seventy-five dollars ($75.00)" for "fifty dollars ($50.00)," substituted "twenty-five dollars ($25.00)" for "ten dollars ($10.00)," substituted "not to exceed five dollars ($5.00)" for "of one dollar ($1.00)," and inserted the last sentence.

§ 89D-6. Registers of applicants and certificate holders.

(a) The secretary-treasurer of the Board shall keep a register of all applicants for certificates of title. The register shall include the date of application, name, place of business, place of residence, and indicate whether the certificate of title was granted or refused.

(b) The secretary-treasurer of the Board shall also keep a current roster showing the names and places of business of all registered titled landscape contractors. The roster shall be kept on file in the office of the Board and be open to public inspection.

(c) On or before the first day of September of each year, the Board shall file with the Secretary of State a copy of the roster of landscape contractors holding certificates of title. At the same time the Board shall file with the Secretary of State a report containing a complete statement of receipts and disbursements of the Board for the preceding fiscal year ending June 30. Such statement shall be attested by the secretary-treasurer of the Board. (1975, c. 741, s. 6.)

§ 89D-7. Denial, revocation or suspension of certificate.

(a) The Board shall have power to revoke or suspend certificates of title herein provided. The Board may upon its own motion or upon a verified complaint in writing hold a hearing as hereinafter provided to investigate the actions of any titled landscape contractor. The Board shall have the power to suspend or revoke any certificate of title issued under the provisions of this Chapter if the registrant has by false or fraudulent representations obtained a certificate; if the registrant has been convicted or has entered a plea of nolo contendere to any crime involving moral turpitude in any court, State or federal; if the registrant is found to have committed any act which constitutes improper, fraudulent or dishonest dealing; or if the registrant violates any rule or regulation duly promulgated by the Board.

(b) Chapter 150B of the General Statutes applies to proceedings under this section to deny, revoke, or suspend a certificate. (1975, c. 741, s. 7; 1987, c. 827, s. 74.)

§ 89D-8. Out-of-state applicants.

An applicant from another state which offers registration privileges to residents of North Carolina may be registered by conforming to all the provisions of this Chapter and, in the discretion of the Board, such other terms and conditions as are required of North Carolina residents applying for a certificate in such other state. The Board may exempt from the examination prescribed in this Chapter a landscape contractor duly registered in another state if a similar exemption is extended to registered landscape contractors from North Carolina. (1975, c. 741, s. 8.)

§ 89D-9. Persons in practice prior to July 1, 1976.

Before July 1, 1976, any person, partnership, corporation or other legal entity submitting an application, application fee and evidence satisfactory to the Board that he has actively engaged in the practice of landscape contracting for one year prior to July 1, 1976, shall be issued a certificate of title without the requirement of examination. (1975, c. 741, s. 10.)

§ 89D-10. Injunctions for violation of Chapter.

The Board shall have authority to petition for, and the superior courts of the State shall have authority to issue, temporary restraining orders, and preliminary and permanent injunctions for violations of this Chapter. (1975, c. 741, s. 11.)

Chapter 89E.

Geologists Licensing Act.

Sec.
89E-1. Short title.
89E-2. Purpose.
89E-3. Definitions.
89E-4. North Carolina Board for Licensing of Geologists; appointments; terms; composition.
89E-5. Functions and duties of the Licensing Board.
89E-6. Exemptions.
89E-7. Limitations.
89E-8. Applications.
89E-9. Minimum qualifications.
89E-10. Examinations.
89E-11. Comity.
Sec.
89E-12. Issuance, renewal and replacement of licenses.
89E-13. Seals; requirements.
89E-14. Records.
89E-15. Roster of licensed geologists.
89E-16. Code of professional conduct.
89E-17. Complaints and investigations.
89E-18. Prohibitions; unlawful acts.
89E-19. Disciplinary procedures.
89E-20. Hearing procedures.
89E-21. Reissuance of license.
89E-22. Misdemeanor.
89E-23. Injunction.
89E-24. Attorney General as legal advisor.

§ 89E-1. Short title.

This Chapter shall be known as the North Carolina Geologists Licensing Act. (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

Cross References. — As to limited liability companies and their powers, see G.S. 57C-2-01 et seq.

Legal Periodicals. — For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

§ 89E-2. Purpose.

The purposes of this Chapter are to protect life, property, health and public welfare through the regulation of the practice of geology in the State of North Carolina; to define the practice of geology as a profession, establishing minimum professional standards of ethical conduct, professional responsibility, educational and experience background; and to prevent abuses of the practice of geology by untrained or unprincipled individuals. (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

§ 89E-3. Definitions.

When used in this Chapter, unless the context otherwise requires:

(1) "Board" means the North Carolina Board for Licensing of Geologists.

(2) "Geologist". The term "geologist", within the intent of this Chapter, shall mean a person who is trained and educated in the science of geology.

(3) The term "geologist-in-training" means a person who has taken and successfully passed the portion of professional examination covering fundamental or academic geologic subjects, prior to his completion of the requisite years of experience in geologic work as provided for in this Chapter.

(4) "Geology" means the science dealing with the earth and its history; investigation, prediction and location of the materials and structures which compose it; the natural processes that cause change in the earth; and the applied science of utilizing knowledge of the earth and its constituent rocks, minerals, liquids, gases and other materials for the benefit of mankind. This definition shall not include any of the following:

a. Service or creative works, the adequate performance of which requires engineering education, training, and experience.
b. The assessment of an underground storage tank required by applicable rules at closure or change in service unless there has been a discharge or release of the product from the tank.

(5) The term "good moral character" means such character as tends to ensure the faithful discharge of the fiduciary duties of the licensed geologist to his client.

(6) "License" means a certificate issued by the Board recognizing the individual named in this certificate as meeting the requirements for licensing under this Chapter.

(7) "Licensed geologist" means a person who is licensed as a geologist under the provisions of this Chapter.

(8) "Public practice of geology" means the performance for others of geological service or work in the nature of work or consultation, investigation, surveys, evaluations, planning, mapping and inspection of geological work, in which the performance is related to the public welfare of safeguarding of life, health, property and the environment, except as specifically exempted by this Chapter. The definition shall not include or allow the practice of engineering as defined in Chapter 89C of the North Carolina General Statutes.

(9) The term "qualified geologist" means a person who possesses all of the qualifications specified in this Chapter for licensing except that he or she is not licensed.

(10) The term "responsible charge of work" means the independent control and direction by the use of initiative, skill and independent judgment of geological work or the supervision of such work.

(11) The term "subordinate" means any person who assists a licensed geologist in the practice of geology without assuming the responsible charge of work. (1983 (Reg. Sess., 1984), c. 1074, s. 1; 1996, 2nd Ex. Sess., c. 18, s. 7.10(j).)

§ 89E-4. North Carolina Board for Licensing of Geologists; appointments; terms; composition.

(a) The North Carolina Board for Licensing of Geologists shall have the power and responsibility to administer the provisions of this Chapter in compliance with Chapter 150B of the General Statutes.

(b) The Board shall consist of five members appointed by the Governor in the manner hereinafter prescribed, and in addition the State geologist shall serve on the Board ex officio. The Governor may remove any member of the Board for neglect of duty or malfeasance or violation of this Chapter or conviction of a felony or other crime of moral turpitude, but for no other reason.

(c) Each member of the Board shall be a citizen of the United States and shall have been a resident of this State for at least six months immediately preceding his or her appointment.

(d) All members of the initial Board shall be appointed by the Governor and shall at the time of their appointment qualify for licensing under this Chapter except for the lay member appointee. At all times at least one member of the Board shall be an academic geologist; one member shall be a salaried company geologist; one member shall be an independent or consultant geologist; one member shall be a representative from the mining industry; one member shall be a consumer or lay member who is not a geologist; and in addition, the State geologist shall serve as a permanent ex officio member.

(e) After the establishment of the initial Board, all members, with the exception of the lay member, shall be so licensed under the provisions of this

Chapter. The term of office of each member of the Board shall be three years; provided, however, that of the members first appointed, one shall be appointed for a term of one year; two for terms of two years; and two for terms of three years in the discretion of the Governor. No member shall serve more than two consecutive three-year terms without an interruption in service of at least one year.

(f) Each term of service on the Board shall expire on the 30th day of June of the year in which the term expires. As the term of a member expires, the Governor shall make the appointment for a full term, or, if a vacancy occurs for any other reason, for the remainder of the unexpired term.

(g) Members of the Board may receive compensation for their services and reimbursement for expenses incurred in the performance of duties required by this Chapter at the rates prescribed in G.S. 138-5, subject to availability of funds.

(h) The Board may employ the necessary personnel for performance of its functions, and fix their compensation within the limits of funds available to the Board. (1983 (Reg. Sess., 1984), c. 1074, s. 1; 1987, c. 827, s. 75; 1989, c. 579, s. 1.)

§ 89E-5. Functions and duties of the Licensing Board.

(a) The Board shall administer and enforce the provisions of this Chapter.

(b) The Board shall elect from its membership a chairman, a vice-chairman and a secretary-treasurer, and adopt rules, consistent with the Administrative Procedures Act, to govern its proceedings. A majority of the membership of the Board shall constitute a quorum for all Board meetings.

(c) The Board shall examine and pass on the qualifications of all applicants for licensing under this Chapter, and shall issue a license to each successful applicant therefor.

(d) The Board may adopt a seal which may be affixed to all licenses issued by the Board.

(e) The Board may authorize expenditures deemed necessary to carry out the provisions of this Chapter and all expenses shall be paid upon the warrant of the Board treasurer. The Board treasurer shall deposit funds received by the Board in one or more funds in banks or other financial institutions carrying deposit insurance and authorized to do business in North Carolina. Interest earned on such funds may remain in the funds account and may be expended as authorized by the Board to carry out the provisions of this Chapter. In no event may expenditures exceed the revenues of the Board during any fiscal year. The Board is authorized and empowered to utilize the services of the Purchase and Contract Division of the Department of Administration for the procurement of personal property, in accordance with Article 3 of Chapter 143 of the General Statutes.

(f) The Board shall hold a meeting within 30 days after a quorum of its members is first appointed and thereafter shall hold at least two regular meetings each year.

(g) The Board shall establish and receive fees as required by this Chapter. In establishing fees, the Board shall consider exemptions from fees or a reduction in licensing fees for those persons otherwise qualified for licensing under this Chapter but who perform geologic work or services less than 15 days per year.

(h) The Board shall have such other powers and duties as are necessary to carry out the provisions of this Chapter.

(i) The Board shall have the power to establish or approve reasonable standards for licensing and renewal of licenses of geologists, including, but not limited to the power to adopt or use examination materials and accreditation standards of any duly professionally recognized accrediting agency. The Board shall have the power to establish reasonable standards for continuing professional education for geologists, provided that for renewal of license no examination shall be required. (1983 (Reg. Sess., 1984), c. 1074, s. 1; 1989, c. 579, s. 2.)

§ 89E-6. Exemptions.

Any person except as specifically exempted below who shall publicly practice or offer to publicly practice geology in this State is subject to the provisions of this Chapter. The following persons are exempt:

(1) Persons engaged solely in teaching the science of geology or engaged solely in geologic research in this State may pursue their teaching and/or research without licensing. A teacher or researcher must, however, be a licensed geologist if he or she performs geologic work and services for which a licensed geologist is required by this Chapter.

(2) Officers and employees of the United States of America and the State of North Carolina practicing solely as such officers or employees.

(3) Officers and employees of petroleum companies practicing solely as such officers and employees and not offering their professional services to the public for hire.

(4) A subordinate to a geologist or a geologist-in-training licensed under this Chapter insofar as he or she acts solely in such capacity. This exemption does not permit any such subordinate to practice geology for others in his own right or use the term "licensed geologist". (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

OPINIONS OF ATTORNEY GENERAL

Violations of Code of Professional Conduct. — The North Carolina Board for Licensing of Geologists has the authority to investigate written charges that a geologist, licensed in North Carolina, has violated the Code of Professional Conduct; after such investigation, the Board may refuse to grant or renew, or may suspend or may revoke the license of any geologist licensed under the Act who has violated the Code, including a State official or employee performing his or her assigned duties. However, a State official or employee who loses his license for violations of the Code is still exempt from the provisions of the Act, and thus would not be prevented from practicing geology for the State without a license should the agency decide to retain him. See opinion of Attorney General to Mr. Robert Upton, Board Administrator, North Carolina Board for Licensing of Geologists, 1998 N.C.A.G. 17 (3/19/98).

§ 89E-7. Limitations.

(a) This Chapter does not prohibit one or more geologists from practicing through the business organization of a sole proprietorship; partnership; corporation or professional association. In a partnership, the primary activity of which consists of geological services, at least one partner shall be a licensed geologist as defined in this Chapter. A corporation or professional association providing geological services shall comply with the provisions of Chapter 55B of the General Statutes.

(b) This Chapter shall not be construed to prevent or to affect:

(1) The practice of any profession or trade for which a license is required under any other law of this State, or the practice of registered professional engineers from lawfully practicing soils mechanics, foundation engineering and other professional engineering as provided in the North Carolina General Statutes, or licensed architects or landscape architects from lawfully practicing architecture or landscape architecture, or the practice of soil science by professionals certified by

the Soil Science Society of North Carolina, respectively as provided in the General Statutes;

(2) The public practice of geology by a person not a resident of and having no established place of business in this State, when such practice does not exceed in the aggregate more than 90 days in any calendar year, and provided such person is duly licensed to practice such profession in another state where the requirements for a license are not lower than those specified in this Chapter for obtaining the license required for such work; and provided further that such nonresident shall file with the Board within 10 days of entering this State for commencing of such work, a statement giving his name, residence, the number of his license, and by what authority issued, and upon the completion of the work, a statement of the time engaged in such work within the State; or

(3) The practice of a person not a resident and having no established place of business in this State, or who has recently become a resident hereof, practicing or offering to practice herein for more than 90 days in any calendar year the profession of geology, if he is licensed in another state or qualified as defined herein, if he shall have filed with the Board an application for a license and shall have paid the fee required by this Chapter. Such practice shall be deemed a provisional practice and shall continue only for such time as the Board requires reasonably for the consideration of the applicant for licensing under this Chapter as a geologist. (1983 (Reg. Sess., 1984), c. 1074, s. 1; 1991, c. 205, s. 5.)

§ 89E-8. Applications.

An application for licensing as a geologist shall be made under oath, shall show the applicant's education and a summary of his geological work, plus other relevant criteria to be determined by the Board. The Board shall have the power to determine a reasonable application fee which shall accompany each application. (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

§ 89E-9. Minimum qualifications.

An applicant shall be eligible for a license as a geologist in North Carolina provided that each applicant meets the following minimum qualifications:

(1) Be of good moral and ethical character.

(2) Have graduated from an accredited college or university, and have a degree with a major in geology, engineering geology or geological engineering or related geologic science; or have completed 30 semester hours or the equivalent in geological science courses leading to a major in geology, of which at least 24 hours of the equivalent were upper level undergraduate courses or graduate courses. The Board shall waive the academic requirements for a person already practicing geology at the time this Chapter is enacted, provided application for license is made not later than one year after appointment of the initial Board and provided further that the applicant can provide evidence to satisfy the Board that he or she is competent to engage in the public practice of geology.

(3) Successfully pass such examination established by the Board which shall be designed to demonstrate that the applicant has the necessary knowledge and requisite skill to exercise the responsibilities of the public practice of geology. The Board shall waive the examination for licensing as a geologist of an applicant who makes written application

to the Board not later than one year after appointment of the initial Board, and who otherwise meets the qualification of this Chapter.

(4) Have at least five years of professional geological work which shall include a minimum of three years of professional geological work under the supervision of a licensed geologist; or a minimum of three cumulative years work in responsible charge of geological work satisfactory to the Board. The following criteria of education and experience qualify as specified toward accumulation of the required five years of professional geological work:

a. Each full year of undergraduate study in the geological sciences shall count as one-half year of training up to a maximum of two years, and each year of graduate study shall count as one year of work.

b. Credit for undergraduate study, graduate study, graduate courses, individually or in any combination thereof, shall in no case exceed a total of four years toward meeting the requirements for at least five years of professional geological work as set forth above.

c. The Board may consider in lieu of the above professional geological work the cumulative total of professional geological work or geological research of persons teaching upper level geology courses at the college or university level, provided such work or research can be demonstrated to be of a sufficiently responsible nature to be equivalent to the professional requirements set forth in this section.

d. The ability of the applicant shall have been demonstrated by his having performed the work in a responsible position as determined by the Board. The adequacy of the required supervision and the experience shall be determined by the Board in accordance with the standards set forth in regulations adopted by it. (1983 (Reg. Sess., 1984), c. 1074, s. 1; 1989, c. 579, s. 3.)

Editor's Note. — The enactment of this Chapter, as referred to in subdivision (2) above, was effectuated by Session Laws 1983 (Reg. Sess., 1984), c. 1074, which was ratified July 3, 1984.

§ 89E-10. Examinations.

(a) Examinations shall be formulated and conducted by the Board at such time and place as the Board shall determine, but shall be held at least annually.

(b) The Board shall determine the fee required for examination. (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

§ 89E-11. Comity.

A person holding a license to engage in the practice of geology, on the basis of comparable licensing requirements issued to him by a proper authority by the State, territory, or possession of the United States or the District of Columbia, and who, in the opinion of the Board otherwise meets the requirements of this Chapter based upon verified evidence may, upon application, be licensed without further examination. (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

§ 89E-12. Issuance, renewal and replacement of licenses.

(a) The Board shall issue a license upon payment of the license fee as fixed by the Board to any applicant who has satisfactorily met all the requirements of the Chapter as administered by the Board. Licenses shall show the full name of the registrant, shall give a serial number, and shall be signed by the chairman and secretary of the Board under the seal of the Board. The issuance of a license by the Board shall be prima facie evidence that the person named therein is entitled to all the rights and privileges of a licensed geologist while the license remains in full force and effect.

(b) All licenses shall expire at such interval as may be determined by the Board, unless licenses are renewed. All applications for renewal shall be filed with the Board under rules and regulations it shall adopt and which renewal shall be accompanied by the renewal fee prescribed by the Board. A license which has expired for failure to renew may only be restored after application and payment of the prescribed restoration fee, provided the renewal applicant meets all other provisions of this Chapter.

(c) A new license to replace any license lost, destroyed or mutilated may be issued, subject to the rules of the Board and payment of a fee set by the Board. (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

§ 89E-13. Seals; requirements.

Each geologist licensed hereunder, upon the issuance of a license, shall obtain from the secretary at a cost prescribed by the Board, a seal of the design authorized by the Board bearing the licensee's name and the legend "Licensed Geologist — State of North Carolina". All drawings, reports or other geologic papers or documents involving geologic work as defined in this Chapter which shall have been prepared or approved by a licensed geologist or a subordinate employee under his direction for the use of or for delivery to any person or for public record within this State shall be signed by him or her and impressed with the said seal or the seal of a nonresident practicing under the provisions of this Chapter, either of which shall indicate his or her responsibility therefor. (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

§ 89E-14. Records.

(a) The Board shall keep a public record of its proceedings and a register of all applications for licensing.

(b) The register shall show:
(1) The name, the age and the residency of each applicant;
(2) The date of application;
(3) The place of business of such applicant;
(4) His or her education and other qualifications;
(5) Whether or not an examination was required;
(6) Whether the applicant was licensed;
(7) Whether a license was granted;
(8) The dates of the action by the Board; and
(9) Such other information as may be deemed necessary by the Board. All official records of the Board or affidavits by the secretary as to the content of such records shall be prima facie evidence of all matters required to be kept therein.

(c) The Board shall treat as confidential and not subject to disclosure except to the extent required by law or by rule or regulation of the Board individual test scores and applications and material relating thereto, including letters of reference relating to an application. (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

§ 89E-15. Roster of licensed geologists.

The secretary shall keep a record and shall publish annually a roster showing the names and places of business and residence addresses of all licensed geologists. Copies of this roster shall be made available to the public upon request and payment of reasonable fee for copying established by the Board. (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

§ 89E-16. Code of professional conduct.

This Board shall cause to have prepared and shall adopt a code of professional conduct which shall be made known in writing to every licensee and applicant for licensing under this Chapter and which shall be published by the Board. Such publication shall constitute due notice to all licensees. The Board may revise and amend this code of ethics from time to time after due notice and opportunity for hearing to all licensed members and the public for comment before adoption of the revision or amendments. (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

§ 89E-17. Complaints and investigations.

(a) Any person may file written charges with the Board against any licensee pursuant to rules and regulations adopted by the Board; provided however, such charges or allegations shall be in writing and shall be sworn to by the person or persons making them and shall be filed with the secretary. The Board shall have the authority and shall be under a duty to investigate reasonably all valid complaints.

(b) The Board may appoint, employ, or retain investigators for the purpose of examining or inquiring into any acts committed in this State that may violate the provisions of this Chapter, the Board's code of professional conduct, or the Board's rules. The Board may expend funds for salaries and fees in connection with an investigation conducted pursuant to this Chapter.

(c) Investigations by the Board shall be confidential until the Board takes disciplinary action against a licensee or corporate registrant. Records, papers, and other documents containing information collected or compiled by the Board, its members, or employees as a result of an investigation, inquiry, or interview conducted pursuant to this Chapter shall not be a public record within the meaning of Chapter 132 of the General Statutes, except any notice or statement of charges or notice of hearing in any proceeding conducted by the Board and any records, papers, or other documents containing information collected and compiled by the Board and admitted into evidence in a hearing before the Board shall be a public record. (1983 (Reg. Sess., 1984), c. 1074, s. 1; 1999-355, s. 1.)

§ 89E-18. Prohibitions; unlawful acts.

After the effective date of this Chapter:

(1) It shall be unlawful for any person other than a licensed geologist or a subordinate under his direction to prepare any geologic plans, reports or documents in which the performance is related to the public welfare or safeguarding of life, health, property or the environment.

(2) It shall be unlawful for any person to publicly practice, or offer to publicly practice, geology in this State as defined in the provisions of this Chapter, or to use in connection with his or her name or otherwise assume, or advertise any title or description tending to convey the impression that he or she is a licensed geologist, unless such person has been duly licensed or exempted under the provisions of this Chapter.

(3) After one year following the effective date of this act, it shall be unlawful for anyone other than a geologist licensed under this

Chapter to stamp or seal any plans, plats, reports or other documents with the seal or stamp of a licensed geologist, or to use in any manner the title "Licensed Geologist" unless that person is licensed hereunder.

(4) It shall be unlawful for any person to affix his or her signature to or to stamp or seal any plans, plats, reports, or other documents after the licensing of the person named thereon has expired or has been suspended or revoked unless the license has been renewed or reissued. (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

CASE NOTES

Cited in State v. Clemmons, 111 N.C. App. 569, 433 S.E.2d 748 (1993).

§ 89E-19. Disciplinary procedures.

(a) The Board, consistent with the provisions of Article 3A of Chapter 150B of the General Statutes, may refuse to grant a license to any applicant who does not meet the qualifications required by this Chapter, the Board's code of professional conduct, or the Board's rules, or to any corporate registrant that does not meet such qualifications and the requirements of Chapter 55B of the General Statutes. The Board, consistent with the provisions of Article 3A of Chapter 150B of the General Statutes, may refuse to renew, suspend, or revoke a license or certificate of registration if a licensee or corporate registrant:

(1) Violates the provisions of this Chapter, the Board's code of professional conduct, the Board's rules, or an order issued by the Board.

(2) Has been convicted of a misdemeanor under G.S. 89E-22.

(3) Has been convicted of a felony.

(4) Engages in gross unprofessional conduct, dishonest practice, or professional incompetence.

(5) Commits fraud or deceit in obtaining a license or certificate of registration or in assisting another person in obtaining a license or certificate of registration.

(b) If the Board finds that a licensee is professionally incompetent, the Board may require the licensee to take an oral or written examination or to meet other requirements to demonstrate the licensee's fitness to practice geology, and the Board may suspend the licensee's license until he or she establishes professional competence to the satisfaction of the Board.

(c) In addition to the authority granted in subsections (a) and (b) of this section, the Board may levy a civil penalty not in excess of five thousand dollars ($5,000) for any licensee or corporate registrant who violates the provisions of this Chapter, the Board's code of professional conduct, the Board's rules, or any order issued by the Board. All civil penalties collected by the Board shall be remitted to the school fund of the county in which the violation occurred. Before assessing a civil penalty, the Board shall consider the following:

(1) The nature, gravity, and persistence of the violation.

(2) The appropriateness of the imposition of a civil penalty when considered alone or in combination with other action taken by the Board.

(3) Whether the violation was willful.

(4) Any other factors that tend to mitigate or aggravate the violation.

(d) The Board may bring a civil action in the superior court of the county in which the violation occurred to recover a civil penalty if a licensee or corporate registrant does one of the following:

(1) Fails to request a hearing on the imposition of a civil penalty and fails to pay the civil penalty within 30 days after being notified that a civil penalty has been imposed.

(2) Requests and receives a hearing on the imposition of a civil penalty but fails to pay the civil penalty within 30 days after service of a written copy of the Board's decision. (1983 (Reg. Sess., 1984), c. 1074, s. 1; 1987, c. 827, s. 1; 1999-355, s. 2.)

OPINIONS OF ATTORNEY GENERAL

Violations of Code of Professional Conduct. — The North Carolina Board for Licensing of Geologists has the authority to investigate written charges that a geologist, licensed in North Carolina, has violated the Code of Professional Conduct; after such investigation, the Board may refuse to grant or renew, or may suspend or may revoke the license of any geologist licensed under the Act who has violated the Code, including a State official or employee performing his or her assigned duties. However, a State official or employee who loses his license for violations of the Code is still exempt from the provisions of the Act, and thus would not be prevented from practicing geology for the State without a license should the agency decide to retain him. See opinion of Attorney General to Mr. Robert Upton, Board Administrator, North Carolina Board for Licensing of Geologists, 1998 N.C.A.G. 17 (3/19/98).

§ 89E-20. Hearing procedures.

(a) The Board shall develop procedures for investigation, prehearing and hearing of disciplinary actions; such disciplinary actions shall be conducted pursuant to the provisions of Chapter 150B of the General Statutes.

(b) Any person aggrieved by a decision of the Board other than a decision in a disciplinary action may petition the Board for a hearing pursuant to the provisions of Chapter 150B of the General Statutes.

(c) Judicial review of a final agency decision is available in the manner prescribed by Article 4, Chapter 150B of the General Statutes. (1983 (Reg. Sess., 1984), c. 1074, s. 1; 1987, c. 827, ss. 1, 76.)

§ 89E-21. Reissuance of license.

The Board, by a majority vote of the quorum, may reissue a license to any person whose license has been revoked when the Board finds upon written application by the applicant that there is good cause to justify such reissuance. (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

§ 89E-22. Misdemeanor.

Any person who shall willfully practice publicly, or offer to practice publicly, geology for other natural or corporate persons in this State without being licensed in accordance with the provisions of this Chapter, or any person presenting or attempting to use as his own the license or the seal of another, or any person who shall give any false or forged evidence of any kind in obtaining a license, or any person who shall falsely impersonate any other licensee of like or different name, or any person who shall attempt to use an expired or revoked license or practice at any time during a period the Board has suspended or revoked the license, or any person who shall violate the provisions of this Chapter shall be guilty of a Class 2 misdemeanor. (1983 (Reg. Sess., 1984), c. 1074, s. 1; 1993, c. 539, s. 613; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 89E-23. Injunction.

As an additional remedy, the Board shall have the authority to proceed in a superior court appropriate jurisdiction to enjoin and restrain any natural or corporate person from violating the prohibitions of this Chapter. The Board shall not be required to post bond in connection with obtaining either provisional, preliminary or permanent injunctive relief pursuant to the North Carolina Rules of Civil Procedure or G.S. 1-485 et seq. (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

Editor's Note. — The Rules of Civil Procedure, referred to in this section, are codified at G.S. 1A-1.

§ 89E-24. Attorney General as legal advisor.

The Attorney General or any assistant or associate in the Department of Justice selected by him shall act as legal advisor to the Board. (1983 (Reg. Sess., 1984), c. 1074, s. 1.)

Chapter 89F.

North Carolina Soil Scientist Licensing Act.

Sec.
89F-1. Short title.
89F-2. Purposes.
89F-3. Definitions.
89F-4. North Carolina Board for Licensing of Soil Scientists.
89F-5. Powers and duties of the Board.
89F-6. Corporate, limited liability company, partnership, or sole proprietorship practice of soil science.
89F-7. Exemptions.
89F-8. Limitations.
89F-9. Applications.
89F-10. Minimum qualifications.
89F-11. Examinations.
89F-12. Comity.

Sec.
89F-13. Issuance, renewal, and replacement of licenses.
89F-14. Seals; requirements.
89F-15. Records.
89F-16. Roster of licensed soil scientists.
89F-17. Code of Professional Conduct.
89F-18. Complaints.
89F-19. Prohibitions; unlawful acts.
89F-20. Disciplinary procedures.
89F-21. Reissuance of license.
89F-22. Misdemeanors.
89F-23. Injunctive relief.
89F-24. Legal advisor.
89F-25. Fees.

§ 89F-1. Short title.

This Chapter may be cited as the North Carolina Soil Scientist Licensing Act. (1995, c. 414, s. 1.)

§ 89F-2. Purposes.

The purposes of this Chapter are to protect life, property, health, and public welfare through regulation of the practice of soil science in the State; to define the practice of soil science as a profession by establishing minimum standards of ethical conduct and professional responsibility and by establishing professional education and experience requirements; and to prevent abuses in the practice of soil science by untrained or unprincipled individuals. (1995, c. 414, s. 1.)

§ 89F-3. Definitions.

As used in this Chapter, unless the context otherwise requires:

(1) "Board" means the North Carolina Board for Licensing of Soil Scientists.

(2) "License" means a certificate issued by the Board to an individual who meets the requirements established for a licensed soil scientist by this Chapter and rules adopted pursuant to this Chapter.

(3) "Licensed soil scientist" means a person who is licensed as a soil scientist under this Chapter.

(4) "Practice of soil science" means any service or work, the adequate performance of which requires education in the physical, chemical, and biological sciences, as well as soil science; training and experience in the application of special knowledge of these sciences to the use and management of soils by accepted principles and methods; and investigation, evaluation, and consultation; and in which the performance is related to the public welfare by safeguarding life, health, property, and the environment. "Practice of soil science" includes, but is not limited to, investigating and evaluating the interaction between water, soil, nutrients, plants, and other living organisms that are used to prepare soil scientists' reports for: subsurface ground absorption

systems, including infiltration galleries; land application of residuals such as sludge, septage, and other wastes; spray irrigation of wastewater; soil remediation at conventional rates; land application of agricultural products; processing residues, bioremediation, and volatilization; soil erodibility and sedimentation; and identification of hydric soil and redoximorphic features.

(5) "Responsible charge of work" means the independent control and direction by the use of initiative, skill, and independent judgment in the practice of soil science or supervision of the practice of soil science by soil scientists-in-training and subordinates.

(6) "Soil" means the site or environmental setting consisting of soil material, saprolite, weathered materials, and soil rock interface. "Soil" includes the solid materials, waters, gases, and other biological, chemical, and contaminant materials in the soil environment.

(7) "Soil science" means the science dealing with soils as an environmental resource. "Soil science" includes the following tasks: soil characterization, classification, and mapping, and the physical, chemical, hydrologic, mineralogical, biological, and microbiological analysis of soil per se, and to its assessment, analysis, modeling, testing, evaluation, and use for the benefit of mankind when specifically required to complete the investigation and evaluation of interactions between water, soil, nutrients, plants, and other living organisms described in subdivision (5) of this section. "Soil science" does not include design or creative works, the adequate performance of which requires extensive geological, engineering, or land surveying education, training, and experience or requires licensing as a geologist under Chapter 89E of the General Statutes or as a professional engineer or land surveyor under Chapter 89C of the General Statutes.

(8) "Soil scientist" means a person who practices soil science.

(9) "Soil scientist-in-training" means a person who has passed the examination and satisfied all other requirements for licensure under this Chapter except for the professional work experience requirement.

(10) "Subordinate" means any person who assists a licensed soil scientist in the practice of soil science without assuming the responsible charge of work. (1995, c. 414, s. 1.)

§ 89F-4. North Carolina Board for Licensing of Soil Scientists.

(a) Creation; Membership. — The North Carolina Board for Licensing of Soil Scientists is created. The Board shall consist of seven members appointed as follows:

(1) One member appointed by the Governor, who shall be a soil scientist employed by a federal or State agency.

(2) One member appointed by the Governor, who shall be a soil scientist employed by a local government agency.

(3) One member appointed by the Governor, who shall be a soil scientist employed by an institution of higher education.

(4) One member appointed by the General Assembly upon recommendation of the Speaker of the House of Representatives, who shall be a soil scientist who is privately employed.

(5) One member appointed by the General Assembly upon recommendation of the Speaker of the House of Representatives, who shall be a member of the public who is not a soil scientist.

(6) One member appointed by the General Assembly upon recommendation of the President Pro Tempore of the Senate, who shall be a soil scientist who is privately employed.

(7) One member appointed by the General Assembly upon recommendation of the President Pro Tempore of the Senate, who shall be a member of the public who is not a soil scientist.

(b) Ex Officio Member. — In addition to the members of the Board appointed pursuant to subsection (a) of this section, the President of the Soil Science Society of North Carolina, or a member of the Society appointed by its President, shall serve as a nonvoting ex officio member of the Board.

(c) Terms. — Members shall serve staggered terms of office of three years. No member shall serve more than six consecutive years without an interruption in service of at least one year. The terms of office of members filling positions four and six shall expire on 30 June of years evenly divisible by three. The terms of office of members filling positions five and seven shall expire on 30 June of years that follow by one year those years that are evenly divisible by three. The terms of office of members filling positions one, two, and three shall expire on 30 June of years that precede by one year those years that are evenly divisible by three. Terms shall expire as provided by this subsection except that members of the Board shall serve until their successors are appointed and duly qualified as provided by G.S 128-7.

(d) Vacancies; Removal. — Vacancies in appointments shall be filled for the unexpired term. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122. The Governor shall have the power to remove, in accordance with G.S 143B-13, any member appointed by the Governor. The General Assembly shall have the power to remove, in accordance with G.S 143B-13, any member appointed by the General Assembly.

(e) Quorum. — A majority of the members of the Board appointed pursuant to subsection (a) of this section shall constitute a quorum for the transaction of business.

(f) Compensation; Expenses. — Subject to the availability of funds, members of the Board may receive compensation for their services and be reimbursed for expenses incurred in the performance of duties required by this Chapter at the rates prescribed in G.S. 138-5. (1995, c. 414, s. 1.)

§ 89F-5. Powers and duties of the Board.

(a) The Board shall:

(1) Administer and enforce the provisions of this Chapter.

(2) Elect from its membership a Chair, a Vice-Chair, and a Secretary-Treasurer.

(3) Examine and pass on the qualifications of all applicants for licensing under this Chapter and issue a license to each successful applicant.

(4) Hold at least two regular meetings each year.

(5) Establish and receive fees as required by this Chapter. In establishing fees, the Board may provide for reduced fees or an exemption from fees for persons licensed under this Chapter who practice soil science for less than 15 days per calendar year.

(6) Adopt rules that establish standards or approve reasonable standards for licensing and renewal of licenses of soil scientists, including adopting examination materials and accreditation standards of any recognized accrediting agency.

(7) Establish reasonable standards for continuing professional education for soil scientists. No examination shall be required for a renewal of a license.

(8) Submit two nominees to the appropriate appointing authority for each position to be filled on the Board.

(9) Have any other powers and duties as are necessary to implement the provisions of this Chapter and adopt any rules needed to implement this Chapter.

(b) The Board may adopt a seal that may be affixed to all licenses issued by the Board.

(c) The Secretary-Treasurer shall deposit funds received by the Board, except for the clear proceeds of civil penalties assessed pursuant to G.S. 89F-20(b), in one or more funds in banks or other financial institutions carrying deposit insurance and authorized to do business in the State. Interest earned on funds may remain in the account and may be expended as authorized by the Board to carry out the provisions of this Chapter. The Board may authorize expenditures deemed necessary to carry out the provisions of this Chapter, and all expenses shall be paid upon the warrant of the Secretary-Treasurer. During any fiscal year, expenditures shall not exceed the revenues of the Board.

The clear proceeds of civil penalties shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(d) The Board may employ the necessary personnel for the performance of its functions and shall fix their compensation within the limits of funds available to the Board. The Board may procure personal property in accordance with the provisions of Article 3 of Chapter 143 of the General Statutes.

(e) The Board may adopt rules in accordance with Chapter 150B of the General Statutes and shall administer this Chapter in accordance with Chapter 150B of the General Statutes. (1995, c. 414, s. 1; 1998-215, s. 135.)

§ 89F-6. Corporate, limited liability company, partnership, or sole proprietorship practice of soil science.

A corporation organized under Chapter 55B of the General Statutes, a limited liability company organized under Chapter 57C of the General Statutes, a partnership, or a sole proprietorship may engage in the practice of soil science in this State. A licensed soil scientist shall be in responsible charge of all practice of soil science by the corporation, limited liability company, partnership, or sole proprietorship. (1995, c. 414, s. 1; 2000-115, s. 7.)

§ 89F-7. Exemptions.

(a) Except as provided in subsection (b) of this section, any person who practices or offers to practice soil science in this State is subject to the provisions of this Chapter.

(b) The following are exempt from the provisions of this Chapter:

(1) Persons engaged solely in teaching soil science or engaged solely in soil science research.

(2) Officers and employees of the United States, the State, and units of local government who practice soil science solely in the capacity of their office or employment.

(3) Officers and employees of companies engaged in the practice of soil science, when the officers and employees practice soil science solely in the capacity of their employment and who do not offer their services to the public for hire. (1995, c. 414, s. 1.)

§ 89F-8. Limitations.

This Chapter shall not prevent:

(1) The practice of any profession or trade for which a license is required under any other law of this State.

(2) Registered professional engineers from lawfully practicing soil mechanics, foundation engineering, or other professional engineering

practices for which a license is required pursuant to Chapter 89C of the General Statutes.

(3) Registered land surveyors licensed pursuant to Chapter 89C of the General Statutes from practicing surveying.

(4) Architects licensed pursuant to Chapter 83A of the General Statutes or landscape architects licensed pursuant to Chapter 89A of the General Statutes from lawfully practicing architecture or landscape architecture.

(5) Geologists licensed pursuant to Chapter 89E of the General Statutes from practicing geology.

(6) The practice of soil science for 30 days or less in any calendar year by a person who is not a resident of this State and who has no established place of business in this State if the person:

  a. Is licensed to practice soil science in another state where the requirements for a license equal or exceed the requirements for licensure under this Chapter;

  b. Files a statement giving the person's name, address, the license number, and issuing authority with the Board within 10 days of commencing the practice of soil science in this State; and

  c. Files a statement with the Board detailing the total time that the person engaged in the practice of soil science in the State within 10 days of the day on which the practice of soil science is completed.

(7) The practice of soil science by a person who is not a resident of this State and who has no established place of business in this State, the practice of soil science by a person who has become a resident of this State within the preceding 30 days, or the practice or an offer to practice soil science for more than 30 days in any calendar year by a person who is licensed as a soil scientist in another state, who meets the licensing requirements of this Chapter, and who has filed an application for a license with the Board and paid the application fee. The practice of soil science under this subdivision shall continue only until the Board acts on the application for licensure under this Chapter.

(8) Soil sampling solely for the purpose of determining plant nutrient and lime application rates for gardening and agricultural purposes by persons who are not licensed soil scientists. (1995, c. 414, s. 1.)

§ 89F-9. Applications.

An application for a license as a soil scientist shall be made under oath, shall show the applicant's education and a summary of the applicant's professional work experience as a soil scientist, and shall show any other relevant criteria as determined by the Board. (1995, c. 414, s. 1.)

§ 89F-10. Minimum qualifications.

(a) To be eligible for a license as a soil scientist in this State, an applicant shall satisfy the following minimum qualifications:

(1) Be of good moral and ethical character as attested to by (i) four letters of reference, two of which shall be written by licensed soil scientists or persons who are eligible for licensure under this Chapter, and (ii) an agreement signed by the applicant to adhere to the Code of Professional Conduct adopted pursuant to G.S. 89F-17. For purposes of this requirement, "good moral and ethical character" means character that tends to ensure faithful discharge of the duties of a licensed soil scientist.

(2) Hold at least a bachelor of science degree from an accredited college or university with a minimum of 30 semester hours or 45 quarter hours in agricultural, biological, physical, or earth sciences and at least 15 semester hours or an equivalent number of quarter hours in soil science. The Board may adopt rules specifying combinations of education and experience that an applicant may substitute for a bachelor of science degree.

(3) Successfully pass an examination established by the Board. The examination shall be designed to demonstrate whether the applicant has the necessary knowledge and requisite skill to exercise the responsibilities of the practice of soil science.

(4) Subject to subsection (b) of this section, have at least three years of professional work experience as a soil scientist under the supervision of a licensed soil scientist, or a soil scientist who is eligible for licensure, under this Chapter, or a minimum of three cumulative years of professional work experience as a soil scientist in responsible charge of work satisfactory to the Board and in accordance with standards established by the Board by rule.

(b) An applicant may substitute an advanced degree in soil science for a portion of the professional work experience requirement. The Board, in its discretion, may allow an applicant to substitute a masters degree in soil science for one year of professional work experience and to substitute a doctoral degree in soil science for two years of professional work experience. The Board, in its discretion, may allow an applicant to substitute experience gained through teaching upper level soil science courses at the college or university level or research in soil science for all or any portion of the professional work experience requirement if the Board finds the teaching or research to be equivalent to the responsible charge of work by a soil scientist.

(c) The Board shall designate an applicant who meets all the requirements for a license under this Chapter except the professional work experience requirement as a soil scientist-in-training. A soil scientist-in-training may apply for a license upon completion of the professional work experience requirement. (1995, c. 414, s. 1.)

§ 89F-11. Examinations.

Examinations shall be formulated and conducted by the Board at the time and place as determined by the Board, and shall be held at least annually. (1995, c. 414, s. 1.)

§ 89F-12. Comity.

A person who holds a license to engage in the practice of soil science on the basis of comparable licensing requirements issued to that person by a proper authority by another state, by a territory, or by a possession of the United States or the District of Columbia, and who, as determined by the Board, meets the requirements of this Chapter based upon verified evidence, may, upon application, be licensed without taking an examination pursuant to G.S. 89F-10(a)(3). (1995, c. 414, s. 1.)

§ 89F-13. Issuance, renewal, and replacement of licenses.

(a) The Board shall issue a license to any applicant who has satisfactorily met the requirements of this Chapter including the payment of the license fee. A license shall be valid for the period of time established by the Board by rule. Each license shall state the full name of the registrant, shall have a serial number, shall state the date on which the license expires, shall be signed by the Chair and Secretary-Treasurer of the Board, and shall bear the seal of the Board. The issuance of a license by the Board shall be prima facie evidence that the person named on the license is entitled to all the rights and privileges of a licensed soil scientist for the period the license remains in effect.

(b) The Board shall renew the license of any licensee who continues to meet the requirements of this Chapter and who pays the renewal fee prior to the expiration of the license. The Board shall reinstate the license of any licensee whose license has expired, who continues to meet the requirements of this Chapter, and who pays the restoration fee.

(c) If a license is lost, destroyed, or mutilated, the Board may issue a replacement license subject to rules adopted by the Board. (1995, c. 414, s. 1.)

§ 89F-14. Seals; requirements.

Upon the issuance of a license, each soil scientist shall obtain from the Secretary-Treasurer a seal bearing the licensee's name and the legend "Licensed Soil Scientist — State of North Carolina". The Board shall ensure that the design of the seal is easily distinguished from other professional seals. All drawings, reports, or other soil science papers or documents involving the practice of soil science that are prepared or approved by a licensed soil scientist or a subordinate under his or her direction shall be signed by the soil scientist and impressed with the seal. The impression of the seal indicates his or her responsibility for the practice of soil science. (1995, c. 414, s. 1.)

§ 89F-15. Records.

(a) The Board shall maintain a record of its proceedings and a register of all applications for licensure under this Chapter. For each applicant the register shall show:

(1) The name, age, and home address of the applicant.
(2) The date of application.
(3) The applicant's place of business.
(4) The applicant's education, professional work experience, and other qualifications.
(5) Whether the applicant was required to take an examination.
(6) Whether a license was issued to the applicant.
(7) Whether the applicant is currently licensed.
(8) The date and nature of any action by the Board with respect to the applicant or licensee.
(9) Any other information that the Board determines to be necessary to meet the requirements of this Chapter or rules adopted pursuant to this Chapter.

(b) The Board shall treat as confidential and not subject to disclosure, except to the extent required by law or by rule of the Board, individual applications, related information, and examination scores. (1995, c. 414, s. 1.)

§ 89F-16. Roster of licensed soil scientists.

The Secretary-Treasurer of the Board shall keep a record and shall publish annually a roster showing the names, places of business, and residence addresses of all soil scientists licensed under this Chapter. Copies of this roster shall be made available to the public upon request and payment of a reasonable fee, established by the Board, for copying. (1995, c. 414, s. 1.)

§ 89F-17. Code of Professional Conduct.

The Board shall prepare and adopt by rule a Code of Professional Conduct that shall be made known in writing to every licensee and applicant for licensing under this Chapter and that shall be published by the Board. Publication of the Code of Professional Conduct is due notice to all licensees of its contents. The Board may revise and amend this Code of Professional Conduct. Prior to adoption of any revision or amendments, all licensed members and the public shall receive due notice and an opportunity to be heard. (1995, c. 414, s. 1.)

§ 89F-18. Complaints.

Any person may file written charges of violations of this Chapter or any rules adopted pursuant to this Chapter with the Board against any licensee. Any charges or allegations shall be in writing, shall be sworn to by the person making them, and shall be filed with the Secretary-Treasurer of the Board. The Board shall investigate reasonably all valid complaints. (1995, c. 414, s. 1.)

§ 89F-19. Prohibitions; unlawful acts.

(a) It is unlawful for any person other than a licensed soil scientist or a subordinate under the soil scientist's direction to conduct or participate in any practice of soil science or prepare any soil science reports, maps, or documents related to the public welfare or the safeguarding of life, health, property, or the environment.

(b) It is unlawful for any person, including a soil scientist-in-training or a subordinate, to practice, or offer to practice, soil science in this State, or to use in connection with his or her name, otherwise assume, or advertise any title or description tending to convey the impression that he or she is a licensed soil scientist, unless that person has been duly licensed or is exempted under the provisions of this Chapter.

(c) It is unlawful for anyone other than a licensed soil scientist to stamp or seal any soils-related plans, maps, reports, or other soils-related documents with the seal or stamp of a licensed soil scientist, or use in any manner the title "soil scientist", unless that person is licensed under this Chapter.

(d) It is unlawful for any person to affix his or her signature to, stamp, or seal any soils-related plans, maps, reports, or other soils-related documents after the license of the person has expired, been suspended, or revoked.

(e) It is unlawful for a licensed soil scientist to prepare plats and maps so as to engage in the practice of land surveying by a registered land surveyor, as defined in G.S. 89C-3, unless the licensed soil scientist is also a registered land surveyor, as defined in G.S 89C-3.

(f) It is unlawful for a licensed soil scientist to engage in the design of engineering works and systems, as that phrase is used in G.S. 89C-3(6), unless the licensed soil scientist is also a registered professional engineer, as defined in G.S. 89C-3. (1995, c. 414, s. 1.)

§ 89F-20. Disciplinary procedures.

(a) The Board may, consistent with the provisions of Chapter 150B of the General Statutes, refuse to grant or to renew, suspend, or revoke the license of any person licensed under this Chapter who:

(1) Violates the provisions of this Chapter or a rule adopted by the Board.
(2) Has been convicted of a misdemeanor under this Chapter.
(3) Has been convicted of a felony.
(4) Has been found by the Board to have engaged in unprofessional conduct, dishonest practice, incompetence, fraud or deceit in obtaining a license, or who aids another person who obtains or attempts to obtain a license by fraud or deceit.

(b) In lieu of revoking a license, the Board may enter a probationary order and assess a civil penalty not to exceed one thousand dollars ($1,000). In determining the amount of a penalty under this section, the Board shall consider the following factors:

(1) The degree and extent of harm to the natural resources of the State, to the public health, or to private property resulting from the violation.
(2) The duration and gravity of the violation.
(3) The effect on water quality.
(4) The cost of rectifying the damage.
(5) The cost to the State of enforcement procedures.
(6) The prior record of the violator in complying or failing to comply with this Chapter or a rule adopted pursuant to this Chapter. (1995, c. 414, s. 1.)

§ 89F-21. Reissuance of license.

The Board may, by a vote of the quorum, reissue a license to any person whose license has been revoked if the Board finds, after written application by the applicant, that there is good cause to justify the reissuance of the license. (1995, c. 414, s. 1.)

§ 89F-22. Misdemeanors.

A person who does any of the following shall be guilty of a Class 2 misdemeanor:

(1) Willfully practices soil science or offers to practice soil science for any other person in this State without being licensed in accordance with the provisions of this Chapter.
(2) Presents, or attempts to use as his or her own, the license or the seal of any other soil scientist.
(3) Gives any false or forged evidence in the course of applying for a license under this Chapter.
(4) Impersonates a licensed soil scientist.
(5) Attempts to use an expired or revoked license, or practice at any time while the license is suspended or revoked.
(6) Violates the provisions of this Chapter or rules adopted pursuant to this Chapter. (1995, c. 414, s. 1.)

§ 89F-23. Injunctive relief.

The Board may seek injunctive relief to enjoin and restrain any natural or corporate person from violating this Chapter. The Board shall not be required to post bond in connection with obtaining either provisional, preliminary, or permanent injunctive relief. (1995, c. 414, s. 1.)

§ 89F-24. Legal advisor.

The Attorney General or his designee shall act as legal advisor to the Board. (1995, c. 414, s. 1.)

§ 89F-25. Fees.

The Board shall determine fees for the following services that shall not exceed the amounts specified in this section:

Application	$ 50.00
Examination	125.00

License	85.00
Renewal	85.00
Restoration	110.00
Replacement license	50.00
Seal	30.00.

(1995, c. 414, s. 1.)

Chapter 90.

Medicine and Allied Occupations.

Article 1.

Practice of Medicine.

Sec.
90-1. North Carolina Medical Society incorporated.
90-1.1. Definitions.
90-2. Medical Board.
90-2.1. [Repealed.]
90-3. Review Panel recommends certain Board members; criteria for recommendations.
90-4. Board elects officers; quorum.
90-5. Meetings of Board.
90-5.1. Powers and duties of the Board.
90-5.2. Board to collect and publish certain data.
90-6. [Recodified.]
90-7. Bond of secretary.
90-8. Officers may administer oaths, and subpoena witnesses, records and other materials.
90-8.1. Rules governing applicants for licensure.
90-8.2. Appointment of subcommittees.
90-9. [Repealed.]
90-9.1. Requirements for licensure as a physician under this Article.
90-9.2. Requirements for graduates of foreign medical schools.
90-9.3. Requirements for licensure as a physician assistant.
90-9.4. Requirements for licensure as an anesthesiologist assistant.
90-10. [Repealed.]
90-10.1. Examinations accepted by the Board.
90-11. Criminal background checks.
90-12. [Repealed.]
90-12.01. Limited license to practice in a medical education and training program.
90-12.1. [Recodified.]
90-12.1A. Limited volunteer license.
90-12.2. [Recodified.]
90-12.2A. Special purpose license.
90-12.3. Medical school faculty license.
90-12.4. Physician assistant limited volunteer license.
90-12.5. Disasters and emergencies.
90-13. [Repealed.]
90-13.1. License fees.
90-13.2. Registration every year with Board.
90-13.3. Salaries, fees, expenses of the Board.
90-14. Disciplinary Authority.
90-14.1. Judicial review of Board's decision denying issuance of a license.
90-14.2. Hearing before disciplinary action.
90-14.3. Service of notices.
Sec.
90-14.4. [Repealed.]
90-14.5. Use of hearing committee and depositions; appointment of hearing officers.
90-14.6. Evidence admissible.
90-14.7. Procedure where person fails to request or appear for hearing.
90-14.8. Appeal from Board's decision taking disciplinary action on a license.
90-14.9. Appeal bond; stay of Board order.
90-14.10. Scope of review.
90-14.11. Appeal; appeal bond.
90-14.12. Injunctions.
90-14.13. Reports of disciplinary action by health care institutions; reports of professional liability insurance awards or settlements; immunity from liability.
90-15, 90-15.1 [Recodified.]
90-16. Self-reporting requirements; confidentiality of Board investigative information; cooperation with law enforcement; patient protection; Board to keep public records.
90-17. [Repealed.]
90-18. Practicing without license; penalties.
90-18.1. Limitations on physician assistants.
90-18.2. Limitations on nurse practitioners.
90-18.2A. Physician assistants receiving, prescribing, or dispensing prescription drugs without charge or fee.
90-18.3. Physical examination by nurse practitioners and physician assistants.
90-18.4. Limitations on clinical pharmacist practitioners.
90-18.5. Limitations on anesthesiologist assistants.
90-19 through 90-21. [Repealed.]

Article 1A.

Treatment of Minors.

Part 1. General Provisions.

90-21.1. When physician may treat minor without consent of parent, guardian or person in loco parentis.
90-21.2. "Treatment" defined.
90-21.3. Performance of surgery on minor; obtaining second opinion as to necessity.
90-21.4. Responsibility, liability and immunity of physicians.
90-21.5. Minor's consent sufficient for certain medical health services.

Part 2. Parental or Judicial Consent for Abortion.

Sec.
90-21.6. Definitions.
90-21.7. Parental consent required.
90-21.8. Procedure for waiver of parental consent.
90-21.9. Medical emergency exception.
90-21.10. Penalty.

Article 1B.

Medical Malpractice Actions.

90-21.11. Definitions.
90-21.12. Standard of health care.
90-21.12A. Nonresident physicians.
90-21.13. Informed consent to health care treatment or procedure.
90-21.14. First aid or emergency treatment; liability limitation.
90-21.15. Emergency treatment using automated external defibrillator; immunity.
90-21.16. Volunteer health care professionals; liability limitation.
90-21.17. Portable do not resuscitate order and Medical Order for Scope of Treatment.
90-21.18. Medical directors; liability limitation.
90-21.19. [Reserved.]

Article 1C.

Physicians and Hospital Reports.

90-21.20. Reporting by physicians and hospitals of wounds, injuries and illnesses.
90-21.20A. Reporting by physicians of pilots' mental or physical disabilities or infirmities.
90-21.20B. Access to and disclosure of medical information for certain purposes.
90-21.21. [Repealed.]

Article 1D.

Peer Review.

90-21.22. Peer review agreements.
90-21.22A. Medical review and quality assurance committees.
90-21.23. Election by State.

Article 1E.

Certificate of Public Advantage.

90-21.24. Findings.
90-21.25. Definitions.
90-21.26. Certificate of public advantage; application.
90-21.27. Procedure for review; standards for review.
90-21.28. Issuance of a certificate.
Sec.
90-21.29. Objection by Attorney General.
90-21.30. Record keeping.
90-21.31. Review after issuance of certificate.
90-21.32. Periodic reports.
90-21.33. Right to judicial action.
90-21.34. Fees for applications and periodic reports.
90-21.35. Department and Attorney General authority.
90-21.36. Effects of certificate of public advantage; other laws.
90-21.37 through 90-21.40. [Reserved.]

Article 1F.

Psychotherapy Patient/Client Sexual Exploitation Act.

90-21.41. Definitions.
90-21.42. Action for sexual exploitation.
90-21.43. Remedies.
90-21.44. Scope of discovery.
90-21.45. Admissibility of evidence of sexual history.
90-21.46. Prohibited defense.
90-21.47. Statute of limitations.
90-21.48. Agreements to not pursue complaint before licensing entity void.
90-21.49. [Reserved.]

Article 1G.

Health Care Liability.

90-21.50. Definitions.
90-21.51. Duty to exercise ordinary care; liability for damages for harm.
90-21.52. No liability under this Article on the part of an employer or employer group organization that purchases coverage or assumes risk on behalf of its employees or a physician or health care provider; liability of State Health Plan under State Tort Claims Act.
90-21.53. Separate trial required.
90-21.54. Exhaustion of administrative remedies and appeals.
90-21.55. External review decision.
90-21.56. Remedies.

Article 1H.

Voluntary Arbitration of Negligent Health Care Claims.

90-21.60. Voluntary arbitration; prior agreements to arbitration void.
90-21.61. Requirements for submitting to arbitration.
90-21.62. Selection of arbitrator.
90-21.63. Witnesses; discovery; depositions; subpoenas.
90-21.64. Time limitations for arbitration.
90-21.65. Written decision by arbitration.

Sec.
90-21.66. Judgment by court.
90-21.67. Retention of jurisdiction by court.
90-21.68. Appeal of arbitrator's decision.
90-21.69. Revised Uniform Arbitration Act not applicable.

Article 2.

Dentistry.

90-22. Practice of dentistry regulated in public interest; Article liberally construed; Board of Dental Examiners; composition; qualifications and terms of members; vacancies; nominations and elections; compensation; expenditures by Board.
90-23. Officers; common seal.
90-24. Quorum; adjourned meetings.
90-25. Records and transcripts.
90-26. Annual and special meetings.
90-27. Judicial powers; additional data for records.
90-28. Bylaws and regulations; acquisition of property.
90-29. Necessity for license; dentistry defined; exemptions.
90-29.1. Extraoral services performed for dentists.
90-29.2. Requirements in respect to written work orders; penalty.
90-29.3. Provisional license.
90-29.4. Intern permit.
90-29.5. Instructor's license.
90-30. Examination and licensing of applicants; qualifications; causes for refusal to grant license; void licenses.
90-30.1. Standards for general anesthesia and enteral and parenteral sedation; fees authorized.
90-31. Annual renewal of licenses.
90-31.1. Continuing education courses required.
90-32. Contents of original license.
90-33. Displaying license and current certificate of renewal.
90-34. Refusal to grant renewal of license.
90-35. Duplicate licenses.
90-36. Licensing practitioners of other states.
90-37. Certificate issued to dentist moving out of State.
90-37.1. Limited volunteer dental license.
90-37.2. Temporary permits for volunteer dentists.
90-38. Licensing former dentists who have moved back into State or resumed practice.
90-39. Fees.
90-40. Unauthorized practice; penalty.
90-40.1. Enjoining unlawful acts.
90-41. Disciplinary action.
90-41.1. Hearings.

Sec.
90-42. Restoration of revoked license.
90-43. Compensation and expenses of Board.
90-44. Annual report of Board.
90-45. [Repealed.]
90-46. Filling prescriptions.
90-47. [Repealed.]
90-48. Rules and regulations of Board; violation a misdemeanor.
90-48.1. Free choice by patient guaranteed.
90-48.2. Board agreements with special peer review organizations for impaired dentists.
90-48.3. Board authority to include impaired dental hygienists in programs developed for impaired dentists.
90-48.4 through 90-48.6. [Reserved.]

Article 2A.

Dental Peer Review Protection Act.

90-48.7. Title.
90-48.8. Immunity of a member.
90-48.9. Immunity of witnesses before dental peer review committee.
90-48.10. Confidentiality of review organization's proceedings and records.
90-48.11. No limitation on previous privileges and immunities.

Article 3.

The Licensing of Mouth Hygienists to Teach and Practice Mouth Hygiene in Public Institutions.

90-49 through 90-52. [Repealed.]

Article 4.

Pharmacy.

Part 1. Practice of Pharmacy.

90-53 through 90-75. [Recodified.]
90-76. [Repealed.]

Part 1A. Drug Product Selection.

90-76.1 through 90-76.5. [Recodified.]
90-76.6. [Repealed.]

Part 2. Dealing in Specific Drugs Regulated.

90-77 through 90-85.1. [Repealed.]

Article 4A.

North Carolina Pharmacy Practice Act.

90-85.2. Legislative findings.
90-85.3. Definitions.
90-85.4. North Carolina Pharmaceutical Association.
90-85.5. Objective of Pharmaceutical Association.
90-85.6. Board of Pharmacy; creation; membership; qualification of members.

Sec.
90-85.7. Board of Pharmacy; selection; vacancies; commission; term; per diem; removal.
90-85.8. Organization.
90-85.9. Meetings.
90-85.10. Employees; Executive Director.
90-85.11. Compensation of employees.
90-85.11A. Acquisition of real property; equipment; liability insurance.
90-85.12. Executive Director to make investigations and prosecute.
90-85.13. Approval of schools and colleges of pharmacy.
90-85.14. Practical experience program.
90-85.15. Application and examination for licensure as a pharmacist; prerequisites.
90-85.15A. Pharmacy technicians.
90-85.16. Examination.
90-85.17. License renewal.
90-85.18. Approval of continuing education programs.
90-85.19. Reinstatement.
90-85.20. Licensure without examination.
90-85.21. Pharmacy permit.
90-85.21A. Applicability to out-of-state operations.
90-85.21B. Unlawful practice of pharmacy.
90-85.22. Device and medical equipment permits.
90-85.23. License and permit to be displayed.
90-85.24. Fees collectible by Board.
90-85.25. Disasters and emergencies.
90-85.26. Prescription orders preserved.
90-85.26A. Clinical pharmacist practitioners subcommittee.
90-85.27. Definitions.
90-85.28. Selection by pharmacists permissible; prescriber may permit or prohibit selection; price limit on selected drugs.
90-85.29. Prescription label.
90-85.30. Prescription record.
90-85.31. Prescriber and pharmacist liability not extended.
90-85.32. Rules pertaining to filling, refilling, transfer, and mail or common-carrier delivery of prescription orders.
90-85.33. Unit dose medication systems.
90-85.34. Unique pharmacy practice.
90-85.34A. Public health pharmacy practice.
90-85.35. Availability of patient records.
90-85.36. Availability of pharmacy records.
90-85.37. Embargo.
90-85.38. Disciplinary authority.
90-85.39. Injunctive authority.
90-85.40. Violations.
90-85.41. Board agreements with special peer review organizations for impaired pharmacy personnel.
90-85.42 through 90-85.44. [Reserved.]

Article 4B.

Pharmacy Quality Assurance Protection Act.

Sec.
90-85.45. Legislative intent.
90-85.46. Definitions.
90-85.47. Pharmacy quality assurance program required; limited liability; discovery.

Article 5.

North Carolina Controlled Substances Act.

90-86. Title of Article.
90-87. Definitions.
90-88. Authority to control.
90-89. Schedule I controlled substances.
90-89.1. Treatment of controlled substance analogues.
90-90. Schedule II controlled substances.
90-91. Schedule III controlled substances.
90-92. Schedule IV controlled substances.
90-93. Schedule V controlled substances.
90-94. Schedule VI controlled substances.
90-95. Violations; penalties.
90-95.1. Continuing criminal enterprise.
90-95.2. Cooperation between law-enforcement agencies.
90-95.3. Restitution to law-enforcement agencies for undercover purchases; restitution for drug analyses; restitution for seizure and cleanup of clandestine laboratories.
90-95.4. Employing or intentionally using minor to commit a drug law violation.
90-95.5. Civil liability — employing a minor to commit a drug offense.
90-95.6. Promoting drug sales by a minor.
90-95.7. Participating in a drug violation by a minor.
90-96. Conditional discharge and expunction of records for first offense.
90-96.01. Drug education schools; responsibilities of the Department of Health and Human Services; fees.
90-96.1. Immunity from prosecution for minors.
90-97. Other penalties.
90-98. Attempt and conspiracy; penalties.
90-99. Republishing of schedules.
90-100. Rules.
90-101. Annual registration and fee to engage in listed activities with controlled substances; effect of registration; exceptions; waiver; inspection.
90-102. Additional provisions as to registration.
90-102.1. Registration of persons requiring limited use of controlled sub-

Sec.

stances for training purposes in certain businesses.
90-103. Revocation or suspension of registration.
90-104. Records of registrants or practitioners.
90-105. Order forms.
90-106. Prescriptions and labeling.
90-107. Prescriptions, stocks, etc., open to inspection by officials.
90-108. Prohibited acts; penalties.
90-109. Licensing required.
90-109.1. Treatment.
90-110. Injunctions.
90-111. Cooperative arrangements.
90-112. Forfeitures.
90-112.1. Remission or mitigation of forfeitures; possession pending trial.
90-113. [Repealed.]
90-113.1. Burden of proof; liabilities.
90-113.2. Judicial review.
90-113.3. Education and research.
90-113.4, 90-113.4A. [Repealed.]
90-113.5. State Board of Pharmacy, North Carolina Department of Justice and peace officers to enforce Article.
90-113.6. Payments and advances.
90-113.7. Pending proceedings.
90-113.8. Continuation of regulations.

Article 5A.

North Carolina Toxic Vapors Act.

90-113.8A. Title.
90-113.9. Definitions.
90-113.10. Inhaling fumes for purpose of causing intoxication.
90-113.10A. Alcohol vaporizing devices prohibited.
90-113.11. Possession of substances.
90-113.12. Sale of substance.
90-113.13. Violation a misdemeanor.
90-113.14. Conditional discharge and expunction of records for first offenses.
90-113.15 through 90-113.19. [Reserved.]

Article 5B.

Drug Paraphernalia.

90-113.20. Title.
90-113.21. General provisions.
90-113.22. Possession of drug paraphernalia.
90-113.23. Manufacture or delivery of drug paraphernalia.
90-113.24. Advertisement of drug paraphernalia.
90-113.25 through 90-113.29. [Reserved.]

Article 5C.

North Carolina Substance Abuse Professional Practice Act.

90-113.30. Declaration of purpose.
90-113.31. [Repealed.]

Sec.

90-113.31A. Definitions.
90-113.31B. Scope of practice.
90-113.32. Board; composition; voting.
90-113.33. Board; powers and duties.
90-113.33A. Officers may administer oaths, and subpoena witnesses, records, and other materials.
90-113.34. Records to be kept; copies of records.
90-113.35. Disposition of funds.
90-113.36. Credentials.
90-113.37. [Repealed.]
90-113.37A. Renewal of credential; lapse.
90-113.38. Maximums for certain fees.
90-113.39. Standards for credentials.
90-113.40. Requirements for certification and licensure.
90-113.40A. Requirements for registration.
90-113.40B. Applicant supervision.
90-113.41. Examination.
90-113.41A. Deemed status.
90-113.41B. Change of name or address.
90-113.42. Violations; exemptions.
90-113.43. Illegal practice; misdemeanor penalty.
90-113.44. Grounds for disciplinary action.
90-113.45. Enjoining illegal practices.
90-113.46. Application of requirements of Article.
90-113.46A. Criminal history record checks of applicants for registration, certification, or licensure.
90-113.47. [Repealed.]
90-113.48, 90-113.49. [Reserved.]

Article 5D.

Control of Methamphetamine Precursors.

90-113.50. Title.
90-113.51. Definitions.
90-113.52. Pseudoephedrine: restrictions on sales.
90-113.53. Pseudoephedrine transaction limits.
90-113.54. Posting of signs.
90-113.55. Training of employees.
90-113.56. Penalties.
90-113.57. Immunity.
90-113.58. Commission authority to control pseudoephedrine products.
90-113.59. Commission development of employee training programs.
90-113.60. Preemption.
90-113.61. Regulation of pseudoephedrine products in the form of liquids, liquid capsules, gel capsules, and pediatric products.
90-113.62 through 90-113.69. [Reserved.]

Article 5E.

North Carolina Controlled Substances Reporting System Act.

Sec.
90-113.70. Short title.
90-113.71. Legislative findings and purpose.
90-113.72. Definitions.
90-113.73. Requirements for controlled substances reporting system.
90-113.74. Confidentiality.
90-113.75. Civil penalties; other remedies; immunity from liability.
90-113.76. Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services to adopt rules.

Article 6.

Optometry.

90-114. Optometry defined.
90-115. Practice without registration unlawful.
90-115.1. Acts not constituting the unlawful practice of optometry.
90-116. Board of Examiners in Optometry.
90-117. Officers; common seal.
90-117.1. Quorum; adjourned meetings.
90-117.2. Records and transcripts.
90-117.3. Annual and special meetings.
90-117.4. Judicial powers; additional data for records.
90-117.5. Bylaws and regulations.
90-118. Examination and licensing of applicants; qualifications; causes for refusal to grant license; void licenses; educational requirements for prescription and use of pharmaceutical agents.
90-118.1. Contents of original license.
90-118.2. Displaying license and current certificate of renewal.
90-118.3. Refusal to grant renewal of license.
90-118.4. Duplicate licenses.
90-118.5. Licensing practitioners of other states.
90-118.6. Certificate issued to optometrist moving out of State.
90-118.7. Licensing former optometrists who have moved back into State or resumed practice.
90-118.8, 90-118.9. [Repealed.]
90-118.10. Annual renewal of licenses.
90-118.11. Unauthorized practice; penalty for violation of Article.
90-119. Persons in practice before passage of statute.
90-120, 90-121. [Repealed.]
90-121.1. Board may enjoin illegal practices.
90-121.2. Rules and regulations; discipline, suspension, revocation and regrant of certificate.
Sec.
90-121.3. Hearings.
90-121.4. Restoration of revoked license.
90-122. Compensation and expenses of Board.
90-123. Fees.
90-123.1. Continuing education courses required.
90-124. Rules and regulations of Board; violation a misdemeanor.
90-125. Practicing under other than own name or as a salaried or commissioned employee.
90-126, 90-126.1. [Repealed.]
90-127. Application of Article.
90-127.1. Free choice by patient guaranteed.
90-127.2. Filling prescriptions.
90-127.3. Copy of prescription furnished on request.
90-128. [Repealed.]

Article 6A.

Optometry Peer Review.

90-128.1. Peer review agreements.
90-128.2 through 90-128.6 [Reserved.]

Article 7.

Osteopathy.

90-129. Osteopathy defined.
90-130. Board of Examiners; membership; officers; meeting.
90-131. Educational requirements, examination and certification of applicants.
90-132. When examination dispensed with; temporary permit; annual registration.
90-133. Fees held by Board; salaries; payment of expenses.
90-134. Subject to State and municipal regulations.
90-135. [Repealed.]
90-136. Refusal, revocation or suspension of license; misdemeanors.
90-137. Restoration of revoked license.
90-138. Objects of North Carolina Osteopathic Society.

Article 8.

Chiropractic.

90-139. Creation and membership of Board of Examiners.
90-140. Selection of chiropractic members of Board.
90-141. Organization; quorum.
90-142. Rules and regulations.
90-143. Definitions of chiropractic; examinations; educational requirements.
90-143.1. Applicants licensed in other states.
90-143.2. Certification of diagnostic imaging technicians.

Sec.
90-143.3. Criminal record checks of applicants for licensure.
90-144. Meetings of Board of Examiners.
90-145. Grant of license.
90-146. Graduates from other states.
90-147. Practice without license a misdemeanor; injunctions.
90-148. Records of Board.
90-149. Application fee.
90-150. [Repealed.]
90-151. Extent and limitation of license.
90-151.1. Selling nutritional supplements to patients.
90-152. [Repealed.]
90-153. Licensed chiropractors may practice in public hospitals.
90-154. Grounds for professional discipline.
90-154.1. Collection of certain fees prohibited.
90-154.2. Unethical conduct.
90-154.3. Acceptable care in the practice of chiropractic.
90-154.4. Enticements prohibited.
90-155. Annual fee for renewal of license.
90-156. Pay of Board and authorized expenditures.
90-157. Chiropractors subject to State and municipal regulations.
90-157.1. Free choice by patient guaranteed.
90-157.2. Chiropractor as expert witness.
90-157.3. Ownership of chiropractic practices limited.

Article 9.

Nurse Practice Act.

90-158 through 90-171.18. [Recodified.]

Article 9A.

Nursing Practice Act.

90-171.19. Legislative findings.
90-171.20. Definitions.
90-171.21. Board of Nursing; composition; selection; vacancies; qualifications; term of office; compensation.
90-171.22. Officers.
90-171.23. Duties, powers, and meetings.
90-171.24. Executive director.
90-171.25. Custody and use of funds.
90-171.26. The Board may accept contributions, etc.
90-171.27. Expenses payable from fees collected by Board.
90-171.28. Nurses registered under previous law.
90-171.29. Qualifications of applicants for examination.
90-171.30. Licensure by examination.
90-171.31. Reexamination.
90-171.32. Qualifications for license as a registered nurse or a licensed practical nurse without examination.
Sec.
90-171.33. Temporary license.
90-171.34. Licensure renewal.
90-171.35. Reinstatement.
90-171.36. Inactive list.
90-171.36A. Retired nurse status; reinstatement.
90-171.37. Revocation, discipline, suspension, probation, or denial of licensure.
90-171.37A. Use of hearing committee and depositions.
90-171.38. Standards for nursing programs.
90-171.39. Approval.
90-171.40. Ongoing approval.
90-171.41. Baccalaureate in nursing candidate credits.
90-171.42. Continuing education programs.
90-171.43. License required.
90-171.43A. Mandatory employer verification of licensure status.
90-171.44. Prohibited acts.
90-171.45. Violation of Article.
90-171.46. Injunctive authority.
90-171.47. Reports: immunity from suit.
90-171.48. Criminal history record checks of applicants for licensure.
90-171.49. [Reserved.]

Article 9B.

Information and Financial Assistance for Nursing Students and Inactive Nurses.

90-171.50. Existing scholarship and loan information to be consolidated and published.
90-171.51. Emergency Financial Assistance Fund.
90-171.52. Nursing licensing exam follow-up assistance.
90-171.53. Area Health Education Centers publicity programs.
90-171.54. [Repealed.]

Article 9C.

Nurses Aides Registry Act.

90-171.55. Nurses Aides Registry.
90-171.56. Medication aide requirements.
90-171.57 through 90-171.59. [Reserved.]

Article 9D.

Nursing Scholars Program.

90-171.60. North Carolina Nursing Scholars Commission established; membership.
90-171.61. Nursing Scholars Program established; administration.
90-171.62. Terms of loans; receipt and disbursement of funds.
90-171.63, 90-171.64. [Reserved.]

Article 9E.

Need-Based Nursing Scholarships.

Sec.
90-171.65. Need-based nursing scholarships fund.
90-171.66 through 90-171.69. [Reserved.]

Article 9F.

North Carolina Center for Nursing.

90-171.70. North Carolina Center for Nursing; establishment; goals.
90-171.71. North Carolina Center for Nursing; governing board.
90-171.72. North Carolina Center for Nursing; State support.
90-171.73 through 90-171.79. [Reserved.]

Article 9G.

Nurse Licensure Compact.

90-171.80. Entering into Compact.
90-171.81. Findings and declaration of purpose.
90-171.82. Definitions.
90-171.83. General provisions and jurisdiction.
90-171.84. Application for licensure in a party state.
90-171.85. Adverse actions.
90-171.86. Current significant investigative information.
90-171.87. Additional authority of party state nursing licensing boards.
90-171.88. Coordinated licensure information system.
90-171.89. Compact administration and interchange of information.
90-171.90. Immunity.
90-171.91. Effective date, withdrawal, and amendment.
90-171.92. Dispute resolution.
90-171.93. Construction and severability.
90-171.94. Applicability of compact.
90-171.95 through 90-171.99 [Reserved.]

Article 9H.

Graduate Nurse Scholarship Program for Faculty Production.

90-171.100. Graduate Nurse Scholarship Program for Faculty Production established; administration.
90-171.101. Terms of loans; receipt and disbursement of funds.

Article 10.

Midwives.

90-172 through 90-178. [Repealed.]

Article 10A.

Practice of Midwifery.

90-178.1. Title.
90-178.2. Definitions.
Sec.
90-178.3. Regulation of midwifery.
90-178.4. Administration.
90-178.5. Qualifications for approval.
90-178.6. Denial, revocation or suspension of approval.
90-178.7. Enforcement.

Article 11.

Veterinarians.

90-179. Purpose of Article.
90-180. Title.
90-181. Definitions.
90-181.1. Practice facility names and levels of service.
90-182. North Carolina Veterinary Medical Board; appointment, membership, organization.
90-183. Meeting of Board.
90-184. Compensation of the Board.
90-185. General powers of the Board.
90-186. Special powers of the Board.
90-187. Application for license; qualifications.
90-187.1. Examinations.
90-187.2. Status of persons previously licensed.
90-187.3. Applicants licensed in other states.
90-187.4. Temporary permit.
90-187.5. License renewal.
90-187.6. Veterinary technicians and veterinary employees.
90-187.7. Abandonment of animals; notice to owner; relief from liability for disposal; “abandoned” defined.
90-187.8. Discipline of licensees.
90-187.9. Reinstatement.
90-187.10. Necessity for license; certain practices exempted.
90-187.11. Partnership, corporate, or sole proprietorship practice.
90-187.12. Unauthorized practice; penalty.
90-187.13. Injunctions.
90-187.14. Veterinary faculty certificates and zoo veterinary certificates.
90-187.15. Board agreement for programs for impaired veterinary personnel.

Article 12.

Podiatrists.

90-188 through 90-202.1. [Recodified.]

Article 12A.

Podiatrists.

90-202.2. “Podiatry” defined.
90-202.3. Unlawful to practice unless registered.
90-202.4. Board of Podiatry Examiners; terms of office; powers; duties.
90-202.5. Applicants to be examined; examina-

Sec.
tion fee; requirements; temporary licenses.
90-202.6. Examinations; subjects; certificates.
90-202.7. Applicants licensed in other states.
90-202.8. Revocation of certificate; grounds for; suspension of certificate.
90-202.9. Fees for certificates and examinations; compensation of Board.
90-202.10. Annual fee; cancellation or renewal of license.
90-202.11. Continuing education courses required.
90-202.12. Free choice by patient guaranteed.
90-202.13. Injunctions.
90-202.14. Not applicable to physicians.

Article 13.

Embalmers and Funeral Directors.

90-203 through 90-210.17. [Recodified.]

Article 13A.

Practice of Funeral Service.

90-210.18. [Repealed.]
90-210.18A. Board of Funeral Service created; qualifications; vacancies; removal.
90-210.19. Board members' oath of office.
90-210.20. Definitions.
90-210.21. [Repealed.]
90-210.22. Required meetings of the Board.
90-210.23. Powers and duties of the Board.
90-210.24. Inspector.
90-210.25. Licensing.
90-210.25A. [Recodified.]
90-210.26. Good moral character.
90-210.27. [Repealed.]
90-210.27A. Funeral establishments.
90-210.28. Fees.
90-210.29. Students.
90-210.29A. Identification of bodies before burial or cremation.
90-210.29B. Examination scores not public record.

Article 13B.

Funeral and Burial Trust Funds.

90-210.30 through 90-210.39. [Repealed.]

Article 13C.

Cremations.

90-210.40 through 90-210.54. [Recodified.]
90-210.55 through 90-210.59. [Reserved.]

Article 13D.

Preneed Funeral Funds.

90-210.60. Definitions.
90-210.61. Deposit or application of preneed funeral funds.
Sec.
90-210.62. Types of preneed funeral contracts; forms.
90-210.63. Substitution of licensee.
90-210.63A. Amendment of preneed funeral contracts.
90-210.64. Death of preneed funeral contract beneficiary; disposition of funds.
90-210.65. Refund of preneed funeral funds.
90-210.66. Recovery fund.
90-210.67. Application for license.
90-210.68. Licensee's books and records; notice of transfers, assignments and terminations.
90-210.69. Rulemaking; enforcement of Article; judicial review; determination of penalty amount.
90-210.70. Penalties.
90-210.71. Nonregulation of insurance sales.
90-210.72. Nonapplication to certain funeral contracts.
90-210.73. Not public record.
90-210.74 through 90-210.79. [Reserved.]

Article 13E.

Mutual Burial Associations.

90-210.80. Duties of Board; meetings.
90-210.81. Requirements as to rules and bylaws.
90-210.82. Limitation of soliciting agents; licensing and qualifications; officers exempt from license; issuance of membership certificates.
90-210.83. Assessments against associations.
90-210.84. Unlawful to operate without written authority of Board.
90-210.85. Revocation of license.
90-210.86. Deposit or investment of funds of mutual burial associations.
90-210.87. Unclaimed funds of defunct burial association.
90-210.88. Penalty for failure to operate in substantial compliance with bylaws.
90-210.89. Penalty for wrongfully inducing person to change membership.
90-210.90. Penalty for making false and fraudulent entries.
90-210.91. Accepting applications without collecting fee and first assessment.
90-210.92. Removal of secretary-treasurer for failure to maintain proper records.
90-210.93. Free services; failure to make proper assessments, etc., made a misdemeanor.
90-210.94. Right of appeal upon revocation or suspension of license.
90-210.95. Bond of secretary or secretary-treasurer of burial associations.
90-210.96. Assessments.

Sec.
90-210.97. Making false or fraudulent statement a misdemeanor.
90-210.98. Statewide organization of associations.
90-210.99. Article deemed exclusive authority for organization, etc., of mutual burial associations.
90-210.100. Operation of association in violation of law prohibited.
90-210.101. Member in armed forces failing to pay assessments; reinstatement.
90-210.102. Hearing by Board of dispute over liability for funeral benefits; appeal.
90-210.103. Board authorized to subpoena witnesses, administer oaths and compel attendance at hearings.
90-210.104. Authority of Board to examine financial records.
90-210.105. Board authorized to freeze certain funds of Association.
90-210.106. Authority of foreign or domestic mutual burial association or domestic or foreign insurance company to purchase, merge or consolidate with North Carolina mutual burial associations.
90-210.107. Acquisition, merger, dissolution, and liquidation of mutual burial associations.
90-210.108 through 90-210.119. [Reserved.]

Article 13F.

Cremations.

90-210.120. Short title.
90-210.121. Definitions.
90-210.122. Crematory Authority established.
90-210.123. Licensing and inspection.
90-210.124. Authorizing agent.
90-210.125. Authorization to cremate.
90-210.126. Preneed cremation arrangements.
90-210.127. Record keeping.
90-210.128. Cremation containers.
90-210.129. Cremation procedures.
90-210.130. Final disposition of cremated remains.
90-210.131. Limitation of liability.
90-210.132. Fees.
90-210.133. Crematory licensee rights.
90-210.134. Rulemaking, applicability, violations, and prohibitions of Article.
90-210.135. Cremation societies.

Article 14.

Cadavers for Medical Schools.

90-211 through 90-216. [Repealed.]

Article 14A.

Bequest of Body or Part Thereof.

90-216.1 through 90-216.5. [Repealed.]

Article 14B.

Disposition of Unclaimed Bodies.

Sec.
90-216.6 through 90-216.11. [Repealed.]

Article 14C.

Final Disposition or Transportation of Deceased Migrant Farm Workers and Their Dependents.

90-216.12. [Repealed.]

Article 15.

Autopsies.

90-217 through 90-220. [Repealed.]

Article 15A.

Uniform Anatomical Gift Act.

90-220.1 through 90-220.11. [Repealed.]

Article 15B.

Blood Banks.

90-220.12. Supervision of licensed physician required; penalty for violation.
90-220.13. Selection of donors; due care required.
90-220.14. Inapplicability.

Article 16.

Dental Hygiene Act.

90-221. Definitions.
90-222. Administration of Article.
90-223. Powers and duties of Board.
90-224. Examination.
90-224.1. Licensure by credentials.
90-225. License issue and display.
90-225.1. Continuing education courses required.
90-226. Provisional license.
90-227. Renewal certificates.
90-228. Renewal of license.
90-229. Disciplinary measures.
90-230. Certificate upon transfer to another state.
90-231. Opportunity for licensee or applicant to have hearing.
90-232. Fees.
90-233. Practice of dental hygiene.
90-233.1. Violation a misdemeanor.

Article 17.

Dispensing Opticians.

90-234. Necessity for certificate of registration.
90-235. Definition.
90-236. What constitutes practicing as a dispensing optician.
90-236.1. Requirements for filling contact lens prescriptions.

Sec.
90-237. Qualifications for dispensing opticians.
90-238. North Carolina State Board of Opticians created; appointment and qualification of members.
90-239. Organization, meetings and powers of Board.
90-240. Examination.
90-241. Waiver of written examination requirements.
90-242. [Repealed.]
90-243. Registration of places of business, apprentices.
90-244. Display, use, and renewal of license of registration.
90-245. Collection of fees.
90-246. Fees.
90-247. [Repealed.]
90-248. Compensation and expenses of Board members and secretary.
90-249. Powers of the Board.
90-249.1. Disciplinary actions.
90-250. Sale of optical glasses.
90-251. Licensee allowing unlicensed person to use his certificate or license.
90-252. Engaging in practice without license.
90-253. Exemptions from Article.
90-254. General penalty for violation.
90-255. Rebates.
90-255.1. Sale of flammable frames.

Article 18.

Physical Therapy.

90-256 through 90-270. [Recodified.]

Article 18A.

Psychology Practice Act.

90-270.1. Title; purpose.
90-270.2. Definitions.
90-270.3. Practice of medicine and optometry not permitted.
90-270.4. Exemptions to this Article.
90-270.5. Application; examination; supervision; provisional and temporary licenses.
90-270.6. Psychology Board; appointment; term of office; composition.
90-270.7. Qualifications of Board members; removal of Board members.
90-270.8. Compensation of members; expenses; employees.
90-270.9. Election of officers; meetings; adoption of seal and appropriate rules; powers of the Board.
90-270.10. Annual report.
90-270.11. Licensure; examination; foreign graduates.
90-270.12. [Repealed.]
90-270.13. Licensure of psychologists licensed or certified in other jurisdictions; licensure of diplomates of the American Board of Professional Psychology; reciprocity.
90-270.14. Renewal of licenses; duplicate or replacement licenses.
90-270.15. Denial, suspension, or revocation of licenses and health services provider certification, and other disciplinary and remedial actions for violations of the Code of Conduct; relinquishing of license.
90-270.16. Prohibited acts.
90-270.17. Violations and penalties.
90-270.18. Disposition and schedule of fees.
90-270.19. Injunctive authority.
90-270.20. Provision of health services; certification as health services provider.
90-270.21. Ancillary services.
90-270.22. Criminal history record checks of applicants for licensure and licensees.
90-270.23. [Reserved.]

Article 18B.

Physical Therapy.

90-270.24. Definitions.
90-270.25. Board of Examiners.
90-270.26. Powers of the Board.
90-270.27. Records to be kept; copies of record.
90-270.28. Disposition of funds.
90-270.29. Qualifications of applicants for examination; application; fee.
90-270.30. Licensure of foreign-trained physical therapists.
90-270.31. Certificates of licensure.
90-270.32. Renewal of license; lapse; revival.
90-270.33. Fees.
90-270.34. Exemptions from licensure; certain practices exempted.
90-270.35. Unlawful practice.
90-270.36. Grounds for disciplinary action.
90-270.37. Enjoining illegal practices.
90-270.38. Title.
90-270.39. Osteopaths, chiropractors, and podiatrists not restricted.
90-270.40 through 90-270.44. [Reserved.]

Article 18C.

Marriage and Family Therapy Licensure.

90-270.45. Title of Article.
90-270.46. Policy and purpose.
90-270.47. Definitions.
90-270.48. Prohibited acts.
90-270.48A. Exemptions.
90-270.48B. [Repealed.]
90-270.49. North Carolina Marriage and Family Therapy Licensure Board.
90-270.50. Appointment and qualification of Board members.
90-270.51. Powers and duties.
90-270.52. License application.

Sec.
90-270.53. [Repealed.]
90-270.54. Requirements for license.
90-270.55. Examinations.
90-270.55A. Temporary license.
90-270.56. Reciprocal licenses.
90-270.57. Fees.
90-270.58. Renewal of license.
90-270.58A. Reinstatement after expiration.
90-270.58B. Inactive status.
90-270.58C. Continuing education requirements.
90-270.59. Disposition of funds.
90-270.60. Denial, revocation, or suspension of license.
90-270.61. Penalties.
90-270.62. Injunction.
90-270.63, 90-270.64. [Reserved.]

Article 18D.

Occupational Therapy.

90-270.65. Title.
90-270.66. Declaration of purpose.
90-270.67. Definitions.
90-270.68. Establishment of Board, terms, vacancies, removal, meetings, compensation.
90-270.69. Powers and duties of the Board.
90-270.70. Requirements for licensure.
90-270.71. [Repealed.]
90-270.72. Exemption from requirements.
90-270.73. Issuance of license.
90-270.74. [Repealed.]
90-270.75. Renewal of license.
90-270.76. Suspension, revocation and refusal to renew license.
90-270.77. Fees.
90-270.78. False representation of license prohibited.
90-270.79. Violation a misdemeanor.
90-270.80. Injunctions.
90-270.80A. Civil penalties, disciplinary costs.
90-270.81. Persons and practices not affected.

Article 19.

Sterilization Operations.

90-271. Operation lawful upon request of married person or person over 18.
90-272. Operation on unmarried minor.
90-273. [Repealed.]
90-274. No liability for nonnegligent performance of operation.
90-275. Article does not affect duty of guardian to obtain order permitting guardian to consent to sterilization of a mentally ill or mentally retarded ward.

Article 20.

Nursing Home Administrator Act.

90-275.1. Title.
90-276. Definitions.

Sec.
90-277. Composition of Board.
90-278. Qualifications for licensure.
90-279. Licensing function.
90-280. Fees; display of license; duplicate license; inactive list.
90-281. Collection of funds.
90-282. [Repealed.]
90-283. Organization of Board; compensation; employees and services.
90-284. Exclusive jurisdiction of Board.
90-285. Functions and duties of the Board.
90-285.1. Suspension, revocation or refusal to issue a license.
90-286. Renewal of license.
90-287. Reciprocity with other states.
90-288. Misdemeanor.
90-288.01 through 90-288.09. [Reserved.]

Article 20A.

Assisted Living Administrator Act.

90-288.10. Title.
90-288.11. Purpose.
90-288.12. Certification required; exemptions.
90-288.13. Definitions.
90-288.14. Assisted living administrator certification.
90-288.15. Issuance, renewal, and replacement of certificates.
90-288.16. Certification by reciprocity.
90-288.17. Posting certificates.
90-288.18. Adverse action on a certificate.
90-288.19. Reporting requirement.
90-288.20. Penalties.

Article 21.

Determination of Need for Medical Care Facilities.

90-289 through 90-291. [Repealed.]

Article 22.

Licensure Act for Speech and Language Pathologists and Audiologists.

90-292. Declaration of policy.
90-293. Definitions.
90-294. License required; Article not applicable to certain activities.
90-295. Qualifications of applicants for permanent licensure.
90-296. Examinations.
90-297. [Repealed.]
90-298. Qualifications for applicants for temporary licensure.
90-298.1. Registered assistant.
90-299. Licensee to notify Board of place of practice.
90-300. Renewal of licenses.
90-301. Grounds for suspension or revocation of license.

Sec.
90-301A. Unethical acts and practices.
90-302. Prohibited acts and practices.
90-303. Board of Examiners for speech and language pathology and audiology; qualifications, appointment and terms of members; vacancies; meetings, etc.
90-304. Powers and duties of Board.
90-305. Fees.
90-306. Penalty for violation.
90-307. Severability.
90-308 through 90-319. [Reserved.]

Article 23.

Right to Natural Death; Brain Death.

90-320. General purpose of Article.
90-321. Right to a natural death.
90-322. Procedures for natural death in the absence of a declaration.
90-323. Death; determination by physician.
90-324 through 90-328. [Reserved.]

Article 24.

Licensed Professional Counselors Act.

90-329. Declaration of policy.
90-330. Definitions; practice of marriage and family therapy.
90-331. Prohibitions.
90-332. Use of title by firm.
90-332.1. Exemptions from licensure.
90-333. North Carolina Board of Licensed Professional Counselors; appointments; terms; composition.
90-334. Functions and duties of the Board.
90-335. Board general provisions.
90-336. Title and qualifications for licensure.
90-337. Persons credentialed in other states.
90-338. Exemptions.
90-339. Renewal of licenses.
90-340. Protection of the public.
90-341. Violation a misdemeanor.
90-342. Injunction.
90-343. Disclosure.
90-344. Third-party reimbursements.
90-345 through 90-349. [Reserved.]

Article 25.

Dietetics/Nutrition.

90-350. Short title.
90-351. Purpose.
90-352. Definitions.
90-353. Creation of Board.
90-354. Appointments and removal of Board members, terms and compensation.
90-355. Election of officers; meetings of Board.
90-356. Power and responsibility of Board.
90-357. License requirements.

Sec.
90-358. Notification of applicant following evaluation of application.
90-359. Examinations.
90-360. Granting license without examination.
90-361. Provisional licenses.
90-362. License as constituting property of Board; display requirement; renewal; inactive status.
90-363. Suspension, revocation and refusal to renew license.
90-364. Fees.
90-365. Requirement of license.
90-366. Violation a misdemeanor.
90-367. Injunctions.
90-368. Persons and practices not affected.
90-369. Third party reimbursement; limitation on modifications.
90-370 through 90-379. [Reserved.]

Article 26.

Fee-Based Practicing Pastoral Counselors.

90-380. Title.
90-381. Purpose.
90-382. Definitions.
90-383. Exemptions.
90-384. Temporary certificates.
90-385. Creation of Board; appointment and removal of members; terms and compensation; powers.
90-386. Annual report.
90-387. Certification and examination.
90-388. Equivalent certification and memberships recognized.
90-389. Renewal of certificate.
90-390. Refusal, suspension, or revocation of a certificate.
90-391. Prohibited acts.
90-392. Disposition of fees.
90-393. Injunction for violations.
90-394. Duplicate and replacement certificates.
90-395. Practice of medicine and psychology not authorized.
90-396. [Repealed.]
90-397 through 90-399. [Reserved.]

Article 27.

Referral Fees and Payment for Certain Solicitations Prohibited.

90-400. Definition.
90-401. Referral fees and payment for certain solicitations prohibited.
90-401.1. Direct solicitation prohibited.
90-402. Sanctions.
90-403, 90-404. [Reserved.]

Article 28.

Self-Referrals by Health Care Providers.

90-405. Definitions.
90-406. Self-referrals prohibited.

Sec.
90-407. Disciplinary action and penalties.
90-408. Exceptions for underserved areas.
90-409. [Reserved].

Article 29.

Medical Records.

90-410. Definitions.
90-411. Record copy fee.
90-412. Electronic medical records.
90-413 through 90-449. [Reserved.]

Article 30.

Practice of Acupuncture.

90-450. Purpose.
90-451. Definitions.
90-452. Practice of acupuncture without license prohibited.
90-453. Acupuncture Licensing Board.
90-454. Powers and duties of Board.
90-455. Qualifications for license; renewal; inactive, suspended, expired, or lapsed license.
90-456. Prohibited activities.
90-457. Fees.
90-457.1. Continuing education.
90-458. Use of titles and display of license.
90-459. Third-party reimbursements.
90-460 through 90-469. [Reserved.]

Article 31.

Institute of Medicine.

90-470. Institute of Medicine.
90-471 through 90-499. [Reserved.]

Article 32.

Employee Assistance Professionals.

90-500. Definitions.
90-501. Board of Employee Assistance Professionals; members.
90-502. Powers and duties of the Board.
90-503. License requirements.
90-504. License renewals.
90-505. Requirements for persons licensed out-of-state.
90-506. Violations; enforcement; penalties.
90-507. Hearings.
90-508. Representation as licensed professional.
90-509. Other prohibited activities.
90-510. Investigations; good faith reports of violations.
90-511. Employee assistance professional practice by members of other professional groups.
90-512 through 90-514. [Reserved.]

Article 33.

Industrial Hygiene.

90-515. Definitions.
90-516. Unlawful acts.
Sec.
90-517 through 90-521. [Reserved.]

Article 34.

Athletic Trainers.

90-522. Title; purpose.
90-523. Definitions.
90-524. Board of Examiners created.
90-525. Powers of the Board.
90-526. Custody and use of funds; contributions.
90-527. License required; exemptions from license requirement.
90-528. Application for license; qualifications; issuance.
90-529. Athletic trainers previously certified.
90-530. Athletic trainers not certified.
90-531. Reciprocity with other states.
90-532. License renewal.
90-533. Continuing education.
90-534. Expenses and fees.
90-535. Hiring of athletic trainers by school units.
90-536. Disciplinary authority of the Board; administrative proceedings.
90-537. Enjoining illegal practices.
90-538. Penalties.
90-539. Reports; immunity from suit.
90-540. No third-party reimbursement required.
90-541 through 90-599. [Reserved.]

Article 35.

Accident-Trauma Victim Identification.

90-600. Short title.
90-601. Purpose.
90-602. Routine search for donor information.
90-603. Timely notification of next of kin.
90-604. Use of body information tags.
90-605 through 90-619. [Reserved.]

Article 36.

Massage and Bodywork Therapy Practice.

90-620. Short title.
90-621. Declaration of purpose.
90-622. Definitions.
90-623. License required.
90-624. Exemptions.
90-625. North Carolina Board of Massage and Bodywork Therapy.
90-626. Powers and duties.
90-627. Custody and use of funds.
90-628. Expenses and fees.
90-629. Requirements for licensure.
90-630. Reciprocity.
90-631. Massage and bodywork therapy schools.
90-632. License renewal and continuing education.

Sec.
90-633. Disciplinary action.
90-634. Enforcement; injunctive relief.
90-634.1. Civil penalties; disciplinary costs.
90-635. Third-party reimbursement.
90-636. Regulation by county or municipality.
90-637 through 90-639. [Reserved.]

Article 37.

Health Care Practitioner Identification.

90-640. Identification badges required.
90-641 through 90-645. [Reserved.]

Article 38.

Respiratory Care Practice Act.

90-646. Short title.
90-647. Purpose.
90-648. Definitions.
90-649. North Carolina Respiratory Care Board; creation.
90-650. Appointments and removal of Board members; terms and compensation.
90-651. Election of officers; meetings of the Board.
90-652. Powers and duties of the Board.
90-653. Licensure requirements; examination.
90-654. Temporary license.
90-655. Licensure by reciprocity.
90-656. Provisional license.
90-657. Notification of applicant following evaluation of application.
90-658. License as property of the Board; display requirement; renewal; inactive status.
90-659. Suspension, revocation, and refusal to renew a license.
90-660. Expenses; fees.
90-661. Requirement of license.
90-662. Violation a misdemeanor.
90-663. Injunctions.
Sec.
90-664. Persons and practices not affected.
90-665. Third-party reimbursement.
90-666. Civil penalties.
90-667 through 90-670 [Reserved.]

Article 39.

Safety Profession.

90-671. Definitions.
90-672. Unlawful acts; injunctive relief; exclusion.
90-673. Exemptions and limitations.
90-674. Certification registry.
90-675 through 90-680. [Reserved.]

Article 40.

Perfusionist Licensure Act.

90-681. Legislative findings.
90-682. Definitions.
90-682.1. Medical Board approval required.
90-683. License required; exemptions.
90-684. Perfusion Advisory Committee.
90-685. Powers of the Committee.
90-685.1. Confidentiality of Committee investigative information.
90-686. Qualifications for licensure.
90-687. Reciprocity.
90-688. Provisional license.
90-689. Expenses; fees.
90-690. Renewal of licenses.
90-690.1. Maintenance of certification to maintain licensure.
90-691. Disciplinary authority.
90-692. Enjoining illegal practices.
90-693. Civil penalties; disciplinary costs.
90-694. Third-party reimbursement.
90-695 through 90-700. [Reserved.]

Article 41.

Pathology Services Billing.

90-701. Billing of anatomic pathology services.

ARTICLE 1.

Practice of Medicine.

§ 90-1. North Carolina Medical Society incorporated.

The association of regularly graduated physicians, calling themselves the State Medical Society, is hereby declared to be a body politic and corporate, to be known and distinguished by the name of The Medical Society of the State of North Carolina. The name of the society is now the North Carolina Medical Society. (1858-9, c. 258, s. 1; Code, s. 3121; Rev., s. 4491; C.S., s. 6605; 1981, c. 573, s. 1.)

Cross References. — As to limited liability companies and their powers, see G.S. 57C-2-01 et seq. As to a civil action remedy for persons who are sexually exploited by their psychotherapists, see the Psychotherapy Patient/Client Sexual Exploitation Act, G.S. 90-21.41 et seq.

Legal Periodicals. — For legislative survey on medicine, see 22 Campbell L. Rev. 253 (2000).

CASE NOTES

Cited in Powell v. Duke Univ., Inc., 18 N.C. App. 736, 197 S.E.2d 910 (1973); In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

§ 90-1.1. Definitions.

The following definitions apply in this Article:

(1) Board. — The North Carolina Medical Board.

(2) Hearing officer. — Any current or past member of the Board who is a physician, physician assistant, or nurse practitioner and has an active license or approval to practice medical acts, tasks, or functions issued by the Board, or any current or retired judge of the Office of Administrative Hearings, a State district court, a State superior court, the North Carolina Court of Appeals, the North Carolina Supreme Court, or of the federal judiciary who has an active license to practice law in North Carolina and who is a member in good standing of the North Carolina State Bar.

(3) Integrative medicine. — A diagnostic or therapeutic treatment that may not be considered a conventionally accepted medical treatment and that a licensed physician in the physician's professional opinion believes may be of potential benefit to the patient, so long as the treatment poses no greater risk of harm to the patient than the comparable conventional treatments.

(4) License. — An authorization issued by the Board to a physician or physician assistant to practice medical acts, tasks, or functions.

(5) The practice of medicine or surgery. — The practice of medicine or surgery, for purposes of this Article, includes any of the following acts:

  a. Advertising, holding out to the public, or representing in any manner that the individual is authorized to practice medicine in this State.

  b. Offering or undertaking to prescribe, order, give, or administer any drug or medicine for the use of any other individual.

  c. Offering or undertaking to prevent or diagnose, correct, prescribe for, administer to, or treat in any manner or by any means, methods, or devices any disease, illness, pain, wound, fracture, infirmity, defect, or abnormal physical or mental condition of any individual, including the management of pregnancy or parturition.

  d. Offering or undertaking to perform any surgical operation on any individual.

  e. Using the designation "Doctor," "Doctor of Medicine," "Doctor of Osteopathy," "Doctor of Osteopathic Medicine," "Physician," "Surgeon," "Physician and Surgeon," "Dr.," "M.D.," "D.O.," or any combination thereof in the conduct of any occupation or profession pertaining to the prevention, diagnosis, or treatment of human disease or condition, unless the designation additionally contains the description of or reference to another branch of the healing arts for which the individual holds a valid license in this State or the use of the designation "Doctor" or "Physician" is otherwise specifically permitted by law.

f. The performance of any act, within or without this State, described in this subdivision by use of any electronic or other means, including the Internet or telephone. (2007-346, s. 1.)

Editor's Note. — Session Laws 2007-346, s. 1, enacted this section as G.S. 90-1A. It has been renumbered as this section at the direction of the Revisor of Statutes.

Session Laws 2007-346, s. 28, made this section effective October 1, 2007.

§ 90-2. Medical Board.

(a) There is established the North Carolina Medical Board to regulate the practice of medicine and surgery for the benefit and protection of the people of North Carolina. The Board shall consist of 12 members.

(1) Seven of the members shall be duly licensed physicians recommended by the Review Panel and appointed by the Governor as set forth in G.S. 90-3.

(2) The remaining five members shall all be appointed by the Governor as follows:

a. One shall be a duly licensed physician who is a doctor of osteopathy or a full-time faculty member of one of the medical schools in North Carolina who utilizes integrative medicine in that person's clinical practice or a member of The Old North State Medical Society. This Board position shall not be subject to recommendations of the Review Panel pursuant to G.S. 90-3.

b. Three shall be public members, and these Board positions shall not be subject to recommendations of the Review Panel pursuant to G.S. 90-3. A public member shall not be a health care provider nor the spouse of a health care provider. For the purpose of Board membership, "health care provider" means any licensed health care professional, agent or employee of a health care institution, health care insurer, health care professional school, or a member of any allied health profession. For purposes of this section, a person enrolled in a program as preparation to be a licensed health care professional or an allied health professional shall be deemed a health care provider. For purposes of this section, any person with significant financial interest in a health service or profession is not a public member.

c. One shall be a physician assistant as defined in G.S. 90-18.1 or a nurse practitioner as defined in G.S. 90-18.2 as recommended by the Review Panel pursuant to G.S. 90-3.

(a1) Each appointing and nominating authority shall endeavor to see, insofar as possible, that its appointees and nominees to the Board reflect the composition of the State with regard to gender, ethnic, racial, and age composition.

(b) No member shall serve more than two complete consecutive three-year terms, except that each member shall serve until a successor is chosen and qualifies.

(c) Repealed by Session Laws 2003-366, s. 1, effective October 1, 2003.

(d) Any member of the Board may be removed from office by the Governor for good cause shown. Any vacancy in the physician, physician assistant, or nurse practitioner membership of the Board shall be filled for the period of the unexpired term by the Governor from a list submitted by the Review Panel pursuant to G.S. 90-3 except as provided in G.S. 90-2(a)(2)a. Any vacancy in the public membership of the Board shall be filled by the Governor for the unexpired term.

(e) The North Carolina Medical Board shall have the power to acquire, hold, rent, encumber, alienate, and otherwise deal with real property in the same manner as any private person or corporation, subject only to approval of the Governor and the Council of State as to the acquisition, rental, encumbering, leasing, and sale of real property. Collateral pledged by the Board for an encumbrance is limited to the assets, income, and revenues of the Board. (1858-9, c. 258, ss. 3, 4; Code, s. 3123; Rev., s. 4492; C.S., s. 6606; Ex. Sess. 1921, c. 44, s. 1; 1981, c. 573, s. 2; 1991 (Reg. Sess., 1992), c. 787, s. 1; 1993, c. 241, s. 2; 1995, c. 94, s. 1; c. 405, s. 1; 1997-511, s. 1; 2003-366, s. 1; 2007-346, s. 2.)

Editor's Note. — Session Laws 2003-366, s. 6, made this section applicable to positions on the Board only upon their expiration. Current members of the Board eligible to be reappointed to the Board may be reappointed, notwithstanding this section.

Session Laws 2005-415, s. 3, provides: "The State licensing boards subject to G.S. 90-681 [renumbered as G.S. 90-701], as enacted by this act, and the Division of Facility Services [now the Division of Health Service Regulation] of the Department of Health and Human Services shall report to the 2006 Regular Session of the 2005 General Assembly upon its convening. The report shall indicate efforts made to apprise licensed practitioners and to evaluate licensed practitioners' and licensed health care facilities' compliance with the requirements of G.S. 90-681 [renumbered as G.S. 90-701], as enacted by this act."

Effect of Amendments. — Session Laws 2007-346, s. 2, effective January 1, 2008, rewrote the section.

Legal Periodicals. — For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

CASE NOTES

Section Is Valid Exercise of Police Power and Properly Delegates Authority. — This section is a valid exercise of the police power and properly delegates authority to the Board of Medical Examiners. The legislature may delegate certain authority, such as adjudicative and rule-making functions, to administrative bodies. In re Guess, 327 N.C. 46, 393 S.E.2d 833 (1990), cert. denied, 498 U.S. 1047, 111 S. Ct. 754, 112 L. Ed. 2d 774 (1991).

Suit Against Board. — Neither the State nor any of its institutions or agencies, including the Board, can be sued without its permission. Mazzucco v. North Carolina Bd. of Medical Exmrs., 31 N.C. App. 47, 228 S.E.2d 529, appeal dismissed, 291 N.C. 323, 230 S.E.2d 676 (1976).

The Board is not a "person" within the meaning of 42 U.S.C. § 1983 and cannot be subject to a suit for damages. Hoke v. Board of Medical Exmrs., 445 F. Supp. 1313 (W.D.N.C. 1978).

A suit against the Board directly under U.S. Const., Amend. XIV is barred by U.S. Const. Amend. XI. Hoke v. Board of Medical Exmrs., 445 F. Supp. 1313 (W.D.N.C. 1978).

Cited in In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978); Mebane v. Board of Medical Exmrs., 55 N.C. App. 455, 286 S.E.2d 112 (1982); In re Lustgarten, 177 N.C. App. 663, 629 S.E.2d 886, 2006 N.C. App. LEXIS 1200 (2006).

OPINIONS OF ATTORNEY GENERAL

Section Permits Physician to Serve as a Member of the Board for More Than Two Three-Year Terms. — See opinion of Attorney General to Ms. Josephine E. Newell, M.D., President N.C. Medical Society, 51 N.C.A.G. 96 (1982).

Section Does Not Permit North Carolina Medical Society to Limit Period of a Physician's Service on the Board. — See opinion of Attorney General to Ms. Josephine E. Newell, M.D., President N.C. Medical Society, 51 N.C.A.G. 96 (1982).

§ 90-2.1: Repealed by Session Laws 2007-346, s. 3, effective October 1, 2007.

§ 90-3. Review Panel recommends certain Board members; criteria for recommendations.

(a) There is created a Review Panel to review all applicants for the physician positions and the physician assistant or nurse practitioner position on the Board except as provided in G.S. 90-2(a)(2)a. The Review Panel shall consist of nine members, including four from the Medical Society, one from the Old North State Medical Society, one from the North Carolina Osteopathic Medical Association, one from the North Carolina Academy of Physician Assistants, one from the North Carolina Nurses Association Council of Nurse Practitioners, and one public member currently serving on the Board. All physicians, physician assistants, and nurse practitioners serving on the Review Panel shall be actively practicing in North Carolina.

The Review Panel shall contract for the independent administrative services needed to complete its functions and duties. The Board shall provide funds to pay the reasonable cost for the administrative services of the Review Panel. The Board shall convene the initial meeting of the Review Panel. The Review Panel shall elect a chair, and all subsequent meetings shall be convened by the Review Panel.

The Governor shall appoint Board members as provided in G.S. 90-2. The Review Panel shall attempt to make its recommendations to the Governor reflect the composition of the State with regard to gender, ethnic, racial, and age composition.

The Review Panel and its members and staff shall not be held liable in any civil or criminal proceeding for exercising, in good faith, the powers and duties authorized by law.

(b) To be considered qualified for a physician position or the physician assistant or nurse practitioner position on the Board, an applicant shall meet each of the following criteria:

(1) Hold an active, nonlimited license to practice medicine in North Carolina, or in the case of a physician assistant or nurse practitioner, hold an active license or approval to perform medical acts, tasks, and functions in North Carolina.

(2) Have an active clinical or teaching practice. For purposes of this subdivision, the term “active” means patient care, or instruction of students in an accredited medical school or residency, or clinical research program, for 20 hours or more per week.

(3) Have actively practiced in this State for at least five consecutive years immediately preceding the appointment.

(4) Intend to remain in active practice in this State for the duration of the term on the Board.

(5) Submit at least three letters of recommendation, either from individuals or from professional or other societies or organizations.

(6) Have no public disciplinary history with the Board or any other licensing board in this State or another state over the past 10 years before applying for appointment to the Board.

(7) Have no history of felony convictions of any kind.

(8) Have no misdemeanor convictions related to the practice of medicine.

(9) Indicate, in a manner prescribed by the Review Panel, that the applicant: (i) understands that the primary purpose of the Board is to protect the public; (ii) is willing to take appropriate disciplinary action against his or her peers for misconduct or violations of the standards of care or practice of medicine; and (iii) is aware of the time commitment needed to be a constructive member of the Board.

(c) The review panel shall recommend at least two qualified nominees for each open position on the Board. If the Governor chooses not to appoint either of the recommended nominees, the Review Panel shall recommend at least two new qualified nominees.

(d) Notice of open physician positions or the physician assistant or nurse practitioner position on the Board shall be sent to all physicians currently licensed to practice medicine in North Carolina and all physician assistants and nurse practitioners currently licensed or approved to perform medical acts, tasks, and functions in this State.

(e) Applicants for positions on the Board shall not be required to be members of any professional association or society, except as provided in G.S. 90-2(a)(2)a. (1858-9, c. 258, s. 9; Code, s. 3126; Rev., s. 4493; C.S., s. 6607; 1981, c. 573, s. 3; 2007-346, s. 4.)

Effect of Amendments. — Session Laws 2007-346, s. 4, effective January 1, 2008, rewrote the section which read: "The Governor shall appoint as physician members of the Board physicians elected and nominated by the North Carolina Medical Society."

CASE NOTES

Cited in In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

§ 90-4. Board elects officers; quorum.

The North Carolina Medical Board is authorized to elect all officers and adopt all bylaws as may be necessary. A majority of the membership of the Board shall constitute a quorum for the transaction of business. (1858-9, c. 258, s. 11; Code, s. 3128; Rev., s. 4494; C.S., s. 6608; 1981, c. 573, s. 4; 1995, c. 94, s. 7.)

§ 90-5. Meetings of Board.

The North Carolina Medical Board shall assemble once in every year in the City of Raleigh, and shall remain in session from day to day until all applicants who may present themselves for examination within the first two days of this meeting have been examined and disposed of; other meetings in each year may be held at some suitable point in the State if deemed advisable. (Rev., s. 4495; 1915, c. 220, s. 1; C.S., s. 6609; 1935, c. 363; 1981, c. 573, s. 5; 1995, c. 94, s. 8.)

§ 90-5.1. Powers and duties of the Board.

(a) The Board shall:

(1) Administer this Article.

(2) Issue interpretations of this Article.

(3) Adopt, amend, or repeal rules as may be necessary to carry out and enforce the provisions of this Article.

(4) Require an applicant or licensee to submit to the Board evidence of the applicant's or licensee's continuing competence in the practice of medicine.

(5) Regulate the retention and disposition of medical records, whether in the possession of a licensee or nonlicensee. In the case of the death of a licensee, the rules may provide for the disposition of the medical records by the estate of the licensee. This subsection shall not apply to records created or maintained by persons licensed under other Articles of this Chapter or to medical records maintained in the normal course of business by licensed health care institutions.

(6) Appoint a temporary or permanent custodian for medical records abandoned by a licensee.
(7) Develop educational programs to facilitate licensee awareness of provisions contained in this Article and public awareness of the role and function of the Board.
(8) Develop and implement methods to identify dyscompetent physicians and physicians who fail to meet acceptable standards of care.
(9) Develop and implement methods to assess and improve physician practice.
(10) Develop and implement methods to ensure the ongoing competence of licensees.

(b) Nothing in subsection (a) of this section shall restrict or otherwise limit powers and duties conferred on the Board in other sections of this Article. (2007-346, s. 5.)

Editor's Note. — Session Laws 2007-346, s. 28, made this section effective October 1, 2007.

§ 90-5.2. Board to collect and publish certain data.

(a) The Board shall require all physicians and physician assistants to report to the Board certain information, including, but not limited to, the following:
(1) The names of any schools of medicine or osteopathy attended and the year of graduation.
(2) Any graduate medical or osteopathic education at any institution approved by the Accreditation Council of Graduate Medical Education, the Committee for the Accreditation of Canadian Medical Schools, the American Osteopathic Association, or the Royal College of Physicians and Surgeons of Canada.
(3) Any specialty board of certification as approved by the American Board of Medical Specialties, the Bureau of Osteopathic Specialists of American Osteopathic Association, or the Royal College of Physicians and Surgeons of Canada.
(4) Specialty area of practice.
(5) Hospital affiliations.
(6) Address and telephone number of the primary practice setting.
(7) An e-mail address or facsimile number which shall not be made available to the public and shall be used for the purpose of expediting the dissemination of information about a public health emergency.
(8) Any final disciplinary order or other action required to be reported to the Board pursuant to G.S. 90-14.13 that results in a suspension or revocation of privileges.
(9) Any final disciplinary order or action of any regulatory board or agency including other state medical boards, the United States Food and Drug Administration, the United States Drug Enforcement Administration, Medicare, or the North Carolina Medicaid program.
(10) Conviction of a felony.
(11) Conviction of certain misdemeanors, occurring within the last 10 years, in accordance with rules adopted by the Board.
(12) Any medical license, active or inactive, granted by another state or country.
(13) Certain malpractice information received pursuant to G.S. 90-14.13 or from other sources in accordance with rules adopted by the Board.

(b) Except as provided, the Board shall make information collected under G.S. 90-5.2(a) available to the public.

(c) The Board may adopt rules to implement this section.

(d) Failure to provide information as required by this section and in accordance with Board rules or knowingly providing false information may be considered unprofessional conduct as defined in G.S. 90-14(a)(6). (2007-346, s. 6.)

Editor's Note. — Subsections (a1), (b) and (c), as enacted by Session Laws 2007-346, s. 6, have been redesignated as subsections (b) through (d), at the direction of the Revisor of Statutes.

Session Laws 2007-346, s. 28, made this section effective October 1, 2007.

§ 90-6: Recodified as G.S. 90-8.1 and G.S. 90-8.2, by Session Laws 2007-346, s. 7, effective October 1, 2007.

Editor's Note. — Session Laws 2007-346, s. 7, effective October 1, 2007, recodified subsection (a) of this section as G.S. 90-8.1, and subsections (b) and (c) of this section as G.S. 90-8.2(a) and (b), respectively.

§ 90-7. Bond of secretary.

The secretary of the North Carolina Medical Board shall give bond with good surety, to the president of the Board, for the safekeeping and proper payment of all moneys that may come into his hands. (1858-9, c. 258, s. 17; Code, s. 3134; Rev., s. 4497; C.S., s. 6611; 1995, c. 94, s. 10.)

§ 90-8. Officers may administer oaths, and subpoena witnesses, records and other materials.

The president and secretary of the Board may administer oaths to all persons appearing before it as the Board may deem necessary to perform its duties, and may summon and issue subpoenas for the appearance of any witnesses deemed necessary to testify concerning any matter to be heard before or inquired into by the Board. The Board may order that any patient records, documents or other material concerning any matter to be heard before or inquired into by the Board shall be produced before the Board or made available for inspection, notwithstanding any other provisions of law providing for the application of any physician-patient privilege with respect to such records, documents or other material. All records, documents, or other material compiled by the Board are subject to the provisions of G.S. 90-16. Notwithstanding the provisions of G.S. 90-16, in any proceeding before the Board, in any record of any hearing before the Board, and in the notice of charges against any licensee, the Board shall withhold from public disclosure the identity of a patient including information relating to dates and places of treatment, or any other information that would tend to identify the patient, unless the patient or the representative of the patient expressly consents to the disclosure. Upon written request, the Board shall revoke a subpoena if, upon a hearing, it finds that the evidence the production of which is required does not relate to a matter in issue, or if the subpoena does not describe with sufficient particularity the evidence the production of which is required, or if for any other reason in law the subpoena is invalid. (1913, c. 20, s. 7; C.S., s. 6612; Ex. Sess. 1921, c. 44, s. 3; 1953, c. 1248, s. 1; 1975, c. 690, s. 1; 1979, c. 107, s. 8; 1987, c. 859, s. 5; 1991, c. 348, s. 1.)

§ 90-8.1. Rules governing applicants for licensure.

The North Carolina Medical Board is empowered to adopt rules that prescribe additional qualifications for an applicant, including education and examination requirements and application procedures. (C.S., s. 6610; 1921, c. 47, s. 5; Ex. Sess. 1921, c. 44, s. 2; 1973, c. 92, s. 2; 1981, c. 665, s. 1; 1983, c. 53; 1995, c. 94, s. 9; c. 405, s. 2; 1999-290, s. 1; 2007-346, ss. 7, 8.)

Editor's Note. — This section is former G.S. 90-6(a), recodified as G.S. 90-8.1, effective October 1, 2007, by Session Laws 2007-346, s. 7.

Effect of Amendments. — Session Laws 2007-346, ss. 7 and 8, effective October 1, 2007, recodified G.S. 90-6(a) as this section; and rewrote the section.

§ 90-8.2. Appointment of subcommittees.

(a) The North Carolina Medical Board shall appoint and maintain a subcommittee to work jointly with a subcommittee of the Board of Nursing to develop rules to govern the performance of medical acts by registered nurses, including the determination of reasonable fees to accompany an application for approval not to exceed one hundred dollars ($100.00) and for renewal of approval not to exceed fifty dollars ($50.00). Rules developed by this subcommittee from time to time shall govern the performance of medical acts by registered nurses and shall become effective when adopted by both the North Carolina Medical Board and the Board of Nursing. The North Carolina Medical Board shall have responsibility for securing compliance with these rules.

(b) The North Carolina Medical Board shall appoint and maintain a subcommittee of four licensed physicians to work jointly with a subcommittee of the North Carolina Board of Pharmacy to develop rules to govern the performance of medical acts by clinical pharmacist practitioners, including the determination of reasonable fees to accompany an application for approval not to exceed one hundred dollars ($100.00) and for renewal of approval not to exceed fifty dollars ($50.00). Rules recommended by the subcommittee shall be adopted in accordance with Chapter 150B of the General Statutes by both the North Carolina Medical Board and the North Carolina Board of Pharmacy and shall not become effective until adopted by both Boards. The North Carolina Medical Board shall have responsibility for ensuring compliance with these rules. (C.S., s. 6610; 1921, c. 47, s. 5; Ex. Sess. 1921, c. 44, s. 2; 1973, c. 92, s. 2; 1981, c. 665, s. 1; 1983, c. 53; 1995, c. 94, s. 9; c. 405, s. 2; 1999-290, s. 1; 2007-346, s. 7; 2007-418, s. 3.)

Editor's Note. — This section is former G.S. 90-6(b) and (c), recodified as G.S. 90-8.2(a) and (b), respectively, effective October 1, 2007, by Session Laws 2007-346, s. 7.

Session Laws 2006-144, s. 10(a) and (b), provide: "(a) The subcommittee of the North Carolina Medical Board and the subcommittee of the Board of Nursing, directed to work jointly to develop rules to govern the performance of medical acts by registered nurses pursuant to G.S. 90-6(b), shall examine adding the provisions of G.S. 90-14(a) to their joint rules that set forth grounds for action against a registered nurse's approval to perform medical acts.

"(b) The subcommittee of the North Carolina Medical Board and the subcommittee of the North Carolina Board of Pharmacy, directed to work jointly to develop rules to govern the performance of medical acts by clinical pharmacist practitioners pursuant to G.S. 90-6(c), shall examine adding the provisions of G.S. 90-14(a) to the joint rules that set forth grounds for action against a clinical pharmacist practitioner's approval to perform medical acts."

Effect of Amendments. — Session Laws 2007-418, s. 3, effective October 1, 2007, deleted the language "The fee for reactivation of an inactive incomplete application shall be five dollars ($5.00)" in subsections (a) and (b).

§ 90-9: Repealed by Session Laws 2007-418, s. 2, effective October 1, 2007.

§ 90-9.1. Requirements for licensure as a physician under this Article.

(a) Except as provided in G.S. 90-9.2, to be eligible for licensure as a physician under this Article, an applicant shall submit proof satisfactory to the Board that the applicant:

(1) Has passed each part of an examination described in G.S. 90-10.1;

(2) Is a graduate of:

a. A medical college approved by the Liaison Commission on Medical Education, the Committee for the Accreditation of Canadian Medical Schools, or an osteopathic college approved by the American Osteopathic Association and has successfully completed one year of training in a medical education program approved by the Board after graduation from medical school; or

b. A medical college approved by the Liaison Commission on Medical Education, the Committee for the Accreditation of Canadian Medical Schools, or an osteopathic college approved by the American Osteopathic Association, is a dentist licensed to practice dentistry under Article 2 of Chapter 90 of the General Statutes, and has been certified by the American Board of Oral and Maxillofacial Surgery after having completed a residency in an Oral and Maxillofacial Surgery Residency program approved by the Board before completion of medical school; and

(3) Is of good moral character.

(b) No license may be granted to any applicant who graduated from a medical or osteopathic college that has been disapproved by the Board pursuant to rules adopted by the Board.

(c) The Board may, by rule, require an applicant to comply with other requirements or submit additional information the Board deems appropriate. (2007-346, s. 9.)

Editor's Note. — Session Laws 2007-346, s. 28, made this section effective October 1, 2007.

§ 90-9.2. Requirements for graduates of foreign medical schools.

(a) To be eligible for licensure under this section, an applicant who is a graduate of a medical school not approved by the Liaison Commission on Medical Education, the Committee for the Accreditation of Canadian Medical Schools, or the American Osteopathic Association shall submit proof satisfactory to the Board that the applicant:

(1) Has successfully completed three years of training in a medical education program approved by the Board after graduation from medical school;

(2) Is of good moral character;

(3) Has a currently valid standard certificate of Educational Commission for Foreign Medical Graduates (ECFMG); and

(4) Is able to communicate in English.

(b) The Board may waive ECFMG certification if the applicant:

(1) Has passed the ECFMG examination and successfully completed an approved Fifth Pathway Program. The applicant is required to provide the original ECFMG Certification Status Report from the ECFMG; or

(2) Has been licensed in another state on the basis of written examination before the establishment of ECFMG in 1958.

(c) The Board may, by rule, require an applicant to comply with other requirements or submit additional information the Board deems appropriate. (2007-346, s. 9.)

Editor's Note. — Session Laws 2007-346, s. 28, made this section effective October 1, 2007.

§ 90-9.3. Requirements for licensure as a physician assistant.

(a) To be eligible for licensure as a physician assistant, an applicant shall submit proof satisfactory to the Board that the applicant:

(1) Has successfully completed an educational program for physician assistants or surgeon assistants accredited by the Committee on Allied Health Education and Accreditation or by the Committee's predecessor or successor entities;

(2) Holds or previously held a certificate issued by the National Commission on Certification of Physician Assistants; and

(3) Is of good moral character.

(b) Before initiating practice of medical acts, tasks, or functions as a physician assistant, the physician assistant shall provide the Board the name, address, and telephone number of the physician who will supervise the physician assistant in the relevant medical setting.

(c) The Board may, by rule, require an applicant to comply with other requirements or submit additional information the Board deems appropriate. The Board may set fees for physician assistants pursuant to rules adopted by the Board. (2007-346, s. 9.)

Editor's Note. — Session Laws 2007-346, s. 28, made this section effective October 1, 2007.

§ 90-9.4. Requirements for licensure as an anesthesiologist assistant.

Every applicant for licensure as an anesthesiologist assistant in the State shall meet the following criteria:

(1) Satisfy the North Carolina Medical Board that the applicant is of good moral character.

(2) Submit to the Board proof of completion of a graduate level training program accredited by the Commission of Accreditation of Allied Health Education Programs or its successor organization.

(3) Submit to the Board proof of current certification from the National Commission of Certification of Anesthesiologist Assistants (NCCAA) or its successor organization, including passage of a certification examination administered by the NCCAA. The applicant shall take the certification exam within 12 months after completing training.

(4) Meet any additional qualifications for licensure pursuant to rules adopted by the Board. (2007-346, s. 9.)

Editor's Note. — Session Laws 2007-346, s. 28, made this section effective October 1, 2007.

§ 90-10: Repealed by Session Laws 2007-418, s. 2, effective October 1, 2007.

§ 90-10.1. Examinations accepted by the Board.

The Board may administer or accept the following examinations for licensure:

(1) A State Board licensing examination.
(2) The National Board of Medical Examiners (NBME) examination or its successor.
(3) The United States Medical Licensing Examination (USMLE) of this section or its successor.
(4) The Federation Licensing Examination (FLEX) or its successor.
(5) Other examinations the Board deems equivalent to the examinations described in subdivisions (1) through (3) of this section pursuant to rules adopted by the Board. (2007-346, s. 10.)

Editor's Note. — Session Laws 2007-346, s. 28, made this section effective October 1, 2007.

§ 90-11. Criminal background checks.

(a) Repealed by Session Laws 2007-346, s. 11, effective October 1, 2007.

(a1) Repealed by Session Laws 2007-346, s. 9.1, effective October 1, 2007.

(b) The Department of Justice may provide a criminal record check to the Board for a person who has applied for a license through the Board. The Board shall provide to the Department of Justice, along with the request, the fingerprints of the applicant, any additional information required by the Department of Justice, and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The Board shall keep all information pursuant to this subsection privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this subsection. (C.S., s. 6615; 1921, c. 47, s. 3; Ex. Sess. 1921, c. 44, s. 5; 1971, c. 1150, s. 3; 1981, c. 573, s. 7; 1995, c. 94, s. 12; 1997-511, s. 2; 2002-147, s. 6; 2007-146, s. 1; 2007-346, ss. 9.1, 11.)

Editor's Note. — Session Laws 2007-146, s. 1, effective June 29, 2007, added G.S. 90-11(a1). Session Laws 2007-346, s. 9.1, repealed Session Laws 2007-146, s. 1, effective October 1 2007. As added by Session Laws 2007-146, s. 1, G.S. 90-11(a1) read:

"(a1) Every applicant for licensure as an anesthesiologist assistant in the State shall meet the following criteria:

"(1) Satisfy the North Carolina Medical Board that the applicant is of good moral character.

"(2) Submit to the Board proof of completion of a graduate level training program accredited by the Commission of Accreditation of Allied Health Education Programs or its successor organization.

"(3) Submit to the Board proof of current certification from the National Commission of Certification of Anesthesiologist Assistants (NCCAA) or its successor organization, including passage of a certification examination administered by the NCCAA. The applicant shall take the certification exam within 12 months after completing training.

"(4) Meet any additional qualifications for licensure pursuant to rules adopted by the Board." For a similar provision, see G.S. 90-9.4, enacted by Session Laws 2007-346, s. 9.

Effect of Amendments. — Session Laws

2007-346, s. 11, effective October 1, 2007, rewrote the section heading; deleted subsection (a) which required North Carolina Medical Board applicants to meet moral character standards and other qualifications for licensure.

§ 90-12: Repealed by Session Laws 2007-346, s. 12, effective October 1, 2007.

Cross References. — For current provisions as to limited license to practice in a medical education and training program, see G.S. 90-12.01.

§ 90-12.01. Limited license to practice in a medical education and training program.

(a) As provided in rules adopted by the Board, the Board may issue a limited license known as a "resident's training license" to a physician not otherwise licensed by the Board who is participating in a graduate medical education training program.

(b) A resident's training license shall become inactive at the time its holder ceases to be a resident in a training program or obtains any other license to practice medicine issued by the Board. The Board shall retain jurisdiction over the holder of the inactive license. (2007-418, s. 4.)

Editor's Note. — Session Laws 2007-418, s. 4, enacted this section as G.S. 90-12A. It has been renumbered as this section at the direction of the Revisor of Statutes.

Session Laws 2007-418, s. 10, made this section effective October 1, 2007.

§ 90-12.1: Recodified as G.S. 90-12.4, by Session Laws 2007-346, s. 7, effective October 1, 2007.

§ 90-12.1A. Limited volunteer license.

(a) The Board may issue a "military limited volunteer license" to an applicant who:

(1) Has a license to practice medicine and surgery in another state;
(2) Produces a letter from the state of licensure indicating the applicant is in good standing; and
(3) Is authorized to treat personnel enlisted in a branch of the United States armed services or veterans.

(b) The Board may issue a "retired limited volunteer license" to an applicant who is a retired physician and has allowed his or her license to practice medicine and surgery in this State or another state to become inactive.

(c) A physician holding a limited license under this section shall comply with the continuing medical education requirements pursuant to rules adopted by the Board.

(d) The Board shall issue a limited license under this section within 30 days after an applicant provides the Board with information satisfying the requirements of this section.

(e) The holder of a limited license under this section may practice medicine and surgery only at clinics that specialize in the treatment of indigent patients. The holder of the limited license may not receive compensation for services rendered at clinics specializing in the care of indigent patients.

(f) The holder of a limited license issued pursuant to this section who practices medicine or surgery at places other than clinics that specialize in the treatment of indigent patients shall be guilty of a Class 3 misdemeanor and, upon conviction, shall be fined not less than twenty-five dollars ($25.00) nor more than fifty dollars ($50.00) for each offense. The Board, in its discretion, may revoke the limited license after due notice is given to the holder of the limited license.

(g) The Board may, by rule, require an applicant for a limited license under this section to comply with other requirements or submit additional information the Board deems appropriate. (2007-418, s. 5.)

Editor's Note. — Session Laws 2007-418, s. 10, made this section effective October 1, 2007.

§ 90-12.2: Recodified as G.S. 90-12.5, by Session Laws 2007-346, s. 7, effective October 1, 2007.

§ 90-12.2A. Special purpose license.

(a) The Board may issue a special purpose license to practice medicine to an applicant who:

(1) Holds a full and unrestricted license to practice in at least one other jurisdiction; and

(2) Does not have any current or pending disciplinary or other action against him or her by any medical licensing agency in any state or other jurisdiction.

(b) The holder of the special purpose license practicing medicine or surgery beyond the limitations of the license shall be guilty of a Class 3 misdemeanor and, upon conviction, shall be fined not less than twenty-five dollars ($25.00) nor more than fifty dollars ($50.00) for each offense. The Board, at its discretion, may revoke the special license after due notice is given to the holder of the special purpose license.

(c) The Board may adopt rules and set fees as appropriate to implement the provisions of this section. (2007-418, s. 6.)

Editor's Note. — Session Laws 2007-418, s. 10, made this section effective October 1, 2007.

§ 90-12.3. Medical school faculty license.

(a) The Board may issue a medical school faculty license to practice medicine and surgery to a physician who:

(1) Holds a full-time appointment as either a lecturer, assistant professor, associate professor, or full professor at one of the following medical schools:

  a. Duke University School of Medicine;
  b. The University of North Carolina at Chapel Hill School of Medicine;
  c. Wake Forest University School of Medicine; or
  d. East Carolina University School of Medicine; and

(2) Is not subject to disciplinary order or other action by any medical licensing agency in any state or other jurisdiction.

(b) The holder of the medical school faculty license issued under this section shall not practice medicine or surgery outside the confines of the medical school or an affiliate of the medical school. The holder of the medical school faculty license practicing medicine or surgery beyond the limitations of the license shall be guilty of a Class 3 misdemeanor and, upon conviction, shall be fined not less than twenty-five dollars ($25.00) nor more than fifty dollars ($50.00) for each offense. The Board, at its discretion, may revoke the special license after due notice is given to the holder of the medical school faculty license.

(c) The Board may adopt rules and set fees related to issuing medical school faculty licenses. The Board may, by rule, set a time limit for the term of a medical school faculty license. (2007-418, s. 7.)

Editor's Note. — Session Laws 2007-418, s. 10, made this section effective October 1, 2007.

§ 90-12.4. Physician assistant limited volunteer license.

The Board shall issue a limited volunteer license which shall authorize a physician assistant to perform medical acts, tasks, and functions without payment or other compensation if the physician assistant meets one of the following:

(1) Holds a current license or registration in another state and submits proof of this status to the Board.

(2) Holds a current license in this State and is not currently employed as a physician assistant.

(3) Is a member of the United States armed services or is employed by the Veterans' Administration or another federal agency. (1997-511, s. 3; 2007-346, s. 7.)

Editor's Note. — This section is former G.S. 90-12.1, recodified as G.S. 90-12.4, effective October 1, 2007, by Session Laws 2007-346, s. 7.

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 469.

§ 90-12.5. Disasters and emergencies.

In the event of an occurrence which the Governor of the State of North Carolina has declared a disaster or when the Governor has declared a state of emergency, or in the event of an occurrence for which a county or municipality has enacted an ordinance to deal with states of emergency under G.S. 14-288.12, 14-288.13, or 14-288.14, or to protect the public health, safety, or welfare of its citizens under Article 22 of Chapter 130A of the General Statutes, G.S. 160A-174(a) or G.S. 153A-121(a), as applicable, the Board may waive the requirements of this Article in order to permit the provision of emergency health services to the public. (2002-179, s. 20(a); 2007-346, s. 7.)

Editor's Note. — This section is former G.S. 90-12.2, recodified as G.S. 90-12.5, effective October 1, 2007, by Session Laws 2007-346, s. 7.

§ 90-13: Repealed by Session Laws 2007-418, s. 2, effective October 1, 2007.

§ 90-13.1. License fees.

(a) Each applicant for a license to practice medicine and surgery in this State under either G.S. 90-9.1 or G.S. 90-9.2 shall pay to the North Carolina Medical Board an application fee of three hundred fifty dollars ($350.00).

(b) Each applicant for a limited license to practice in a medical education and training program under G.S. 90-12.01 shall pay to the Board a fee of one hundred dollars ($100.00).

(c) An applicant for a limited volunteer license under G.S. 90-12.1A shall not pay a fee.

(d) A fee of twenty-five dollars ($25.00) shall be paid for the issuance of a duplicate license.

(e) All fees shall be paid in advance to the North Carolina Medical Board, to be held in a fund for the use of the Board.

(f) For the initial and annual licensure of an anesthesiologist assistant, the Board may require the payment of a fee not to exceed one hundred fifty dollars ($150.00). (1858-9, c. 258, s. 13; Code, s. 3130; Rev., s. 4501; 1913, c. 20, ss. 4, 5; C.S., s. 6619; 1921, c. 47, s. 5; Ex. Sess. 1921, c. 44, s. 7; 1953, c. 187; 1969, c. 929, s. 4; 1971, c. 817, s. 2; c. 1150, s. 5; 1977, c. 838, s. 4; 1979, c. 196, s. 1; 1981, c. 573, s. 15; 1983 (Reg. Sess., 1984), c. 1063, s. 1; 1985, c. 362, ss. 1-3; 1987, c. 859, ss. 13, 14; 1993 (Reg. Sess., 1994), c. 566, s. 2; 1995, c. 94, s. 15; c. 509, s. 37; 2000-5, s. 2; 2005-402, s. 5; 2007-146, s. 2; 2007-346, ss. 7, 13(a); 2007-418, s. 8.)

Editor's Note. — This section is former G.S. 90-15, recodified as G.S. 90-13.1, effective October 1, 2007, by Session Laws 2007-346, s. 7.

Session Laws 2007-146, s. 2, effective June 27, 2007, added a paragraph at the end of former G.S. 90-15, which was subsequently recodified as this section by Session Laws 2007-346, s. 7. The amendments by Session Laws 2007-346, s. 13(a), and Session Laws 2007-418, s. 8, did not show (and therefore did not delete) the paragraph on anesthesiologist assistants fees added by Session Laws 2007-146, s. 2. As a result, that paragraph was set out above and designated as subsection (f) at the direction of the Revisor of Statutes.

Effect of Amendments. — Session Laws 2007-346, ss. 7 and 13(a), effective October 1, 2007, recodified G.S. 90-15 as this section; rewrote the section heading, which formerly read "License fee; salaries, fees, and expenses of Board"; and deleted the former last three sentences of the first paragraph, and deleted the former final paragraph.

Session Laws 2007-418, s. 8, effective October 1, 2007, rewrote the section.

§ 90-13.2. Registration every year with Board.

(a) Every person licensed to practice medicine by the North Carolina Medical Board shall register annually with the Board within 30 days of the person's birthday.

(b) A person who registers with the Board shall report to the Board the person's name and office and residence address and any other information required by the Board, and shall pay an annual registration fee of one hundred seventy-five dollars ($175.00), except those who have a limited license to practice in a medical education and training program approved by the Board for the purpose of education or training shall pay a registration fee of one hundred twenty-five dollars ($125.00) and those who have a limited volunteer license shall pay an annual registration fee of twenty-five dollars ($25.00). However, licensees who have a limited license to practice for the purpose of education and training under G.S. 90-12.01 shall not be required to pay more than one annual registration fee for each year of training.

(c) A physician who is not actively engaged in the practice of medicine in North Carolina and who does not wish to register the license may direct the Board to place the license on inactive status.

(d) A physician who is not actively engaged in the practice of medicine in North Carolina and who does not wish to register the license may direct the Board to place the license on inactive status.

(e) A physician who fails to register as required by this section shall pay an additional fee of fifty dollars ($50.00) to the Board. The license of any physician who fails to register and who remains unregistered for a period of 30 days after certified notice of the failure is automatically inactive. The Board shall retain jurisdiction over the holder of the inactive license.

(f) Except as provided in G.S. 90-12.1A, a person whose license is inactive shall not practice medicine in North Carolina nor be required to pay the annual registration fee.

(g) Upon payment of all accumulated fees and penalties, the license of the physician may be reinstated, subject to the Board requiring the physician to appear before the Board for an interview and to comply with other licensing requirements. The penalty may not exceed the maximum fee for a license under G.S. 90-13.1. (1957, c. 597; 1969, c. 929, s. 5; 1979, c. 196, s. 2; 1983 (Reg. Sess., 1984), c. 1063, s. 2; 1987, c. 859, s. 12; 1993 (Reg. Sess., 1994), c. 566, s. 1; 1995, c. 94, s. 16; 1995 (Reg. Sess., 1996), c. 634, s. 1(a); 1997-481, s. 3; 2000-5, s. 3; 2001-493, s. 3; 2005-402, s. 6; 2007-346, s. 7; 2007-418, s. 9.)

Editor's Note. — This section is former G.S. 90-15.1, recodified as G.S. 90-13.2, effective October 1, 2007, by Session Laws 2007-346, s. 7.

Effect of Amendments. — Session Laws 2007-418, s. 9, effective October 1, 2007, designated the existing provisions as present subsections (a) through (g), and in subsection (b), substituted "an annual" for "a" preceding "registration fee" and inserted the last sentence; added the last sentence in subsection (e); substituted "90-12.1A" for "90-12(d)" in subsection (f); substituted "90-13.1" for "90-13" in subsection (g).

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 469.

§ 90-13.3. Salaries, fees, expenses of the Board.

(a) The compensation and expenses of the members and officers of the Board and all expenses proper and necessary in the opinion of the Board to the discharge of its duties under and to enforce the laws regulating the practice of medicine or surgery shall be paid out of the fund, upon the warrant of the Board.

(b) The per diem compensation of Board members shall not exceed two hundred dollars ($200.00) per member for time spent in the performance and discharge of duties as a member. Any unexpended sum of money remaining in the treasury of the Board at the expiration of the terms of office of the members of the Board shall be paid over to their successors in office. (2007-346, s. 13(b).)

Editor's Note. — Session Laws 2007-346, s. 28, made this section effective October 1, 2007.

§ 90-14. Disciplinary Authority.

(a) The Board shall have the power to place on probation with or without conditions, impose limitations and conditions on, publicly reprimand, assess monetary redress, issue public letters of concern, mandate free medical services, require satisfactory completion of treatment programs or remedial or educational training, fine, deny, annul, suspend, or revoke a license, or other authority to practice medicine in this State, issued by the Board to any person who has been found by the Board to have committed any of the following acts or conduct, or for any of the following reasons:

(1) Immoral or dishonorable conduct.

(2) Producing or attempting to produce an abortion contrary to law.

(3) Made false statements or representations to the Board, or willfully concealed from the Board material information in connection with an application for a license, an application, request or petition for reinstatement or reactivation of a license, an annual registration of a license, or an investigation or inquiry by the Board.

(4) Repealed by Session Laws 1977, c. 838, s. 3.

(5) Being unable to practice medicine with reasonable skill and safety to patients by reason of illness, drunkenness, excessive use of alcohol, drugs, chemicals, or any other type of material or by reason of any physical or mental abnormality. The Board is empowered and authorized to require a physician licensed by it to submit to a mental or

physical examination by physicians designated by the Board before or after charges may be presented against the physician, and the results of the examination shall be admissible in evidence in a hearing before the Board.

(6) Unprofessional conduct, including, but not limited to, departure from, or the failure to conform to, the standards of acceptable and prevailing medical practice, or the ethics of the medical profession, irrespective of whether or not a patient is injured thereby, or the committing of any act contrary to honesty, justice, or good morals, whether the same is committed in the course of the physician's practice or otherwise, and whether committed within or without North Carolina. The Board shall not revoke the license of or deny a license to a person solely because of that person's practice of a therapy that is experimental, nontraditional, or that departs from acceptable and prevailing medical practices unless, by competent evidence, the Board can establish that the treatment has a safety risk greater than the prevailing treatment or that the treatment is generally not effective.

(7) Conviction in any court of a crime involving moral turpitude, or the violation of a law involving the practice of medicine, or a conviction of a felony; provided that a felony conviction shall be treated as provided in subsection (c) of this section.

(8) By false representations has obtained or attempted to obtain practice, money or anything of value.

(9) Has advertised or publicly professed to treat human ailments under a system or school of treatment or practice other than that for which the physician has been educated.

(10) Adjudication of mental incompetency, which shall automatically suspend a license unless the Board orders otherwise.

(11) Lack of professional competence to practice medicine with a reasonable degree of skill and safety for patients or failing to maintain acceptable standards of one or more areas of professional physician practice. In this connection the Board may consider repeated acts of a physician indicating the physician's failure to properly treat a patient. The Board may, upon reasonable grounds, require a physician to submit to inquiries or examinations, written or oral, as the Board deems necessary to determine the professional qualifications of such licensee. In order to annul, suspend, deny, or revoke a license of an accused person, the Board shall find by the greater weight of the evidence that the care provided was not in accordance with the standards of practice for the procedures or treatments administered.

(11a) Not actively practiced medicine or practiced as a physician assistant, or having not maintained continued competency, as determined by the Board, for the two-year period immediately preceding the filing of an application for an initial license from the Board or a request, petition, motion, or application to reactivate an inactive, suspended, or revoked license previously issued by the Board. The Board is authorized to adopt any rules or regulations it deems necessary to carry out the provisions of this subdivision.

(12) Promotion of the sale of drugs, devices, appliances or goods for a patient, or providing services to a patient, in such a manner as to exploit the patient, and upon a finding of the exploitation, the Board may order restitution be made to the payer of the bill, whether the patient or the insurer, by the physician; provided that a determination of the amount of restitution shall be based on credible testimony in the record.

(13) Having a license to practice medicine or the authority to practice medicine revoked, suspended, restricted, or acted against or having a

license to practice medicine denied by the licensing authority of any jurisdiction. For purposes of this subdivision, the licensing authority's acceptance of a license to practice medicine voluntarily relinquished by a physician or relinquished by stipulation, consent order, or other settlement in response to or in anticipation of the filing of administrative charges against the physician's license, is an action against a license to practice medicine.

(14) The failure to respond, within a reasonable period of time and in a reasonable manner as determined by the Board, to inquiries from the Board concerning any matter affecting the license to practice medicine.

(15) The failure to complete an amount not to exceed 150 hours of continuing medical education during any three consecutive calendar years pursuant to rules adopted by the Board.

The Board may, in its discretion and upon such terms and conditions and for such period of time as it may prescribe, restore a license so revoked or otherwise acted upon, except that no license that has been revoked shall be restored for a period of two years following the date of revocation.

(b) The Board shall refer to the North Carolina Physicians Health Program all physicians and physician assistants whose health and effectiveness have been significantly impaired by alcohol, drug addiction or mental illness. Sexual misconduct shall not constitute mental illness for purposes of this subsection.

(c) A felony conviction shall result in the automatic revocation of a license issued by the Board, unless the Board orders otherwise or receives a request for a hearing from the person within 60 days of receiving notice from the Board, after the conviction, of the provisions of this subsection. If the Board receives a timely request for a hearing in such a case, the provisions of G.S. 90-14.2 shall be followed.

(d) Repealed by Session Laws 2006-144, s. 4, effective October 1, 2006, and applicable to acts or omissions that occur on or after that date.

(e) The Board and its members and staff shall not be held liable in any civil or criminal proceeding for exercising, in good faith, the powers and duties authorized by law.

(f) A person, partnership, firm, corporation, association, authority, or other entity acting in good faitn without fraud or malice shall be immune from civil liability for (i) reporting, investigating, or providing an expert medical opinion to the Board regarding the acts or omissions of a licensee or applicant that violate the provisions of subsection (a) of this section or any other provision of law relating to the fitness of a licensee or applicant to practice medicine and (ii) initiating or conducting proceedings against a licensee or applicant if a complaint is made or action is taken in good faith without fraud or malice. A person shall not be held liable in any civil proceeding for testifying before the Board in good faith and without fraud or malice in any proceeding involving a violation of subsection (a) of this section or any other law relating to the fitness of an applicant or licensee to practice medicine, or for making a recommendation to the Board in the nature of peer review, in good faith and without fraud and malice.

(g) Prior to taking action against any licensee who practices integrative medicine for providing care not in accordance with the standards of practice for the procedures or treatments administered, the Board shall consult with a licensee who practices integrative medicine. (C.S., s. 6618; 1921, c. 47, s. 4; Ex. Sess. 1921, c. 44, s. 6; 1933, c. 32; 1953, c. 1248, s. 2; 1969, c. 612, s. 4; c. 929, s. 6; 1975, c. 690, s. 4; 1977, c. 838, s. 3; 1981, c. 573, ss. 9, 10; 1987, c. 859, ss. 6-10; 1993, c. 241, s. 1; 1995, c. 405, s. 4; 1997-443, s. 11A.118(a); 1997-481, s. 1; 2000-184, s. 5; 2003-366, ss. 3, 4; 2006-144, s. 4; 2007-346, s. 14.)

Editor's Note. — Session Laws 2006-144, s. 10(a)-(c), provides: "(a) The subcommittee of the North Carolina Medical Board and the subcommittee of the Board of Nursing, directed to work jointly to develop rules to govern the performance of medical acts by registered nurses pursuant to G.S. 90-6(b), shall examine adding the provisions of G.S. 90-14(a) to their joint rules that set forth grounds for action against a registered nurse's approval to perform medical acts.

"(b) The subcommittee of the North Carolina Medical Board and the subcommittee of the North Carolina Board of Pharmacy, directed to work jointly to develop rules to govern the performance of medical acts by clinical pharmacist practitioners pursuant to G.S. 90-6(c), shall examine adding the provisions of G.S. 90-14(a) to the joint rules that set forth grounds for action against a clinical pharmacist practitioner's approval to perform medical acts.

"(c) The North Carolina Medical Board, the Board of Nursing, and the North Carolina Board of Pharmacy shall report to the Chairs of the House Committee on Health, the Senate Committee on Health Care, the House Select Committee on Health Care, and the Subcommittee on Patient Safety, Quality and Accountability of the House Select Committee on Health Care on the adoption of the provisions of G.S. 90-14(a) as part of the joint rules governing the practice of medical acts for nurse practitioners and clinical pharmacist practitioners. The boards shall file their reports no later than September 1, 2006."

Effect of Amendments. — Session Laws 2006-144, s. 4, effective October 1, 2006, and applicable to acts or omissions that occur on or after that date, inserted "place on probation with or without conditions, impose limitations and conditions on, publicly reprimand, assess monetary redress, issue public letters of concern, mandate free medical services, require satisfactory completion of treatment programs or remedial or educational training, fine" in the introductory language of subsection (a); deleted "by members of the Board or by other physicians licensed to practice medicine in this State," following "written or oral" in the middle of subdivision (a)(11); added subdivision (a)(11a); in the concluding paragraph of subsection (a), deleted the former first sentence, and substituted "otherwise acted upon" for "rescinded"; in subsection (b), substituted "North Carolina Physicians Health Program" for "State Medical Society Physician Health and Effectiveness Committee" near the beginning, inserted "and physician assistants" following "all physicians" near the middle, and added the last sentence; repealed subsection (d) relating to confidential information; and substituted "reporting, investigating, or providing an expert medical opinion to the Board regarding" for "reporting or" near the beginning of subsection (f).

Session Laws 2007-346, s. 14, effective October 1, 2007, rewrote the section heading; in subdivision (a)(3), deleted "who has" preceding "willfully concealed" and inserted "an application, request or petition for reinstatement or reactivation of a license, an annual registration of a license, or an investigation or inquiry by the Board"; inserted "or failing to maintain acceptable standards of one or more areas of professional physician practice" in subdivision (a)(11).

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 469.

CASE NOTES

Constitutionality. — The test of whether this section is vague or overbroad is whether a reasonably intelligent member of the profession would understand that the conduct in question is forbidden. In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

This section does not deny due process. Hoke v. Board of Medical Exmrs., 395 F. Supp. 357 (W.D.N.C. 1975).

The combination in an agency of investigative and adjudicatory functions does not itself violate due process. Hoke v. Board of Medical Exmrs., 395 F. Supp. 357 (W.D.N.C. 1975).

This section's language itself and in conjunction with established medical ethics sufficiently informs physicians of the standards by which they are to conduct themselves and their practice. Hoke v. Board of Medical Exmrs., 395 F. Supp. 357 (W.D.N.C. 1975).

Section Is Valid Exercise of Police Power and Properly Delegates Authority. — This section is a valid exercise of the police power and properly delegates authority to the Board of Medical Examiners. The legislature may delegate certain authority, such as adjudicative and rule-making functions, to administrative bodies. In re Guess, 327 N.C. 46, 393 S.E.2d 833 (1990), cert. denied, 498 U.S. 1047, 111 S. Ct. 754, 112 L. Ed. 2d 774 (1991).

Issue of Constitutionality Barred in Federal Court by Res Judicata. — Physician's effort to have the federal court relitigate claims challenging the statute's constitutionality already made to the state court was impermissible under principles of res judicata. Guess v. Board of Medical Exmrs., 967 F.2d 998 (4th Cir. 1992).

Legislative Intent of Subdivision (a)(6). — The legislature, in enacting subdivision (a)(6) of this section, reasonably believed that a general risk of endangering the public is inherent in any practices which fail to conform to the standards of "acceptable and prevailing" medical practice in North Carolina; furthermore, the legislative intent was to prohibit any practice departing from acceptable and prevailing medical standards without regard to whether the particular practice itself could be shown to endanger the public. In re Guess, 327 N.C. 46, 393 S.E.2d 833 (1990), cert. denied, 498 U.S. 1047, 111 S. Ct. 754, 112 L. Ed. 2d 774 (1991).

Unprofessional Conduct. — While the Board does not have the power to revoke a license on the sole ground that the holder thereof has been convicted of the violation of a criminal statute in force in the State or in the United States, the Board has the power to revoke a license upon a finding that the holder thereof was guilty of unprofessional conduct in that he had violated the provisions of the statute. State ex rel. Board of Medical Exmrs. v. Gardner, 201 N.C. 123, 159 S.E. 8 (1931).

Trial court erred in affirming the North Carolina Medical Board's suspension of a doctor for unprofessional conduct as the doctor did not testify that another doctor had "tried to temporize his findings and write a note that was benevolent" until he was pressed to do so on cross-examination and the doctor did not actually state that the other doctor had "falsified" a medical record or use the terms "liar" or "lying" to describe the other doctor or his conduct; the doctor's opinion that a patient had an elevated intracranial pressure was based on substantial evidence, including CAT-scan results, mood changes in the patient, pain-medication-resistant headaches being experienced by the patient, and the lack of ventricular flow. In re Lustgarten, 177 N.C. App. 663, 629 S.E.2d 886, 2006 N.C. App. LEXIS 1200 (2006).

Conviction of Crime. — This section does not authorize the revocation of a license of a physician on the ground that he has violated a law of this State or a federal law unless and until he has been convicted thereof. In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

No Particular Threat of Harm Needed Before Action Taken Against Physician. — Subdivision (a)(6) does not require that an unacceptable practice by a physician pose a particular threat of public harm before the board may take action against that physician. In re Guess, 327 N.C. 46, 393 S.E.2d 833 (1990), cert. denied, 498 U.S. 1047, 111 S. Ct. 754, 112 L. Ed. 2d 774 (1991).

Writing Unwarranted Prescriptions. — Findings of the Board that physician wrote prescriptions for controlled substances without determining whether or not the drugs were necessary for the treatment of any ailment or disease and not for any legitimate medical purpose and not in the course of the legitimate practice of medicine, supported by the record, authorized the revocation of the physician's license. In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

Any reasonably intelligent physician would know that to prescribe a highly dangerous drug for a complete stranger, without making any examination of the patient or any inquiry as to his medical history or current symptoms and complaints, would be included within the phrase "unprofessional or dishonorable conduct unworthy of, and affecting, the practice of his profession," the terminology of former version of G.S. 90-14. In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

Findings that physician issued prescription for no legitimate medical purpose and not in the course of the legitimate practice of medicine, being supported by competent evidence in the record, are conclusive on judicial review of the order of the Board. In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

Adjudication of Mental Incompetency — Exception to Notice and Hearing Requirements. — G.S. 90-14.1 and 90-14.2 reflect a clear legislative intent that no applicant or licensee be denied the right to practice medicine for any reason without notice of the grounds and an opportunity to be heard by the board. The sole exception is an automatic suspension based on an adjudication of mental incompetency pursuant to subdivision (a)(10) of this section. In re Magee, 87 N.C. App. 650, 362 S.E.2d 564 (1987).

Same — Continued Suspension on Different Grounds. — The Board of Medical Examiners may not continue to either permanently or indefinitely deprive a person of a medical license suspended for mental incompetency, upon totally different grounds, without notice of those grounds or an opportunity to be heard. In re Magee, 87 N.C. App. 650, 362 S.E.2d 564 (1987).

Same — Procedures for Reinstatement. — The Board of Medical Examiners is required by the Administrative Procedure Act, G.S. 150B-1 et seq., to establish regulations and procedures related to reinstatement of licenses automatically suspended under subdivision (a)(10) of this section to afford procedural protection to suspended licensees. In re Magee, 87 N.C. App. 650, 362 S.E.2d 564 (1987).

Conditional Suspension of Revocation. — While this section does not authorize the revocation of a license of a physician on the ground that he has violated a law of this State or a federal law unless and until he has been convicted thereof, nothing in this section precludes the Board from suspending its order of revocation, based on such a conviction, upon the condition that the physician not violate a State or federal law. In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

A proceeding before the Board for the revocation of a physician's license on the ground that he has violated a condition of a prior, suspended order of revocation is a civil proceeding. Consequently, such violation of the condition of suspension of the prior order does not have to be shown beyond a reasonable doubt, but only by a preponderance of the evidence. In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

Appeal from State Board of Medical Examiners allowed to a physician whose license has been revoked for immoral conduct in the practice of his profession follows the procedure allowed in analogous cases, and the intent of the legislature is interpreted to give a trial de novo in the superior court wherein the jury are to decide upon the evidence adduced before them the facts involved in the issue. State ex rel. Board of Medical Exmrs. v. Carroll, 194 N.C. 37, 138 S.E. 339 (1927).

Cited in In re Kincheloe, 272 N.C. 116, 157 S.E.2d 833 (1967); Glover v. North Carolina, 301 F. Supp. 364 (E.D.N.C. 1969); Mazzucco v. North Carolina Bd. of Medical Exmrs., 31 N.C. App. 47, 228 S.E.2d 529 (1976); Hoke v. Board of Medical Exmrs., 445 F. Supp. 1313 (W.D.N.C. 1978); Dailey v. North Carolina State Bd. of Dental Exmrs., 309 N.C. 710, 309 S.E.2d 219 (1983).

§ 90-14.1. Judicial review of Board's decision denying issuance of a license.

Whenever the North Carolina Medical Board has determined that a person who has duly made application to take an examination to be given by the Board showing his education, training and other qualifications required by said Board, or that a person who has taken and passed an examination given by the Board, has failed to satisfy the Board of his qualifications to be examined or to be issued a license, for any cause other than failure to pass an examination, the Board shall immediately notify such person of its decision, and indicate in what respect the applicant has so failed to satisfy the Board. Such applicant shall be given a formal hearing before the Board upon request of such applicant filed with or mailed by registered mail to the secretary of the Board at Raleigh, North Carolina, within 10 days after receipt of the Board's decision, stating the reasons for such request. The Board shall within 20 days of receipt of such request notify such applicant of the time and place of a public hearing, which shall be held within a reasonable time. The burden of satisfying the Board of his qualifications for licensure shall be upon the applicant. Following such hearing, the Board shall determine whether the applicant is qualified to be examined or is entitled to be licensed as the case may be. Any such decision of the Board shall be subject to judicial review upon appeal to the Superior Court of Wake County upon the filing with the Board of a written notice of appeal with exceptions taken to the decision of the Board within 20 days after service of notice of the Board's final decision. Within 30 days after receipt of notice of appeal, the secretary of the Board shall certify to the clerk of the Superior Court of Wake County the record of the case which shall include a copy of the notice of hearing, a transcript of the testimony and evidence received at the hearing, a copy of the decision of the Board, and a copy of the notice of appeal and exceptions. Upon appeal the case shall be heard by the judge without a jury, upon the record, except that in cases of alleged omissions or errors in the record, testimony may be taken by the court. The decision of the Board shall be upheld unless the substantial rights of the applicant have been prejudiced because the decision of the Board is in violation of law or is not supported by any evidence admissible under this Article, or is arbitrary or capricious. Each party to the review proceeding may appeal to the Supreme Court as hereinafter provided in G.S. 90-14.11. (1953, c. 1248, s. 3; 1995, c. 94, s. 14.)

Legal Periodicals. — For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

CASE NOTES

Adjudication of Mental Incompetency — Exception to Notice and Hearing Requirements. — This section and G.S. 90-14.2 reflect a clear legislative intent that no applicant or licensee be denied the right to practice medicine for any reason without notice of the grounds and an opportunity to be heard by the board. The sole exception is an automatic suspension based on an adjudication of mental incompetency pursuant to G.S. 90-14(a)(10). In re Magee, 87 N.C. App. 650, 362 S.E.2d 564 (1987).

Same — Continued Suspension on Different Grounds. — The Board of Medical Examiners may not continue to either permanently or indefinitely deprive a person of a medical license suspended for mental incompetency, upon totally different grounds, without notice of those grounds or an opportunity to be heard. In re Magee, 87 N.C. App. 650, 362 S.E.2d 564 (1987).

Same — Procedures for Reinstatement. — The Board of Medical Examiners is required by the Administrative Procedure Act, G.S. 150B-1 et seq., to establish regulations and procedures related to reinstatement of licenses automatically suspended under G.S. 90-14(a)(10) to afford procedural protection to suspended licensees. In re Magee, 87 N.C. App. 650, 362 S.E.2d 564 (1987).

Applied in In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

Cited in In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

§ 90-14.2. Hearing before disciplinary action.

Before the Board shall take disciplinary action against any license granted by it, the licensee shall be given a written notice indicating the general nature of the charges, accusation, or complaint made against him, which notice may be prepared by a committee or one or more members of the Board designated by the Board, and stating that such licensee will be given an opportunity to be heard concerning such charges or complaint at a time and place stated in such notice, or at a time and place to be thereafter designated by the Board, and the Board shall hold a public hearing not less than 30 days from the date of the service of such notice upon such licensee, at which such licensee may appear personally and through counsel, may cross examine witnesses and present evidence in his own behalf. A physician who is mentally incompetent shall be represented at such hearing and shall be served with notice as herein provided by and through a guardian ad litem appointed by the clerk of the court of the county in which the physician has his residence. Such licensee or physician may, if he desires, file written answers to the charges or complaints preferred against him within 30 days after the service of such notice, which answer shall become a part of the record but shall not constitute evidence in the case. (1953, c. 1248, s. 3; 1975, c. 690, s. 5; 2007-346, s. 15.)

Effect of Amendments. — Session Laws 2007-346, s. 15, effective October 1, 2007, substituted "disciplinary action" for "revocation or suspension of a license" in the section heading; substituted "take disciplinary action against" for "revoke, restrict or suspend" near the beginning of the paragraph.

CASE NOTES

The function of the Board under this section is certainly quasi-judicial. Mazzucco v. North Carolina Bd. of Medical Exmrs., 31 N.C. App. 47, 228 S.E.2d 529, appeal dismissed, 291 N.C. 323, 230 S.E.2d 676 (1976).

Absolute Privilege of Board. — The public policy which supports the doctrine of absolute privilege in defamation actions fully supports the application of the doctrine to the Board of Medical Examiners and the individual members in the performance of their quasi-judicial statutory duties. Mazzucco v. North Carolina Bd. of Medical Exmrs., 31 N.C. App. 47, 228 S.E.2d 529, appeal dismissed, 291 N.C. 323, 230 S.E.2d 676 (1976).

Satisfaction of Due Process Requirements. — Where physician was notified in writing of the charges against him, was given ample time in which to prepare his defense, was present in person and was represented by able counsel of his choice at the hearing, was confronted by his accusers, was given ample opportunity to cross-examine them and testified in his own behalf, procedurally the hearing was conducted in accordance with the statute and fulfilled the requirements of the federal due process clause and the law of the land clause of the State Constitution. In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

Refusal to Issue Permanent License After Failure to Meet Condition of Temporary License. — Physician who was issued a temporary license to practice in this State, her further practice being conditioned on passing the Federal Licensing Examination, was not entitled to a hearing on the refusal of the Board to issue her a permanent license to practice medicine for failure to pass such examination on expiration of her temporary license. Mebane v. Board of Medical Exmrs., 55 N.C. App. 455, 286 S.E.2d 112, cert. denied and appeal dismissed, 305 N.C. 586, 292 S.E.2d 6 (1982).

Adjudication of Mental Incompetency — Exception to Notice and Hearing Requirements. — This section and G.S. 90-14.1 reflect a clear legislative intent that no applicant or licensee be denied the right to practice medicine for any reason without notice of the grounds and an opportunity to be heard by the board. The sole exception is an automatic suspension based on an adjudication of mental incompetency pursuant to G.S. 90-14(a)(10). In re Magee, 87 N.C. App. 650, 362 S.E.2d 564 (1987).

Same — Continued Suspension on Different Grounds. — The Board of Medical Examiners may not continue to either permanently or indefinitely deprive a person of a medical license suspended for mental incompetency, upon totally different grounds, without notice of those grounds or an opportunity to be heard. In re Magee, 87 N.C. App. 650, 362 S.E.2d 564 (1987).

Same — Procedures for Reinstatement. — The Board of Medical Examiners is required by the Administrative Procedure Act, G.S. 150B-1 et seq., to establish regulations and procedures related to reinstatement of licenses automatically suspended under G.S. 90-14(a)(10) to afford procedural protection to suspended licensees. In re Magee, 87 N.C. App. 650, 362 S.E.2d 564 (1987).

Cited in Hoke v. Board of Medical Exmrs., 395 F. Supp. 357 (W.D.N.C. 1975); Hoke v. Board of Medical Exmrs., 445 F. Supp. 1313 (W.D.N.C. 1978).

§ 90-14.3. Service of notices.

Any notice required by this Chapter may be served either personally by an employee of the Board or by an officer authorized by law to serve process, or by registered or certified mail, return receipt requested, directed to the licensee or applicant at his last known address as shown by the records of the Board. If notice is served personally, it shall be deemed to have been served at the time when the officer or employee of the Board delivers the notice to the person addressed or delivers the notice at the licensee's or applicant's last known address as shown by records of the Board with a person of suitable age and discretion then residing therein. Where notice is served by registered or certified mail, it shall be deemed to have been served on the date borne by the return receipt showing delivery of the notice to the licensee's or applicant's last known address as shown by the records of the Board, regardless of whether the notice was actually received or whether the notice was unclaimed or undeliverable for any reason. (1953, c. 1248, s. 3; 1995, c. 405, s. 5; 2007-346, s. 16.)

Effect of Amendments. — Session Laws 2007-346, s. 16, effective October 1, 2007, inserted "by an employee of the Board" in the first sentence, inserted "or employee of the board" and "or delivers the notice at the licensee's or applicant's last known address as shown by records of the Board with a person of suitable age and discretion then residing therein" in the second sentence, substituted "licensee's or applicant's last known address as shown by the records of the Board, regardless of whether the notice was actually received or whether the notice was unclaimed or undeliverable for any reason" for "addressee, showing refusal of the addressee to accept the notice, or showing failure to locate the addressee at the last known address as shown by the records of the Board" at the end.

§ 90-14.4: Repealed by Session Laws 2007-346, s. 17, effective October 1, 2007.

§ 90-14.5. Use of hearing committee and depositions; appointment of hearing officers.

(a) The Board, in its discretion, may designate in writing three or more hearing officers to conduct hearings as a hearing committee to take evidence.

(b) Evidence and testimony may be presented at hearings before the Board or a hearing committee in the form of depositions before any person authorized to administer oaths in accordance with the procedure for the taking of depositions in civil actions in the superior court.

(c) The hearing committee shall submit a recommended decision that contains findings of fact and conclusions of law to the Board. Before the Board makes a final decision, it shall give each party an opportunity to file written exceptions to the recommended decision made by the hearing committee and to present oral arguments to the Board. A quorum of the Board will issue a final decision.

(d) Hearing officers are entitled to receive per diem compensation and reimbursement for expenses as authorized by the Board. The per diem compensation shall not exceed the amount allowed by G.S. 90-13.3. (1953, c. 1248, s. 3; 2006-144, s. 5; 2007-346, s. 18.)

Effect of Amendments. — Session Laws 2006-144, s. 5, effective October 1, 2006, and applicable to hearings held on or after that date, substituted "hearing committee and" for "trial examiner" in the section heading; and rewrote the section.

Session Laws 2007-346, s. 18, effective October 1, 2007, added "appointment of hearing officers" in the section heading; substituted "hearing officers" for "of its members" in subsection (a); added subsection (d).

§ 90-14.6. Evidence admissible.

(a) Except as otherwise provided in proceedings held pursuant to this Article the Board shall admit and hear evidence in the same manner and form as prescribed by law for civil actions. A complete record of such evidence shall be made, together with the other proceedings incident to such hearing.

(b) Subject to the North Carolina Rules of Civil Procedure and Rules of Evidence, in proceedings held pursuant to this Article, the individual under investigation may call witnesses, including medical practitioners licensed in the United States with training and experience in the same field of practice as the individual under investigation and familiar with the standard of care among members of the same health care profession in North Carolina. Witnesses shall not be restricted to experts certified by the American Board of Medical Specialties.

(c) Subject to the North Carolina Rules of Civil Procedure and Rules of Evidence, statements contained in medical or scientific literature shall be competent evidence in proceedings held pursuant to this Article. Documentary evidence may be received in the form of a copy or excerpt or may be incorporated by reference, if the materials so incorporated are available for examination by the parties. Upon timely request, a party shall be given an opportunity to compare the copy with the original if available.

(d) When evidence is not reasonably available under the Rules of Civil Procedure and Rules of Evidence to show relevant facts, then the most reliable and substantial evidence available shall be admitted. (1953, c. 1248, s. 3; 2003-366, s. 5; 2007-346, s. 19.)

Effect of Amendments. — Session Laws 2007-346, s. 19, effective October 1, 2007, inserted "Except as otherwise provided" at the beginning of subsection (a); in subsection (b), substituted "individual" for "licensee" following "to this Article" and substituted "with training and experience in the same field of practice as the individual under investigation and familiar with the standard of care among members of the same health care profession in North Carolina" for "with expertise in the same field of practice as the licensee under investigation, and the Board shall consider this testimony"; added the second and third sentences in subsection (c); added subsection (d).

Legal Periodicals. — For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

CASE NOTES

Applied in In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

Cited in In re Kincheloe, 272 N.C. 116, 157 S.E.2d 833 (1967).

§ 90-14.7. Procedure where person fails to request or appear for hearing.

If a person who has requested a hearing does not appear, and no continuance has been granted, the Board or its trial examiner or committee may hear the evidence of such witnesses as may have appeared, and the Board may proceed to consider the matter and dispose of it on the basis of the evidence before it. For good cause, the Board may reopen any case for further hearing. (1953, c. 1248, s. 3.)

§ 90-14.8. Appeal from Board's decision taking disciplinary action on a license.

A physician whose license is revoked or suspended by the Board may obtain a review of the decision of the Board in the Superior Court of Wake County upon filing with the secretary of the Board a written notice of appeal within 20 days after the date of the service of the decision of the Board, stating all exceptions taken to the decision of the Board and indicating the court in which the appeal is to be heard.

Within 30 days after the receipt of a notice of appeal as herein provided, the Board shall prepare, certify and file with the clerk of the Superior Court of Wake County the record of the case comprising a copy of the charges, notice of hearing, transcript of testimony, and copies of documents or other written evidence produced at the hearing, decision of the Board, and notice of appeal containing exceptions to the decision of the Board. (1953, c. 1248, s. 3; 1981, c. 573, s. 12; 2007-346, s. 20.)

Effect of Amendments. — Session Laws 2007-346, s. 20, effective October 1, 2007, substituted "taking disciplinary action on a license" for "revoking or suspending a license" in the section heading; deleted "or in the superior court in the county in which the hearing was held or upon agreement of the parties to the appeal in any other superior court of the State" following "Wake County" in the first paragraph, and substituted "the Superior Court of Wake County" for "the superior court in the county to which the appeal is directed" in the second paragraph.

CASE NOTES

Cited in In re Guess, 327 N.C. 46, 393 S.E.2d 833 (1990).

§ 90-14.9. Appeal bond; stay of Board order.

(a) The person seeking the review shall file with the clerk of the reviewing court a copy of the notice of appeal and an appeal bond of two hundred dollars ($200.00) at the same time the notice of appeal is filed with the Board. Subject to subsection (b) of this section, at any time before or during the review proceeding the aggrieved person may apply to the reviewing court for an order staying the operation of the Board decision pending the outcome of the review, which the court may grant or deny in its discretion.

(b) No stay shall be granted under this section unless the Board is given prior notice and an opportunity to be heard in response to the application for an order staying the operation of the Board decision. (1953, c. 1248, s. 3; 1995, c. 405, s. 6.)

§ 90-14.10. Scope of review.

Upon the review of the Board's decision taking disciplinary action on a license, the case shall be heard by the judge without a jury, upon the record, except that in cases of alleged omissions or errors in the record, testimony thereon may be taken by the court. The court may affirm the decision of the Board or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the accused physician have been prejudiced because the findings or decisions of the Board are in violation of substantive or procedural law, or are not supported by competent, material, and substantial evidence admissible under this Article, or are arbitrary or capricious. At any time after the notice of appeal has been filed, the court may remand the case to the Board for the hearing of any additional evidence which is material and is not cumulative and which could not reasonably have been presented at the hearing before the Board. (1953, c. 1248, s. 3; 2007-346, s. 21.)

Effect of Amendments. — Session Laws 2007-346, s. 21, effective October 1, 2007, substituted "taking disciplinary action" for "revoking or suspending" near the beginning of the section.

Legal Periodicals. — For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

CASE NOTES

Findings of Board Supported by Evidence Are Conclusive. — The findings of the Board, supported by evidence in the record, although contradicted by the testimony of the respondent himself, are conclusive upon judicial review of the Board's order. In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

Findings that physician issued prescription for no legitimate medical purpose and not in the course of the legitimate practice of medicine, being supported by competent evidence in the record, are conclusive on judicial review of the order of the Board. In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

The credibility of the witnesses and the resolution of conflicts in their testimony is for the Board, not a reviewing court, and the findings of the Board, supported by competent evidence, are conclusive upon judicial review of the Board's order. In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

Reviewing court may not substitute its discretion for Board's. In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

Grounds for Remand. — The superior court was not required to remand the matter of the revocation of a physician's license to the Board for further proceedings in the absence of some preliminary showing by the physician of the basis for his accusation of racial discrimination and prejudice against him. In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

Cited in In re Kincheloe, 272 N.C. 116, 157 S.E.2d 833 (1967); In re Guess, 327 N.C. 46, 393 S.E.2d 833 (1990).

§ 90-14.11. Appeal; appeal bond.

(a) Any party to the review proceeding, including the Board, may appeal from the decision of the superior court under rules of procedure applicable in other civil cases. No appeal bond shall be required of the Board. Subject to subsection (b) of this section, the appealing party may apply to the superior court for a stay of that court's decision or a stay of the Board's decision, whichever shall be appropriate, pending the outcome of the appeal.

(b) No stay shall be granted unless all parties are given prior notice and an opportunity to be heard in response to the application for an order staying the operation of the Board decision. (1953, c. 1248, s. 3; 1989, c. 770, s. 75.1; 1995, c. 405, s. 7.)

CASE NOTES

Review of Decisions of Board of Medical Examiners by Court of Appeals. — Court of Appeals is the proper court to determine appeals taken from decisions of the superior court in proceedings for judicial review of decisions of the Board of Medical Examiners under G.S. 7A-27(b); the Court of Appeals erred in dismissing an appeal under this section since the generally accepted rule is that where there is an irreconcilable conflict between two statutes, the later statute controls as last expression of legislative intent, and therefore, the later enacted statute, G.S. 7A-27(b), controlled in the case. In re Guess, 324 N.C. 105, 376 S.E.2d 8 (1989), cert. denied, 498 U.S. 1047, 111 S. Ct. 754, 112 L. Ed. 2d 774 (1991), decided prior to the 1989 amendment of this section, which deleted references to the Supreme Court.

Cited in In re Kincheloe, 272 N.C. 116, 157 S.E.2d 833 (1967); In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

§ 90-14.12. Injunctions.

The Board may appear in its own name in the superior courts in an action for injunctive relief to prevent violation of this Article and the superior courts shall have power to grant such injunctions regardless of whether criminal prosecution has been or may be instituted as a result of such violations. Actions under this section shall be commenced in the superior court district or set of districts as defined in G.S. 7A-41.1 in which the respondent resides or has his principal place of business or in which the alleged acts occurred, or in the case of an action against a nonresident, in the district where the Board resides. (1953, c. 1248, s. 3; 1981, c. 573, s. 13; 1987 (Reg. Sess., 1988), c. 1037, s. 100; 2001-27, s. 1.)

CASE NOTES

Dispute as to Nurses Administering Anesthesia. — Trial court properly denied the North Carolina Board of Nursing's motion to enforce a consent order as against petitioners, the North Carolina Medical Society, the North Carolina Society of Anesthesiologists, Inc., a doctor, and the North Carolina Medical Board, because petitioners did not violate the consent order by issuing a position statement with regard to nurses administering anesthesia and never acquiesced to the Board's administrative rule via the consent order on the same topic. N.C. Med. Soc'y v. N.C. Bd. of Nursing, 169 N.C. App. 1, 610 S.E.2d 722 (2005), cert. denied, 360 N.C. 66, 621 S.E.2d 875 (2005).

§ 90-14.13. Reports of disciplinary action by health care institutions; reports of professional liability insurance awards or settlements; immunity from liability.

(a) The chief administrative officer of every licensed hospital or other health care institution, including Health Maintenance Organizations, as defined in G.S. 58-67-5, preferred providers, as defined in G.S. 58-50-56, and all other provider organizations that issue credentials to physicians who practice medicine in the State, shall, after consultation with the chief of staff of that institution, report to the Board the following actions involving a physician's privileges to practice in that institution within 30 days of the date that the action takes effect:

(1) A summary revocation, summary suspension, or summary limitation of privileges, regardless of whether the action has been finally determined.

(2) A revocation, suspension, or limitation of privileges that has been finally determined by the governing body of the institution.

(3) A resignation from practice or voluntary reduction of privileges.

(4) Any action reportable pursuant to Title IV of P.L. 99-660, the Health Care Quality Improvement Act of 1986, as amended, not otherwise reportable under subdivisions (1), (2), or (3) of this subsection.

(a1) A hospital is not required to report:

(1) The suspension or limitation of a physician's privileges for failure to timely complete medical records unless the suspension or limitation is the third within the calendar year for failure to timely complete medical records. Upon reporting the third suspension or limitation, the hospital shall also report the previous two suspensions or limitations.

(2) A resignation from practice due solely to the physician's completion of a medical residency, internship, or fellowship.

(a2) The Board shall report all violations of subsection (a) of this section known to it to the licensing agency for the institution involved. The licensing agency for the institution involved is authorized to order the payment of a civil penalty of two hundred fifty dollars ($250.00) for a first violation and five hundred dollars ($500.00) for each subsequent violation if the institution fails to report as required under subsection (a) of this section.

(b) Any licensed physician who does not possess professional liability insurance shall report to the Board any award of damages or any settlement of any malpractice complaint affecting his or her practice within 30 days of the award or settlement.

(c) The chief administrative officer of each insurance company providing professional liability insurance for physicians who practice medicine in North Carolina, the administrative officer of the Liability Insurance Trust Fund Council created by G.S. 116-220, and the administrative officer of any trust fund or other fund operated or administered by a hospital authority, group, or provider shall report to the Board within 30 days any of the following:

(1) Any award of damages or settlement of any claim or lawsuit affecting or involving a person licensed under this Article that it insures.

(2) Any cancellation or nonrenewal of its professional liability coverage of a physician, if the cancellation or nonrenewal was for cause.

(3) A malpractice payment that is reportable pursuant to Title IV of P.L. 99-660, the Health Care Quality Improvement Act of 1986, as amended, not otherwise reportable under subdivision (1) or (2) of this subsection.

(d) The Board shall report all violations of this section to the Commissioner of Insurance. The Commissioner of Insurance is authorized to order the payment of a civil penalty of two hundred fifty dollars ($250.00) for a first violation and five hundred dollars ($500.00) for each subsequent violation against an insurer for failure to report as required under this section.

(e) The Board may request details about any action covered by this section, and the licensees or officers shall promptly furnish the requested information. The reports required by this section are privileged, not open to the public, confidential and are not subject to discovery, subpoena, or other means of legal compulsion for release to anyone other than the Board or its employees or agents involved in application for license or discipline, except as provided in G.S. 90-16. Any officer making a report required by this section, providing additional information required by the Board, or testifying in any proceeding as a result of the report or required information shall be immune from any criminal prosecution or civil liability resulting therefrom unless such person knew the report was false or acted in reckless disregard of whether the report was false. (1981, c. 573, s. 14; 1987, c. 859, s. 11; 1995, c. 405, s. 8; 1997-481, s. 2; 1997-519, s. 3.14; 2006-144, s. 6.)

Editor's Note. — Session Laws 2006-144, s. 10(d), provides: "The North Carolina Medical Board shall examine the provisions of G.S. 90-14.13 and may develop policies or guidance governing the reporting requirements of that section. The Medical Board may recommend additional legislation, if necessary, to implement these policies prior to the convening of the 2007 General Assembly."

Effect of Amendments. — Session Laws 2006-144, s. 6, effective October 1, 2006, and applicable to awards entered or settlements entered into on or after that date, added "reports of professional liability insurance awards or settlements;" to the section heading; and rewrote the section.

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 469.

§ **90-15:** Recodified as G.S. 90-13.1, by Session Laws 2007-346, s. 7, effective October 1, 2007.

Editor's Note. — For amendment to former G.S. 90-15 by Session Laws 2007-146, s. 2, see Editor's note under G.S. 90-13.1.

§ **90-15.1:** Recodified as G.S. 90-13.2, by Session Laws 2007-346, s. 7, effective October 1, 2007.

§ 90-16. Self-reporting requirements; confidentiality of Board investigative information; cooperation with law enforcement; patient protection; Board to keep public records.

(a) The North Carolina Medical Board shall keep a regular record of its proceedings with the names of the members of the Board present, the names of the applicants for license, and other information as to its actions. The North Carolina Medical Board shall publish the names of those licensed within 30 days after granting the license.

(b) The Board may in a closed session receive evidence involving or concerning the treatment of a patient who has not expressly or impliedly consented to the public disclosure of such treatment as may be necessary for the protection of the rights of such patient or of the accused physician and the full presentation of relevant evidence.

(c) All records, papers, investigative files, investigative reports, other investigative information and other documents containing information in the possession of or received or gathered by the Board, or its members or employees as a result of investigations, inquiries or interviews conducted in connection with a licensing, complaint or, disciplinary matter, or report of professional liability insurance awards or settlements pursuant to G.S. 90-14.13, shall not be considered public records within the meaning of Chapter 132 of the General Statutes and are privileged, confidential, and not subject to discovery, subpoena, or other means of legal compulsion for release to any person other than the Board, its employees or agents involved in the application for license or discipline of a license holder, except as provided in subsections (d) and (e1) of this section. For purposes of this subsection, investigative information includes information relating to the identity of, and a report made by, a physician or other person performing an expert review for the Board and transcripts of any deposition taken by Board counsel in preparation for or anticipation of a hearing held pursuant to this Article but not admitted into evidence at the hearing.

(d) The Board shall provide the licensee or applicant with access to all information in its possession that the Board intends to offer into evidence in presenting its case in chief at the contested hearing on the matter, subject to any privilege or restriction set forth by rule, statute, or legal precedent, upon written request from a licensee or applicant who is the subject of a complaint or investigation, or from the licensee's or applicant's counsel, unless good cause is shown for delay. The Board is not required to provide any of the following:

(1) A Board investigative report.
(2) The identity of a non-testifying complainant.
(3) Attorney-client communications, attorney work product, or other materials covered by a privilege recognized by the Rules of Civil Procedure or the Rules of Evidence.

(e) Information furnished to a licensee or applicant, or counsel for a licensee or applicant, under subsection (d) of this section shall be subject to discovery or subpoena between and among the parties in a civil case in which the licensee is a party.

(e1) When the Board receives a complaint regarding the care of a patient, the Board shall inform the complainant of the disposition of the Board's inquiry into the complaint and the Board's basis for that disposition. Upon written request of a patient, the Board may provide the patient a licensee's written response to a complaint filed by the patient with the Board regarding the patient's care. Upon written request of a complainant, who is not the patient but is authorized by State and federal law to receive protected health information about the patient, the Board may provide the complainant a licensee's written response to a complaint filed with the Board regarding the patient's care. Any information furnished to the patient or complainant pursuant to this subsection shall be inadmissible in evidence in any civil proceeding. However, information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were included in the Board's review or were the subject of information furnished to the patient or complainant pursuant to this subsection.

(f) Any notice or statement of charges against any licensee, or any notice to any licensee of a hearing in any proceeding shall be a public record within the meaning of Chapter 132 of the General Statutes, notwithstanding that it may contain information collected and compiled as a result of any such investigation, inquiry or interview; and provided, further, that if any such record, paper or other document containing information theretofore collected and compiled by the Board, as hereinbefore provided, is received and admitted in evidence in any hearing before the Board, it shall thereupon be a public record within the meaning of Chapter 132 of the General Statutes.

(g) In any proceeding before the Board, in any record of any hearing before the Board, and in the notice of the charges against any licensee (notwithstanding any provision herein to the contrary) the Board may withhold from public disclosure the identity of a patient who has not expressly or impliedly consented to the public disclosure of treatment by the accused physician.

(h) If investigative information in the possession of the Board, its employees, or agents indicates that a crime may have been committed, the Board may report the information to the appropriate law enforcement agency or district attorney of the district in which the offense was committed.

(i) The Board shall cooperate with and assist a law enforcement agency or district attorney conducting a criminal investigation or prosecution of a licensee by providing information that is relevant to the criminal investigation or prosecution to the investigating agency or district attorney. Information disclosed by the Board to an investigative agency or district attorney remains confidential and may not be disclosed by the investigating agency except as necessary to further the investigation.

(j) All persons licensed under this Article shall self-report to the Board within 30 days of arrest or indictment any of the following:

(1) Any felony arrest or indictment.
(2) Any arrest for driving while impaired or driving under the influence.
(3) Any arrest or indictment for the possession, use, or sale of any controlled substance.

(k) The Board, its members and staff, may release confidential or nonpublic information to any health care licensure board in this State or another state or authorized Department of Health and Human Services personnel with enforcement or investigative responsibilities about the issuance, denial, annulment, suspension, or revocation of a license, or the voluntary surrender of a license by a licensee of the Board, including the reasons for the action, or an investigative report made by the Board. The Board shall notify the licensee within 60 days after the information is transmitted. A summary of the information that is being transmitted shall be furnished to the licensee. If the licensee requests in writing within 30 days after being notified that the information has been transmitted, the licensee shall be furnished a copy of all information so transmitted. The notice or copies of the information shall not be provided if the information relates to an ongoing criminal investigation by any law enforcement agency or authorized Department of Health and Human Services personnel with enforcement or investigative responsibilities. (1858-9, c. 258, s. 12; Code, s. 3129; Rev., s. 4500; C.S., s. 6620; 1921, c. 47, s. 6; 1977, c. 838, s. 5; 1993 (Reg. Sess., 1994), c. 570, s. 6; 1995, c. 94, s. 17; 1997-481, s. 4; 2006-144, s. 7; 2007-346, s. 22.)

Effect of Amendments. — Session Laws 2006-144, s. 7, effective October 1, 2006, rewrote the section heading; and rewrote the section.

Session Laws 2007-346, s. 22, effective October 1, 2007, rewrote the section.

Legal Periodicals. — For comment, "You Can't Always Get What You Want: A Look at North Carolina's Public Records Law," see 72 N.C.L. Rev. 1527 (1994).

CASE NOTES

Cited in Hoke v. Board of Medical Exmrs., 445 F. Supp. 1313 (W.D.N.C. 1978).

§ 90-17: Repealed by Session Laws 1967, c. 691, s. 59.

§ 90-18. Practicing without license; penalties.

(a) No person shall perform any act constituting the practice of medicine or surgery, as defined in this Article, or any of the branches thereof, unless the person shall have been first licensed and registered so to do in the manner provided in this Article, and if any person shall practice medicine or surgery without being duly licensed and registered, as provided in this Article, the person shall not be allowed to maintain any action to collect any fee for such services. The person so practicing without license shall be guilty of a Class 1 misdemeanor, except that if the person so practicing without a license is an out-of-state practitioner who has not been licensed and registered to practice medicine or surgery in this State, the person shall be guilty of a Class I felony.

(b) Repealed by Session Laws 2007-346, s. 23, effective October 1, 2007.

(c) The following shall not constitute practicing medicine or surgery as defined in this Article:

(1) The administration of domestic or family remedies.

(2) The practice of dentistry by any legally licensed dentist engaged in the practice of dentistry and dental surgery.

(3) The practice of pharmacy by any legally licensed pharmacist engaged in the practice of pharmacy.

(3a) The provision of drug therapy management by a licensed pharmacist engaged in the practice of pharmacy pursuant to an agreement that is physician, pharmacist, patient, and disease specific when performed in accordance with rules and rules developed by a joint subcommittee of the North Carolina Medical Board and the North Carolina Board of Pharmacy and approved by both Boards. Drug therapy management shall be defined as: (i) the implementation of predetermined drug therapy which includes diagnosis and product selection by the patient's physician; (ii) modification of prescribed drug dosages, dosage forms, and dosage schedules; and (iii) ordering tests; (i), (ii), and (iii) shall be pursuant to an agreement that is physician, pharmacist, patient, and disease specific.

(4) The practice of medicine and surgery by any surgeon or physician of the United States army, navy, or public health service in the discharge of his official duties.

(5) The treatment of the sick or suffering by mental or spiritual means without the use of any drugs or other material means.

(6) The practice of optometry by any legally licensed optometrist engaged in the practice of optometry.

(7) The practice of midwifery as defined in G.S. 90-178.2.

(8) The practice of podiatric medicine and surgery by any legally licensed podiatric physician when engaged in the practice of podiatry as defined in Article 12A of this Chapter.

(9) The practice of osteopathy by any legally licensed osteopath when engaged in the practice of osteopathy as defined by law, and especially G.S. 90-129.

(10) The practice of chiropractic by any legally licensed chiropractor when engaged in the practice of chiropractic as defined by law, and without the use of any drug or surgery.

(11) The practice of medicine or surgery by any nonregistered reputable physician or surgeon who comes into this State, either in person or by use of any electronic or other mediums, on an irregular basis, to consult with a resident registered physician or to consult with personnel at a medical school about educational or medical training. This proviso shall not apply to physicians resident in a neighboring state and regularly practicing in this State.

(11a) The practice of medicine or surgery by any physician who comes into this State to practice medicine or surgery so long as:

a. The physician or surgeon has an oral or written agreement with a sports team to provide general or emergency medical care to the team members, coaching staff, or families traveling with the team for a specific sporting event taking place in this State; and

b. The physician or surgeon does not provide care or consultation to any person residing in this State other than an individual described in sub-subdivision a. of this subdivision.

The exemption shall remain in force while the physician or surgeon is traveling with the team. The exemption shall not exceed 10 days per individual sporting event. However, the executive director of the Board may grant a physician or surgeon additional time for exemption of up to 20 additional days per individual sporting event.

(12) Any person practicing radiology as hereinafter defined shall be deemed to be engaged in the practice of medicine within the meaning of this Article. “Radiology” shall be defined as, that method of medical practice in which demonstration and examination of the normal and abnormal structures, parts or functions of the human body are made by use of X ray. Any person shall be regarded as engaged in the practice of radiology who makes or offers to make, for a consideration, a demonstration or examination of a human being or a part or parts of a human body by means of fluoroscopic exhibition or by the shadow imagery registered with photographic materials and the use of X rays; or holds himself out to diagnose or able to make or makes any interpretation or explanation by word of mouth, writing or otherwise of the meaning of such fluoroscopic or registered shadow imagery of any part of the human body by use of X rays; or who treats any disease or condition of the human body by the application of X rays or radium. Nothing in this subdivision shall prevent the practice of radiology by any person licensed under the provisions of Articles 2, 7, 8, and 12A of this Chapter.

(13) The performance of any medical acts, tasks, and functions by a licensed physician assistant at the direction or under the supervision of a physician in accordance with rules adopted by the Board. This subdivision shall not limit or prevent any physician from delegating to a qualified person any acts, tasks, and functions that are otherwise permitted by law or established by custom. The Board shall authorize physician assistants licensed in this State or another state to perform specific medical acts, tasks, and functions during a disaster.

(14) The practice of nursing by a registered nurse engaged in the practice of nursing and the performance of acts otherwise constituting medical practice by a registered nurse when performed in accordance with rules and regulations developed by a joint subcommittee of the North Carolina Medical Board and the Board of Nursing and adopted by both boards.

(15) The practice of dietetics/nutrition by a licensed dietitian/nutritionist under the provisions of Article 25 of this Chapter.

(16) The practice of acupuncture by a licensed acupuncturist in accordance with the provisions of Article 30 of this Chapter.

(17) The use of an automated external defibrillator as provided in G.S. 90-21.15.

(18) The practice of medicine by any nonregistered physician residing in another state or foreign country who is contacted by one of the physician’s regular patients for treatment by use of the Internet or a toll-free telephone number while the physician’s patient is temporarily in this State.

(19) The practice of medicine or surgery by any physician who comes into this State to practice medicine or surgery at a camp that specializes in providing therapeutic recreation for individuals with chronic illnesses, as long as all the following conditions are satisfied:

a. The physician provides documentation to the medical director of the camp that the physician is licensed and in good standing to practice medicine in another state.
b. The physician provides services only at the camp or in connection with camp events or camp activities that occur off the grounds of the camp.
c. The physician receives no compensation for the services.
d. The physician provides those services within this State for no more than 30 days per calendar year.

e. The camp has a medical director who holds an unrestricted license to practice medicine and surgery issued under this Article.

(20) The provision of anesthesia services by a licensed anesthesiologist assistant under the supervision of an anesthesiologist licensed under Article 1 of this Chapter in accordance with rules adopted by the Board. (1858-9, c. 258, s. 2; Code, s. 3122; 1885, c. 117, s. 2; c. 261; 1889, c. 181, ss. 1, 2; Rev., ss. 3645, 4502; C.S., s. 6622; 1921, c. 47, s. 7; Ex. Sess. 1921, c. 44, s. 8; 1941, c. 163; 1967, c. 263, s. 1; 1969, c. 612, s. 5; c. 929, s. 3; 1971, c. 817, s. 1; c. 1150, s. 6; 1973, c. 92, s. 1; 1983, c. 897, s. 2; 1993, c. 303, s. 2; c. 539, s. 615; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 94, ss. 18, 19; 1997-511, s. 4; 1997-514, s. 1; 1999-290, s. 2; 2000-113, s. 2; 2001-27, s. 2; 2003-109, s. 1; 2005-415, s. 2; 2007-146, s. 3; 2007-346, s. 23.)

Editor's Note. — Session Laws 1983, c. 897, which substituted "as defined in G.S. 90-178.2" for "by any woman who pursues the vocation of midwife" in subdivision (7), provides, in s. 3: "This act shall become effective October 1, 1983. Any person who on October 1, 1983, had been a practicing midwife in North Carolina for more than 10 years may continue to assist at childbirth without approval under this Article. Any other person authorized to practice midwifery on September 30, 1983, may continue to practice midwifery without approval under this Article until April 1, 1984. No annual fee shall be collected for 1983."

Effect of Amendments. — Session Laws 2007-146, s. 3, effective June 29, 2007, added subdivision (c)(20).

Session Laws 2007-346, s. 23, effective October 1, 2007, deleted "practicing defined" in the section heading; in subsection (a), substituted "perform any act constituting the practice of medicine or surgery, as defined in this Article," for "practice medicine or surgery" and deleted "nor in any case prescribe for the cure of diseases" following "thereof" in the first sentence; deleted subsection (b) regarding the definition of practicing; substituted "this Article" for "subsection (b) of this section" in the introductory paragraph of subsection (c); deleted "in cases of emergency" at the end of subdivision (c)(1); in subdivision (c)(8), substituted "podiatric medicine and surgery" for "chiropody," "podiatric physician" for "chiropodist," and "podiatry as defined in Article 12A of this Chapter" for "chiropody, and without the use of any drug"; added subdivision (c)(11a).

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 469.

CASE NOTES

I. General Consideration.
II. Osteopaths.
III. Drugs.
IV. Naturopaths.

I. GENERAL CONSIDERATION.

Constitutionality. — This section is not unconstitutional. State v. Nelson, 69 N.C. App. 638, 317 S.E.2d 711 (1984).

This statute is not invalid, as it is the exercise of police power to protect the public, and is not the creation of a monopoly. State v. Call, 121 N.C. 643, 28 S.E. 517 (1897).

This section does not attempt to regulate constitutionally protected activities. The State is certainly empowered to protect its citizens from those who would attempt to practice medicine without having been duly licensed. State v. Nelson, 69 N.C. App. 638, 317 S.E.2d 711 (1984).

The intent of this section is to protect the public against those who would hold themselves out as medical doctors and who would expect compensation in return for those services. State v. Nelson, 69 N.C. App. 638, 317 S.E.2d 711 (1984).

The language of this section is sufficiently specific to inform a person of ordinary intelligence as to what conduct is prohibited by the statute. State v. Nelson, 69 N.C. App. 638, 317 S.E.2d 711 (1984).

North Carolina courts have not interpreted this section to prohibit the rendering of aid to one's family and friends. State v. Nelson, 69 N.C. App. 638, 317 S.E.2d 711 (1984).

The gratuitous rendering of aid is not barred by this section. State v. Nelson, 69 N.C. App. 638, 317 S.E.2d 711 (1984).

Nonmedical Physicians. — The statute is applicable only to one holding himself out as a medical physician. If one cures by other means he is not subject to this statute. State v. Biggs, 133 N.C. 729, 46 S.E. 401 (1903).

Psychologist. — While not specifically exempted by this section, a psychologist who limits himself to the practice of psychology and the rendering of professional psychological services as defined in G.S. 90-270.2 is exempt from this section to that extent. Wesley v. Greyhound Lines, 47 N.C. App. 680, 268 S.E.2d 855, cert. denied, 301 N.C. 239, 283 S.E.2d 136 (1980).

Nurse. — In case where nurse sufficiently alleged that she was discharged for complying with minimum requirements of the practice of nursing, court disagreed with defendant's argument that her complaint established, as a matter of law, the unauthorized practice of medicine by plaintiff under this section. Deerman v. Beverly Cal. Corp., 135 N.C. App. 1, 518 S.E.2d 804 (1999).

A patent medicine vendor cannot hold himself out as a physician, and then avoid the statute by prescribing only his own products. State v. Van Doran, 109 N.C. 864, 14 S.E. 32 (1891).

Lack of Criminal Intent Not a Defense. — The burden rested upon defendants to know whether their conduct was prohibited by this section, and because a lack of criminal intent does not constitute a valid defense, the court was under no duty to instruct the jury on the defendants' intent. State v. Howard, 78 N.C. App. 262, 337 S.E.2d 598 (1985), appeal dismissed, 316 N.C. 198, 341 S.E.2d 581 (1986).

Unorthodox Treatment of Terminally Ill. — This section is not unconstitutional on the grounds that the terminally ill have a fundamental right to choose unorthodox medical treatment and that this section unconstitutionally infringes upon this fundamental right. State v. Howard, 78 N.C. App. 262, 337 S.E.2d 598 (1985), appeal dismissed, 316 N.C. 198, 341 S.E.2d 581 (1986).

Burden of Proving Exception. — Once the State produces evidence of one committing acts that satisfy the definition of "practicing medicine or surgery" within the meaning of this section, it is incumbent upon defendant to introduce evidence that his actions fell within one of the exceptions thereto. State v. Howard, 78 N.C. App. 262, 337 S.E.2d 598 (1985), appeal dismissed, 316 N.C. 198, 341 S.E.2d 581 (1986).

Instruction That Defendant Did Not Fall Within Exception. — If the defendant fails to produce evidence that his actions fell within one of the exceptions, the jury need not consider the exceptions to the statute and a jury instruction to that effect is a correct statement of the law. State v. Howard, 78 N.C. App. 262, 337 S.E.2d 598 (1985), appeal dismissed, 316 N.C. 198, 341 S.E.2d 581 (1986).

Investigation by Board Not Prerequisite to Prosecution. — G.S. 90-21 [repealed] merely establishes a method whereby the Board of Medical Examiners may procure an investigation by the Attorney General with respect to alleged violations of this section and former G.S. 90-19 and 90-20. There is nothing in this Chapter which requires the Board of Medical Examiners or the Attorney General to take any action before a criminal prosecution may be instituted for such violations. State v. Loesch, 237 N.C. 611, 75 S.E.2d 654 (1953).

Indictment Need Not Show Compliance with G.S. 90-21 [repealed]. — The contention that a strict compliance with the procedure outlined in G.S. 90-21 is a prerequisite to any prosecution for the violation of this section and former G.S. 90-19 and 90-20, and that a bill of indictment charging a violation of any such sections must show upon its face that there has been a compliance with the provisions of G.S. 90-21 [repealed], is without merit. It would be unnecessary to include these averments as prerequisite to the validity of a bill of indictment charging a violation of this section, even though the prosecution was instituted pursuant to a complaint filed by the Board of Medical Examiners with the Attorney General. State v. Loesch, 237 N.C. 611, 75 S.E.2d 654 (1953).

Referral of Alleged Violations to District Attorney. — There is nothing in the language of G.S. 90-21 [repealed] which requires the Board of Medical Examiners to refer alleged violations of this section to the district attorney instead of to the Attorney General. Majebe v. North Carolina Bd. of Medical Exmrs., 106 N.C. App. 253, 416 S.E.2d 404 (1992).

District Attorney Not Deprived of Authority and Duty to Prosecute. — There is nothing in this Chapter which would or could deprive the solicitor (now district attorney) of a district of his constitutional authority and sworn duty to prosecute violations of the criminal laws of the State. State v. Loesch, 237 N.C. 611, 75 S.E.2d 654 (1953).

Applied in State v. Phillip, 261 N.C. 263, 134 S.E.2d 386 (1964); Allen v. Hinson, 12 N.C. App. 515, 183 S.E.2d 852 (1971); Formyduval v. Bunn, 138 N.C. App. 381, 530 S.E.2d 96 (2000).

Cited in Crawford v. Crowell-Collier Publishing Co., 87 F. Supp. 509 (W.D.N.C. 1949); State v. Shaw, 305 N.C. 327, 289 S.E.2d 325 (1982); Lenzer v. Flaherty, 106 N.C. App. 496, 418 S.E.2d 276 (1992).

II. OSTEOPATHS.

Editor's Note. *— As to osteopathy, see also G.S. 90-129 et seq. and case notes thereunder.*

The distinction between the practice of osteopathy and the practice of medicine and surgery is recognized by Articles 1 and 7 of this Chapter. State v. Baker, 229 N.C. 73, 48 S.E.2d 61 (1948).

The legislature has denied to a licensed osteopath the privilege of using drugs in his practice. It necessarily follows that he exceeds the limits of his certificate and is guilty of practicing medicine without being licensed so to do within the purview of this section if he administers or prescribes drugs in treating the ailments of his patients. State v. Baker, 229 N.C. 73, 48 S.E.2d 61 (1948).

But he is not guilty of practicing medicine without a license in administering violet ray treatments to his patients suffering with skin diseases. Subdivision (12) specifically confers upon him the privilege of practicing radiology. State v. Baker, 229 N.C. 73, 48 S.E.2d 61 (1948).

A person administers drugs when he gives or applies drugs to a patient. Thus, the giving of a hypodermic injection of a drug is administering a drug. State v. Baker, 229 N.C. 73, 48 S.E.2d 61 (1948).

Or Gives Oral Directions for Their Use or Application. — The giving of oral directions by an osteopath to his patient directly, or indirectly by telephone directions to the druggist, for the use or application by the patient of recommended remedies, is prescribing drugs. State v. Baker, 229 N.C. 73, 48 S.E.2d 61 (1948).

III. DRUGS.

"Drugs" Defined. — The same substance may be a drug under one set of circumstances, and not a drug under another. The test is whether it is administered or employed as a medicine. State v. Baker, 229 N.C. 73, 48 S.E.2d 61 (1948).

Insofar as the practice of osteopathy is concerned, a "drug" is any substance used as a medicine or in the composition of medicines for internal or external use, and a "medicine" is any substance or preparation used in treating disease. State v. Baker, 229 N.C. 73, 48 S.E.2d 61 (1948).

Laxatives and tonics are "drugs" insofar as the practice of osteopathy is concerned. State v. Baker, 229 N.C. 73, 48 S.E.2d 61 (1948).

Also Patent or Proprietary Remedies. — A person who holds himself out as an expert in medical affairs and prescribes drugs for his patients and charges fees for so doing practices medicine, notwithstanding the drugs are patent or proprietary remedies purchasable without a prescription, and notwithstanding the fact that the recommendation of such remedies to acquaintances without the charge of a fee would not be unlawful. State v. Baker, 229 N.C. 73, 48 S.E.2d 61 (1948).

Canned Milk Is Not a Drug. — An osteopath does not practice medicine in advising a client to feed her baby a designated brand of canned milk, since milk is a food and not a drug. State v. Baker, 229 N.C. 73, 48 S.E.2d 61 (1948).

Whether a vitamin preparation is a drug or a food is ordinarily a question of fact. State v. Baker, 229 N.C. 73, 48 S.E.2d 61 (1948), wherein for the purpose of the particular case it was assumed that vitamin preparations were used solely for nourishment, and that the defendant did not transgress the scope of his osteopathic certificate in urging their use by his patients.

IV. NATUROPATHS.

Prosecution Not Unconstitutionally Selective. — State's prosecution against defendants, who held themselves out as naturopathic practitioners and treated cancers, did not constitute selective prosecution in violation of their rights to equal protection under U.S. Const., Amend. XIV. State v. Howard, 78 N.C. App. 262, 337 S.E.2d 598 (1985), appeal dismissed, 316 N.C. 198, 341 S.E.2d 581 (1986).

OPINIONS OF ATTORNEY GENERAL

The determination of death is regarded as "practicing medicine or surgery" as defined in this section. See opinion of Attorney General to Page Hudson, M.D., Chief Medical Examiner, Medical Examiner Section, Division of Health Services, 49 N.C.A.G. 206 (1980).

Post-operative care of cataract surgery patients falls within the definition of optometry when performed by a licensed optometrist, and does not constitute the unauthorized practice of medicine where there are no complications as a result of the surgery. See opinion of Attorney General to Mr. Bryant D. Paris, Jr., Executive Director, Board of Medical Examiners, 56 N.C.A.G. 5 (1986).

Medical pre-certification and utilization review activities, which are reviews of the need for either the initiation of medical treatment for a patient or for the continuation of such treatment which are conducted by insurance companies, medical assistance programs or other third-party payors after an initial determination has been made that treatment should be initiated, do not constitute the practice of medicine under this section. See opinion of Attorney General to Bryant D. Paris, Jr., Executive Secretary, Board of Medical Examiners, 60 N.C.A.G. 100 (1992).

§ 90-18.1. Limitations on physician assistants.

(a) Any person who is licensed under the provisions of G.S. 90-9.3 to perform medical acts, tasks, and functions as an assistant to a physician may use the title "physician assistant". Any other person who uses the title in any form or holds out to be a physician assistant or to be so licensed, shall be deemed to be in violation of this Article.

(b) Physician assistants are authorized to write prescriptions for drugs under the following conditions:

(1) The North Carolina Medical Board has adopted regulations governing the approval of individual physician assistants to write prescriptions with such limitations as the Board may determine to be in the best interest of patient health and safety.

(2) The physician assistant holds a current license issued by the Board.

(3) The North Carolina Medical Board has assigned an identification number to the physician assistant which is shown on the written prescription.

(4) The supervising physician has provided to the physician assistant written instructions about indications and contraindications for prescribing drugs and a written policy for periodic review by the physician of the drugs prescribed.

(c) Physician assistants are authorized to compound and dispense drugs under the following conditions:

(1) The function is performed under the supervision of a licensed pharmacist.

(2) Rules and regulations of the North Carolina Board of Pharmacy governing this function are complied with.

(3) The physician assistant holds a current license issued by the Board.

(d) Physician assistants are authorized to order medications, tests and treatments in hospitals, clinics, nursing homes, and other health facilities under the following conditions:

(1) The North Carolina Medical Board has adopted regulations governing the approval of individual physician assistants to order medications, tests, and treatments with such limitations as the Board may determine to be in the best interest of patient health and safety.

(2) The physician assistant holds a current license issued by the Board.

(3) The supervising physician has provided to the physician assistant written instructions about ordering medications, tests, and treatments, and when appropriate, specific oral or written instructions for an individual patient, with provision for review by the physician of the order within a reasonable time, as determined by the Board, after the medication, test, or treatment is ordered.

(4) The hospital or other health facility has adopted a written policy, approved by the medical staff after consultation with the nursing administration, about ordering medications, tests, and treatments, including procedures for verification of the physician assistants' orders by nurses and other facility employees and such other procedures as are in the interest of patient health and safety.

(e) Any prescription written by a physician assistant or order given by a physician assistant for medications, tests, or treatments shall be deemed to have been authorized by the physician approved by the Board as the supervisor of the physician assistant and the supervising physician shall be responsible for authorizing the prescription or order.

(f) Any registered nurse or licensed practical nurse who receives an order from a physician assistant for medications, tests, or treatments is authorized to perform that order in the same manner as if it were received from a licensed physician.

(g) Any person who is licensed under G.S. 90-9.3 to perform medical acts, tasks, and functions as an assistant to a physician shall comply with each of the following:

(1) Maintain a current and active license to practice in this State.
(2) Maintain an active registration with the Board.
(3) Have a current Intent to Practice form filed with the Board.

(h) A physician assistant serving active duty in the United States military is exempt from the requirements of subdivision (g)(3) of this section.

(i) A physician assistant's license shall become inactive any time the holder fails to comply with the requirements of subsection (g) of this section. A physician assistant with an inactive license shall not practice medical acts, tasks, or functions. The Board shall retain jurisdiction over the holder of the inactive license. (1975, c. 627; 1977, c. 904, s. 1; 1977, 2nd Sess., c. 1194, s. 1; 1995, c. 94, s. 20; 1997-511, s. 5; 2007-346, ss. 24, 25.)

Effect of Amendments. — Session Laws 2007-346, ss. 24 and 25, effective October 1, 2007, substituted "90-9.3" for "90-11" in subsection (a); added subsections (g), (h), and (i).

Legal Periodicals. — For note, "Nurse Malpractice in North Carolina: The Standard of Care," see 65 N.C.L. Rev. 579 (1987).

CASE NOTES

Applied in Whitaker v. Akers, 137 N.C.App. 274, 527 S.E.2d 721, 2000 N.C. App. LEXIS 315 (2000).

§ 90-18.2. Limitations on nurse practitioners.

(a) Any nurse approved under the provisions of G.S. 90-18(14) to perform medical acts, tasks or functions may use the title "nurse practitioner." Any other person who uses the title in any form or holds out to be a nurse practitioner or to be so approved, shall be deemed to be in violation of this Article.

(b) Nurse practitioners are authorized to write prescriptions for drugs under the following conditions:

(1) The North Carolina Medical Board and Board of Nursing have adopted regulations developed by a joint subcommittee governing the approval of individual nurse practitioners to write prescriptions with such limitations as the boards may determine to be in the best interest of patient health and safety;
(2) The nurse practitioner has current approval from the boards;
(3) The North Carolina Medical Board has assigned an identification number to the nurse practitioner which is shown on the written prescription; and
(4) The supervising physician has provided to the nurse practitioner written instructions about indications and contraindications for prescribing drugs and a written policy for periodic review by the physician of the drugs prescribed.

(c) Nurse practitioners are authorized to compound and dispense drugs under the following conditions:

(1) The function is performed under the supervision of a licensed pharmacist; and
(2) Rules and regulations of the North Carolina Board of Pharmacy governing this function are complied with.

(d) Nurse practitioners are authorized to order medications, tests and treatments in hospitals, clinics, nursing homes and other health facilities under the following conditions:

(1) The North Carolina Medical Board and Board of Nursing have adopted regulations developed by a joint subcommittee governing the approval of individual nurse practitioners to order medications, tests and treatments with such limitations as the boards may determine to be in the best interest of patient health and safety;

(2) The nurse practitioner has current approval from the boards;

(3) The supervising physician has provided to the nurse practitioner written instructions about ordering medications, tests and treatments, and when appropriate, specific oral or written instructions for an individual patient, with provision for review by the physician of the order within a reasonable time, as determined by the Board, after the medication, test or treatment is ordered; and

(4) The hospital or other health facility has adopted a written policy, approved by the medical staff after consultation with the nursing administration, about ordering medications, tests and treatments, including procedures for verification of the nurse practitioners' orders by nurses and other facility employees and such other procedures as are in the interest of patient health and safety.

(e) Any prescription written by a nurse practitioner or order given by a nurse practitioner for medications, tests or treatments shall be deemed to have been authorized by the physician approved by the boards as the supervisor of the nurse practitioner and such supervising physician shall be responsible for authorizing such prescription or order.

(f) Any registered nurse or licensed practical nurse who receives an order from a nurse practitioner for medications, tests or treatments is authorized to perform that order in the same manner as if it were received from a licensed physician. (1977, 2nd Sess., c. 1194, s. 2; 1995, c. 94, s. 21.)

Legal Periodicals. — For note, "Nurse Malpractice in North Carolina: The Standard of Care," see 65 N.C.L. Rev. 579 (1987).

CASE NOTES

Dispute as to Nurses Administering Anesthesia. — Trial court properly denied the North Carolina Board of Nursing's motion to enforce a consent order as against petitioners, the North Carolina Medical Society, the North Carolina Society of Anesthesiologists, Inc., a doctor, and the North Carolina Medical Board, because petitioners did not violate the consent order by issuing a position statement with regard to nurses administering anesthesia and never acquiesced to the Board's administrative rule via the consent order on the same topic. N.C. Med. Soc'y v. N.C. Bd. of Nursing, 169 N.C. App. 1, 610 S.E.2d 722 (2005), cert. denied, 360 N.C. 66, 621 S.E.2d 875 (2005).

OPINIONS OF ATTORNEY GENERAL

It is unlawful for certified registered nurse anesthetists (CRNAs) to provide anesthesia care without physician supervision. See opinion of Attorney General to The Honorable James S. Forrester, M.D. North Carolina General Assembly, 1998 N.C.A.G. 58 (12/31/98).

§ 90-18.2A. Physician assistants receiving, prescribing, or dispensing prescription drugs without charge or fee.

The North Carolina Medical Board shall have sole jurisdiction to regulate and license physician assistants receiving, prescribing, or dispensing prescription drugs under the supervision of a licensed physician without charge or fee to the patient. The provisions of G.S. 90-18.1(c)(1), (c)(2), and G.S. 90-85.21(b), shall not apply to the receiving, prescribing, or dispensing of prescription drugs without charge or fee to the patient. (2004-124, s. 10.2E(a).)

§ 90-18.3. Physical examination by nurse practitioners and physician assistants.

(a) Whenever a statute or State agency rule requires that a physical examination shall be conducted by a physician, the examination may be conducted and the form signed by a nurse practitioner or a physician's assistant, and a physician need not be present. Nothing in this section shall otherwise change the scope of practice of a nurse practitioner or a physician's assistant, as defined by G.S. 90-18.1 and G.S. 90-18.2, respectively.

(b) This section shall not apply to physical examinations conducted pursuant to G.S. 1A-1, Rule 35; G.S. 15B-12; G.S. 90-14 unless those statutes or rules are amended to make the provisions of this section applicable. (1999-226, s. 1; 2004-124, s. 18.2(f).)

§ 90-18.4. Limitations on clinical pharmacist practitioners.

(a) Any pharmacist who is approved under the provisions of G.S. 90-18(c)(3a) to perform medical acts, tasks, and functions may use the title "clinical pharmacist practitioner". Any other person who uses the title in any form or holds himself or herself out to be a clinical pharmacist practitioner or to be so licensed shall be deemed to be in violation of this Article.

(b) Clinical pharmacist practitioners are authorized to implement predetermined drug therapy, which includes diagnosis and product selection by the patient's physician, modify prescribed drug dosages, dosage forms, and dosage schedules, and to order laboratory tests pursuant to a drug therapy management agreement that is physician, pharmacist, patient, and disease specific under the following conditions:

(1) The North Carolina Medical Board and the North Carolina Board of Pharmacy have adopted rules developed by a joint subcommittee governing the approval of individual clinical pharmacist practitioners to practice drug therapy management with such limitations that the Boards determine to be in the best interest of patient health and safety.

(2) The clinical pharmacist practitioner has current approval from both Boards.

(3) The North Carolina Medical Board has assigned an identification number to the clinical pharmacist practitioner which is shown on written prescriptions written by the clinical pharmacist practitioner.

(4) The drug therapy management agreement prohibits the substitution of a chemically dissimilar drug product by the pharmacist for the product prescribed by the physician without the explicit consent of the physician and includes a policy for periodic review by the physician of the drugs modified pursuant to the agreement or changed with the consent of the physician.

(c) Clinical pharmacist practitioners in hospitals and other health facilities that have an established pharmacy and therapeutics committee or similar group that determines the prescription drug formulary or other list of drugs to be utilized in the facility and determines procedures to be followed when considering a drug for inclusion on the formulary and procedures to acquire a nonformulary drug for a patient may order medications and tests under the following conditions:

(1) The North Carolina Medical Board and the North Carolina Board of Pharmacy have adopted rules governing the approval of individual clinical pharmacist practitioners to order medications and tests with such limitations as the Boards determine to be in the best interest of patient health and safety.

(2) The clinical pharmacist practitioner has current approval from both Boards.

(3) The supervising physician has provided to the clinical pharmacist practitioner written instructions for ordering, changing, or substituting drugs, or ordering tests with provision for review of the order by the physician within a reasonable time, as determined by the Boards, after the medication or tests are ordered.

(4) The hospital or health facility has adopted a written policy, approved by the medical staff after consultation with nursing administrators, concerning the ordering of medications and tests, including procedures for verification of the clinical pharmacist practitioner's orders by nurses and other facility employees and such other procedures that are in the best interest of patient health and safety.

(5) Any drug therapy order written by a clinical pharmacist practitioner or order for medications or tests shall be deemed to have been authorized by the physician approved by the Boards as the supervisor of the clinical pharmacist practitioner and the supervising physician shall be responsible for authorizing the prescription order.

(d) Any registered nurse or licensed practical nurse who receives a drug therapy order from a clinical pharmacist practitioner for medications or tests is authorized to perform that order in the same manner as if the order was received from a licensed physician. (1999-290, s. 3.)

§ 90-18.5. Limitations on anesthesiologist assistants.

(a) Any person who is licensed to provide anesthesia services as an assistant to an anesthesiologist licensed under Article 1 of this Chapter may use the title "anesthesiologist assistant." Any other person who uses the title in any form or holds himself or herself out to be an anesthesiologist assistant or to be so licensed without first obtaining a license shall be deemed in violation of this Article. A student in any anesthesiologist assistant training program shall be identified as a "student anesthesiologist assistant" or an "anesthesiologist assistant student," but under no circumstances shall the student use or permit to be used on the student's behalf the terms "intern," "resident," or "fellow."

(b) Anesthesiologist assistants are authorized to provide anesthesia services under the supervision of an anesthesiologist licensed under Article 1 of this Chapter under the following conditions:

(1) The North Carolina Medical Board has adopted rules governing the provision of anesthesia services by an anesthesiologist assistant consistent with the requirements of subsection (c) of this section.

(2) The anesthesiologist assistant holds a current license issued by the Board or is a student anesthesiologist assistant participating in a training program leading to certification by the National Commission for Certification of Anesthesiologist Assistants and licensure as an anesthesiologist assistant under G.S. 90-11(a1).

(c) The North Carolina Medical Board shall adopt rules to implement this section that include requirements and limitations on the provision of anesthesia services by an anesthesiologist assistant as determined by the Board to be in the best interests of patient health and safety. Rules adopted by the Board pursuant to this section shall include the following requirements:

(1) That an anesthesiologist assistant be supervised by an anesthesiologist licensed under this Article who is actively engaged in clinical practice and immediately available on-site to provide assistance to the anesthesiologist assistant.

(2) That an anesthesiologist may supervise no more than two anesthesiologist assistants or student anesthesiologist assistants at one time. The limitation on the number of anesthesiologist assistants and student anesthesiologist assistants that an anesthesiologist may supervise in no way restricts the number of other qualified anesthesia providers an anesthesiologist may concurrently supervise. After January 1, 2010, the Board may allow an anesthesiologist to supervise up to four licensed anesthesiologist assistants concurrently and may revise the supervision limitations of student anesthesiologist assistants such that the supervision requirements for student anesthesiologist assistants are similar to the supervision requirements for student nurse anesthetists.

(3) That anesthesiologist assistants comply with all continuing education requirements and recertification requirements of the National Commission for Certification of Anesthesiologist Assistants or its successor organization.

(d) Nothing in this section shall limit or expand the scope of practice of physician assistants under existing law. (2007-146, s. 4.)

Editor's Note. — Session Laws 2007-146, s. 5, made this section effective June 29, 2007.

G.S. 90-11(a1), as referred to in subdivision (b)(2) above, was repealed by Session Laws 2007-346, s. 9.1, effective October 1, 2007. For a similar provision, see G.S. 90-9.4, enacted by Session Laws 2007-346, s. 9.

§§ **90-19, 90-20:** Repealed by Session Laws 1967, c. 691, s. 59.

§ **90-21:** Repealed by Session Laws 2007-346, s. 26, effective October 1, 2007.

ARTICLE 1A.

Treatment of Minors.

Part 1. General Provisions.

Editor's Note. — G.S. 90-21.1 to 90-21.5 were designated as Part 1 of Article 1A by Session Laws 1995, c. 462, s. 1.

§ 90-21.1. When physician may treat minor without consent of parent, guardian or person in loco parentis.

It shall be lawful for any physician licensed to practice medicine in North Carolina to render treatment to any minor without first obtaining the consent and approval of either the father or mother of said child, or any person acting as guardian, or any person standing in loco parentis to said child where:

(1) The parent or parents, the guardian, or a person standing in loco parentis to said child cannot be located or contacted with reasonable

diligence during the time within which said minor needs to receive the treatment herein authorized, or

(2) Where the identity of the child is unknown, or where the necessity for immediate treatment is so apparent that any effort to secure approval would delay the treatment so long as to endanger the life of said minor, or

(3) Where an effort to contact a parent, guardian, or person standing in loco parentis would result in a delay that would seriously worsen the physical condition of said minor, or

(4) Where the parents refuse to consent to a procedure, and the necessity for immediate treatment is so apparent that the delay required to obtain a court order would endanger the life or seriously worsen the physical condition of the child. No treatment shall be administered to a child over the parent's objection as herein authorized unless the physician shall first obtain the opinion of another physician licensed to practice medicine in the State of North Carolina that such procedure is necessary to prevent immediate harm to the child.

Provided, however, that the refusal of a physician to use, perform or render treatment to a minor without the consent of the minor's parent, guardian, or person standing in the position of loco parentis, in accordance with this Article, shall not constitute grounds for a civil action or criminal proceedings against such physician. (1965, c. 810, s. 1; 1977, c. 625, s. 1.)

Cross References. — As to application of this section to surgical operations on inmates of State penal institutions, see G.S. 148-22.2.

OPINIONS OF ATTORNEY GENERAL

"Minor" Is Person Under 18. — See opinion of Attorney General to Lena S. Davis, 41 N.C.A.G. 489 (1971).

Protection Extends to Social Workers and Psychologists Working Under Physicians. — See opinion of Attorney General to Mr. Ed McClearsen, Staff Attorney, Mental Health Study Commission, 47 N.C.A.G. 83 (1977).

Delegation of Responsibility to Nurse Practitioner or Physician's Assistant. — A physician associated with a publicly supported family planning clinic can delegate responsibility for medically related contraceptive services to a nurse practitioner or physician's assistant whom he supervises and who functions under his standing orders, if these functions are specifically approved for the individual nurse practitioner or physician's assistant by the Board of Medical Examiners. Opinion of Attorney General to Margie Rose, M.P.H. Branch Head, Family Planning Branch, Division of Health Services, 47 N.C.A.G. 80 (1977).

Counseling Not "Treatment". — Counseling minors for sickle cell disease and related genetic disorders does not constitute "treatment" as defined under G.S. 90-21.2. See opinion of Attorney General to Sarah T. Morrow, M.D., M.P.H., Secretary, Dep't of Human Resources, 49 N.C.A.G. 181 (1980).

Parental consent is required for counseling minors for sickle cell disease and related genetic disorders and such consent remains valid for later counseling if obtained at the time of testing. See opinion of Attorney General of Sarah T. Morrow, M.D., M.P.H., Secretary, Dep't of Human Resources, 49 N.C.A.G. 181 (1980).

To provide genetic counseling to minors without consent would appear to be a violation of the common-law principles governing the parent-child relationship and thus would leave the individual providing these services potentially vulnerable to litigation. See opinion of Attorney General to Sarah T. Morrow, M.D., M.P.H., Secretary, Dep't of Human Resources, 49 N.C.A.G. 181 (1980).

§ 90-21.2. "Treatment" defined.

The word "treatment" as used in G.S. 90-21.1 is hereby defined to mean any medical procedure or treatment, including X rays, the administration of drugs, blood transfusions, use of anesthetics, and laboratory or other diagnostic procedures employed by or ordered by a physician licensed to practice medicine in the State of North Carolina that is used, employed, or ordered to be used or employed commensurate with the exercise of reasonable care and equal to the standards of medical practice normally employed in the community where said physician administers treatment to said minor. (1965, c. 810, s. 2.)

Legal Periodicals. — For article, "Operationalizing the Standard of Medical Care: Uses and Limitations of Epidemiology to Guide Expert Testimony in Medical Negligence Allegations," see 37 Wake Forest L. Rev. 675 (2002).

For article, "Jurors as Beneficiaries of Proposals to Objectify Proof of the Standard of Care in Medical Malpractice Cases," see 37 Wake Forest L. Rev. 943 (2002).

For article, "Observations on the Search for Objective Proof of the Standard of Care in Medical Malpractice Cases," see 37 Wake Forest L. Rev. 953 (2002).

For article, "Ascertaining Customary Care in Malpractice Cases: Asking Those Who Know," see 37 Wake Forest L. Rev. 699 (2002).

For article, "Empirical Evidence and Malpractice Litigation," see 37 Wake Forest L. Rev. 757 (2002).

For article, "Measuring Medical Practice Patterns: Sources of Evidence from Health Services Research," see 37 Wake Forest L. Rev. 779 (2002).

For article, "Using Statistical Evidence to Prove the Malpractice Standard of Care: Bridging Legal, Clinical, and Statistical Thinking," see 37 Wake Forest L. Rev. 821 (2002).

For article, "Determining the Standard of Care in Medical Malpractice: The Physician's Perspective," see 37 Wake Forest L. Rev. 861 (2002).

For article, "The Process of Managing Medical Malpractice Cases: The Role of Standard of Care," see 37 Wake Forest L. Rev. 877 (2002).

For article, "Following the Man on the Clapham Omnibus: Social Science Evidence in Malpractice Litigation," see 37 Wake Forest L. Rev. 903 (2002).

For article, "Unwarranted Variations in the Quality of Health Care: Can the Law Help Medicine Provide a Remedy/Remedies," see 37 Wake Forest L. Rev. 925 (2002).

§ 90-21.3. Performance of surgery on minor; obtaining second opinion as to necessity.

The word "treatment" as defined in G.S. 90-21.2 shall also include any surgical procedure which in the opinion of the attending physician is necessary under the terms and conditions set out in G.S. 90-21.1; provided, however, no surgery shall be conducted upon a minor as herein authorized unless the surgeon shall first obtain the opinion of another physician licensed to practice medicine in the State of North Carolina that said surgery is necessary under the conditions set forth in G.S. 90-21.1; provided further, that in any emergency situation that shall arise in a rural community, or in a community where it is impossible for the surgeon to contact any other physician for the purpose of obtaining his opinion as to the necessity for immediate surgery, it shall not be necessary for the surgeon to obtain approval from another physician before performing such surgery as is necessary under the terms and conditions set forth in G.S. 90-21.1. (1965, c. 810, s. 3.)

CASE NOTES

Cited in Brigham v. Hicks, 44 N.C. App. 152, 260 S.E.2d 435 (1979).

§ 90-21.4. Responsibility, liability and immunity of physicians.

(a) Any physician licensed to practice medicine in North Carolina providing health services to a minor under the terms, conditions and circumstances of this Article shall not be held liable in any civil or criminal action for providing such services without having obtained permission from the minor's parent, legal guardian, person standing in loco parentis, or a legal custodian other than a parent when granted specific authority in a custody order to consent to medical or psychiatric treatment. The physician shall not be relieved on the basis of this Article from liability for negligence in the diagnosis and treatment of a minor.

(b) The physician shall not notify a parent, legal guardian, person standing in loco parentis, or a legal custodian other than a parent when granted specific authority in a custody order to consent to medical or psychiatric treatment, without the permission of the minor, concerning the medical health services set out in G.S. 90-21.5(a), unless the situation in the opinion of the attending physician indicates that notification is essential to the life or health of the minor. If a parent, legal guardian[,] person standing in loco parentis, or a legal custodian other than a parent when granted specific authority in a custody order to consent to medical or psychiatric treatment contacts the physician concerning the treatment or medical services being provided to the minor, the physician may give information. (1965, c. 810, s. 4; 1977, c. 582, s. 1; 1985, c. 589, s. 30.)

OPINIONS OF ATTORNEY GENERAL

This section provides immunity from civil or criminal liability to a nurse practitioner or physician's assistant for nonnegligent acts performed under the physician's supervision and while functioning under the physician's standing orders if the delegation of responsibility is proper. Opinion of Attorney General to Margie Rose, M.P.H. Branch Head, Family Planning Branch, Division of Health Services, 47 N.C.A.G. 80 (1977).

§ 90-21.5. Minor's consent sufficient for certain medical health services.

(a) Any minor may give effective consent to a physician licensed to practice medicine in North Carolina for medical health services for the prevention, diagnosis and treatment of (i) venereal disease and other diseases reportable under G.S. 130A-135, (ii) pregnancy, (iii) abuse of controlled substances or alcohol, and (iv) emotional disturbance. This section does not authorize the inducing of an abortion, performance of a sterilization operation, or admission to a 24-hour facility licensed under Article 2 of Chapter 122C of the General Statutes except as provided in G.S. 122C-222. This section does not prohibit the admission of a minor to a treatment facility upon his own written application in an emergency situation as authorized by G.S. 122C-222.

(b) Any minor who is emancipated may consent to any medical treatment, dental and health services for himself or for his child. (1971, c. 35; 1977, c. 582, s. 2; 1983, c. 302, s. 2; 1985, c. 589, s. 31; 1985 (Reg. Sess., 1986), c. 863, s. 4.)

CASE NOTES

A state cannot require a minor to obtain parental consent for an abortion unless it provides an alternative procedure whereby authorization can be obtained for the abortion. North Carolina has no such alternative procedure. Wilkie v. Hoke, 609 F. Supp. 241 (W.D.N.C. 1985).

Minor plaintiff's common-law ability to void agreement to arbitrate, one of the provisions of an informed consent form which she signed in consenting to an abortion, was not changed by statute and did not deprive her of her constitutional right to an abortion. Wilkie v. Hoke, 609 F. Supp. 241 (W.D.N.C. 1985).

OPINIONS OF ATTORNEY GENERAL

This Section Does Not Conflict with G.S. 7B-3400. — G.S. 7B-3400, which provides that minors are subject to the supervision and control of their parents "notwithstanding any other provision of law," does not abrogate G.S. 90-21.5, which specifies the circumstances under which minors can consent to health services as the statutes address different issues and do not conflict with one another. See opinion of Attorney General to Dr. David King, Chairman, Rowan Board of Health, 1999 N.C. AG LEXIS 27 (8/25/99).

Part 2. Parental or Judicial Consent for Abortion.

§ 90-21.6. Definitions.

For the purposes of Part 2 only of this Article, unless the context clearly requires otherwise:

(1) "Unemancipated minor" or "minor" means any person under the age of 18 who has not been married or has not been emancipated pursuant to Article 35 of Chapter 7B of the General Statutes.

(2) "Abortion" means the use or prescription of any instrument, medicine, drug, or any other substance or device with intent to terminate the pregnancy of a woman known to be pregnant, for reasons other than to save the life or preserve the health of an unborn child, to remove a dead unborn child, or to deliver an unborn child prematurely, by accepted medical procedures in order to preserve the health of both the mother and the unborn child. (1995, c. 462, s. 1; 1998-202, s. 13(t).)

CASE NOTES

Health Care Providers Not Granted Preliminary Injunction. — Because the district court found that health care providers had not demonstrated the likelihood of irreparable injury to them or that the balance of hardships was obviously in their favor, the court did not err in holding that the health care providers should not be granted a preliminary injunction against enforcement of statutes requiring parental or judicial consent for an unemancipated minor's abortion. Manning v. Hunt, 119 F.3d 254 (4th Cir. 1997).

Because North Carolina's Act to Require Parental or Judicial Consent for an Unemancipated Minor's Abortion helps preserve the traditional line of responsibility between parent and child and helps protect the family unit as a viable and time-honored means of raising children while at the same time takes into account exceptional cases in a confidential and expeditious manner, the district court properly determined that a preliminary injunction against enforcement of the Act would not be in the public's best interest. Manning v. Hunt, 119 F.3d 254 (4th Cir. 1997).

§ 90-21.7. Parental consent required.

(a) No physician licensed to practice medicine in North Carolina shall perform an abortion upon an unemancipated minor unless the physician or agent thereof or another physician or agent thereof first obtains the written consent of the minor and of:

(1) A parent with custody of the minor; or

(2) The legal guardian or legal custodian of the minor; or

(3) A parent with whom the minor is living; or

(4) A grandparent with whom the minor has been living for at least six months immediately preceding the date of the minor's written consent.

(b) The pregnant minor may petition, on her own behalf or by guardian ad litem, the district court judge assigned to the juvenile proceedings in the district court where the minor resides or where she is physically present for a waiver of the parental consent requirement if:

(1) None of the persons from whom consent must be obtained pursuant to this section is available to the physician performing the abortion or the physician's agent or the referring physician or the agent thereof within a reasonable time or manner; or

(2) All of the persons from whom consent must be obtained pursuant to this section refuse to consent to the performance of an abortion; or

(3) The minor elects not to seek consent of the person from whom consent is required. (1995, c. 462, s. 1.)

Legal Periodicals. — For comment, "The Burial of an Impartial Judicial System: The Lifting of Restrictions on Judicial Candidate Speech in North Carolina," see 33 Wake Forest L. Rev. 413 (1998).

For a note on minors' rights vis-a-vis abortion, see 1999 Duke L.J. 297.

CASE NOTES

Health Care Provider's Duty to Verify Consent. — Where a health care provider is presented with an apparently valid written parental consent and is thereby deceived into performing an abortion procedure upon a minor, the unknowing and unintentional failure to obtain actual parental consent is not a violation of the statute. Jackson ex rel. Robinson v. A Woman's Choice, Inc., 130 N.C. App. 590, 503 S.E.2d 422 (1998).

Cited in Manning v. Hunt, 119 F.3d 254 (4th Cir. 1997).

§ 90-21.8. Procedure for waiver of parental consent.

(a) The requirements and procedures under Part 2 of this Article are available and apply to unemancipated minors seeking treatment in this State.

(b) The court shall ensure that the minor or her guardian ad litem is given assistance in preparing and filing the petition and shall ensure that the minor's identity is kept confidential.

(c) The minor may participate in proceedings in the court on her own behalf or through a guardian ad litem. The court shall advise her that she has a right to appointed counsel, and counsel shall be provided upon her request in accordance with rules adopted by the Office of Indigent Defense Services.

(d) Court proceedings under this section shall be confidential and shall be given precedence over other pending matters necessary to ensure that the court may reach a decision promptly. In no case shall the court fail to rule within seven days of the time of filing the application. This time limitation may be extended at the request of the minor. At the hearing, the court shall hear evidence relating to the emotional development, maturity, intellect, and understanding of the minor; the nature, possible consequences, and alternatives to the abortion; and any other evidence that the court may find useful in determining whether the parental consent requirement shall be waived.

(e) The parental consent requirement shall be waived if the court finds:

(1) That the minor is mature and well-informed enough to make the abortion decision on her own; or

(2) That it would be in the minor's best interests that parental consent not be required; or

(3) That the minor is a victim of rape or of felonious incest under G.S. 14-178.

(f) The court shall make written findings of fact and conclusions of law supporting its decision and shall order that a confidential record of the evidence be maintained. If the court finds that the minor has been a victim of incest, whether felonious or misdemeanor, it shall advise the Director of the Department of Social Services of its findings for further action pursuant to Article 3 of Chapter 7B of the General Statutes.

(g) If the female petitioner so requests in her petition, no summons or other notice may be served upon the parents, guardian, or custodian of the minor female.

(h) The minor may appeal an order issued in accordance with this section. The appeal shall be a de novo hearing in superior court. The notice of appeal shall be filed within 24 hours from the date of issuance of the district court order. The de novo hearing may be held out of district and out of session and shall be held as soon as possible within seven days of the filing of the notice of appeal. The record of the de novo hearing is a confidential record and shall not be open for general public inspection. The Chief Justice of the North Carolina Supreme Court shall adopt rules necessary to implement this subsection.

(i) No court costs shall be required of any minor who avails herself of the procedures provided by this section. (1995, c. 462, s. 1; 1998-202, s. 13(u); 2000-144, s. 35.)

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B.

CASE NOTES

Court Improperly Failed to Grant Waiver. — Court's findings that minor was not "well-informed enough" to obtain parental waiver was not supported by the evidence or the findings of fact. The trial court substituted its decision for that of the minor, which is not allowed by the statute or by case law; therefore, waiver of the parental consent requirement was granted. In re Doe, 126 N.C. App. 401, 485 S.E.2d 354 (1997).

Appeal. — No appeal of right lies to the Court of Appeals from an order of the superior court entered pursuant to subsection (h). The exclusive appeal remedy is the appeal from the district court to the superior court. In re Doe, 126 N.C. App. 401, 485 S.E.2d 354 (1997).

North Carolina's Act to Require Parental or Judicial Consent for an Unemancipated Minor's Abortion does not impose an undue burden on the right of a pregnant unemancipated minor by requiring that a pregnant minor file her appeal for denial of a petition by the state district court to the superior court within 24 hours of the district court's decision. Manning v. Hunt, 119 F.3d 254 (4th Cir. 1997).

Bypass Provisions Constitutional. — Because there is nothing on the face of North Carolina's Act to Require Parental or Judicial Consent for an Unemancipated Minor's Abortion to indicate that it does not comply with requirements that the judicial bypass procedures maintain the confidentiality of a minor and because the North Carolina Court of Appeals has demonstrated that it is well aware of the need for expedition and confidentiality at all levels of the bypass, the bypass provisions of the Act are constitutional. Manning v. Hunt, 119 F.3d 254 (4th Cir. 1997).

Reporting Requirements Do Not Violate Confidentiality. — Because the reporting requirement of North Carolina's Act to Require Parental or Judicial Consent for an Unemancipated Minor's Abortion was designed to protect the minor and the minor could obtain certification for the abortion without disclosing a rape or incest by proving that she is mature or that the abortion is in her best interest, the district court did not err in holding that the reporting requirements do not violate the confidentiality prong of Belloti. Manning v. Hunt, 119 F.3d 254 (4th Cir. 1997).

Cited in Jackson ex rel. Robinson v. A Woman's Choice, Inc., 130 N.C. App. 590, 503 S.E.2d 422 (1998).

§ 90-21.9. Medical emergency exception.

The requirements of parental consent prescribed by G.S. 90- 21.7(a) shall not apply when, in the best medical judgment of the physician based on the facts of the case before the physician, a medical emergency exists that so complicates the pregnancy as to require an immediate abortion, or when the conditions prescribed by G.S. 90-21.1(4) are met. (1995, c. 462, s. 1.)

CASE NOTES

Judicial Consent Not Required for Medical Emergency. — District court's statement "If there is an emergency need for the abortion, and the attending physician so determines, immediate access to judicial authorization is provided" was not meant to be an interpretation of this section; to the extent such statement might have been an interpretation, any interpretation of the Act to require judicial authorization before an abortion obtained for a medical emergency would be in error. Manning v. Hunt, 119 F.3d 254 (4th Cir. 1997).

§ 90-21.10. Penalty.

Any person who intentionally performs an abortion with knowledge that, or with reckless disregard as to whether, the person upon whom the abortion is to be performed is an unemancipated minor, and who intentionally or knowingly fails to conform to any requirement of Part 2 of this Article shall be guilty of a Class 1 misdemeanor. (1995, c. 462, s. 1.)

CASE NOTES

Cited in Manning v. Hunt, 119 F.3d 254 (4th Cir. 1997); Jackson ex rel. Robinson v. A Woman's Choice, Inc., 130 N.C. App. 590, 503 S.E.2d 422 (1998).

ARTICLE 1B.

Medical Malpractice Actions.

§ 90-21.11. Definitions.

As used in this Article, the term "health care provider" means without limitation any person who pursuant to the provisions of Chapter 90 of the General Statutes is licensed, or is otherwise registered or certified to engage in the practice of or otherwise performs duties associated with any of the following: medicine, surgery, dentistry, pharmacy, optometry, midwifery, osteopathy, podiatry, chiropractic, radiology, nursing, physiotherapy, pathology, anesthesiology, anesthesia, laboratory analysis, rendering assistance to a physician, dental hygiene, psychiatry, psychology; or a hospital or a nursing home; or any other person who is legally responsible for the negligence of such person, hospital or nursing home; or any other person acting at the direction or under the supervision of any of the foregoing persons, hospital, or nursing home.

As used in this Article, the term "medical malpractice action" means a civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider. (1975, 2nd Sess., c. 977, s. 4; 1987, c. 859, s. 1; 1995, c. 509, s. 135.2(o).)

Cross References. — As to limitation of actions for malpractice, see G.S. 1-15, 1-17. As to liability insurance or self-insurance covering health-care practitioners employed by The University of North Carolina, see G.S. 116-219 through 116-222.

Legal Periodicals. — For comment on the statutory standard of care for North Carolina health care providers, see 1 Campbell L. Rev. 11 (1979).

For article discussing the North Carolina medical malpractice statute, see 62 N.C.L. Rev. 711 (1984).

For 1984 survey, "North Carolina Court of Appeals Recognizes Wrongful Birth and Wrongful Life Claims," see 63 N.C.L. Rev. 1327 (1985).

For note suggesting the need for a new tort of breach of confidence, in light of Watts v. Cumberland County Hospital System, 75 N.C. App. 1, 330 S.E.2d 242 (1985), see 8 Campbell L. Rev. 145 (1985).

For note, "Wrongful Conception: North Carolina's Newest Prenatal Tort Claim — Jackson v. Bumgardner," see 65 N.C.L. Rev. 1077 (1987).

For survey on the medical review committee privilege, see 67 N.C.L. Rev. 179 (1988).

For note on medical malpractice and unwarranted operations, see 23 Wake Forest L. Rev. 825 (1988).

For comment, "Compensating Post-Conception Prenatal Medical Malpractice While Respecting Life: A Recommendation to North Carolina Legislators," see 29 Campbell L. Rev. 761 (2007).

CASE NOTES

Purpose and spirit of the medical malpractice act is to decrease the number and severity of medical malpractice claims in an effort to decrease the cost of medical malpractice insurance. Black v. Littlejohn, 312 N.C. 626, 325 S.E.2d 469 (1985); Mozingo ex rel. Thomas v. Pitt County Mem. Hosp., 101 N.C. App. 578, 400 S.E.2d 747 (1991), aff'd, 331 N.C. 182, 415 S.E.2d 341 (1992).

Physician-Patient Relationship Required. — In order to state a claim for medical malpractice under North Carolina law, there must first exist a physician-patient relationship. Doe v. American Nat'l Red Cross, 798 F. Supp. 301 (E.D.N.C. 1992).

Establishment of Physician-Patient Relationship. — Whether a physician-patient relationship is established depends upon whether the defendant actually accepted plaintiffs as patients and undertook to treat them. Doe v. American Nat'l Red Cross, 798 F. Supp. 301 (E.D.N.C. 1992).

No Professional Relationship. — A patient could not bring a medical malpractice action against a licensed physician's assistant, where the assistant allegedly committed unlawful sexual acts on the patient, but the patient presented no evidence that the assistant, who was not directed to provide health care to the patient, furnished professional services to the patient to establish the necessary professional relationship. Massengill v. Duke Univ. Medical Ctr., 133 N.C. App. 336, 515 S.E.2d 70 (1999).

Because the observance and supervision of the plaintiff when she smoked in the designated smoking area did not constitute an occupation involving specialized knowledge or skill, and preventing the patient from dropping a match or a lighted cigarette upon herself while in a designated smoking room did not involve matters of medical science, such behaviors are properly applied to the standards of ordinary negligence, and the requirements of Civil Procedure Rule 9(j), concerning a claim for medical malpractice, did not apply. Taylor v. Vencor, Inc., 136 N.C. App. 528, 525 S.E.2d 201 (2000).

Action Was Medical Malpractice Action. — Patient's claim that preventing a patient from participating in a bowling outing did not require "specialized knowledge or skill," and that the patient's action was a common law negligence action was rejected, as rehabilitative outings constituted part of the treatment prescribed by specialists such as a doctor, and the action was clearly a medical malpractice action under G.S. 90-21.11. Smith v. Serro, — N.C. App. —, 648 S.E.2d 566, 2007 N.C. App. LEXIS 1801 (2007).

No Liability to Third Parties. — Psychologists are liable in medical malpractice only to their patients, not to third parties even if the treatment has resulted in adverse consequences on the patients relationship with them. Russell v. Adams, 125 N.C. App. 637, 482 S.E.2d 30 (1997).

The collection, distribution, and sale of blood, like the manufacture and sale of pharmaceuticals, is not the practice of medicine. Doe v. American Nat'l Red Cross, 798 F. Supp. 301 (E.D.N.C. 1992).

Health Clinic as Health Care Provider. — Where action arose from alleged malpractice of doctor who practiced in a small, rural health clinic, if health clinic were ultimately determined to be responsible for any negligence by doctor, health clinic would be a "health care provider" under the statutory definition. Shumaker v. United States, 714 F. Supp. 154 (M.D.N.C. 1988).

Medical Malpractice Does Not Fall Within Professional Services Exclusion. — Negligence actions against health care providers may be based upon breaches of the ordinary duty of reasonable care where the alleged breach does not involve rendering or failing to render professional services requiring special skills. Therefore, a claim for medical malpractice as defined by statute does not as a matter of law fall within a professional services exclusion in an insurance policy which is strictly construed in favor of coverage. Duke Univ. v. St. Paul Fire & Marine Ins. Co., 96 N.C. App. 635, 386 S.E.2d 762, cert. denied, 326 N.C. 595, 393 S.E.2d 876 (1990).

Statute of Limitations. — Four year statute of repose for medical malpractice actions, G.S. 1-15(c), applied to wrongful death cases; a wrongful death medical malpractice suit filed within two years of decedent's death, but more than four years after doctor's last act, was properly dismissed as untimely. Udzinski v. Lovin, 358 N.C. 534, 597 S.E.2d 703, 2004 N.C. LEXIS 658 (2004).

Victim Could Not Bring Claim Against Red Cross. — No physician-patient relationship existed between Acquired Immune Deficiency Syndrome (AIDS) victim (the blood recipient) and the Red Cross. Therefore, he could not bring a malpractice claim against the Red Cross. Doe v. American Nat'l Red Cross, 798 F. Supp. 301 (E.D.N.C. 1992).

No Nexus Between Surgery and Injury. — Patient who claimed he was injured by negligent failure to provide sufficient padding during his four hours of surgery failed to produce relevant expert testimony as to causation and res ipsa loquitur did not apply, so adverse judgment was entered. Wright v. United States, 280 F. Supp. 2d 472 (M.D.N.C. 2003).

Certification Not Required. — Complaint's allegations that a doctor improperly allowed access to and exposure of a patient's medical records by third parties stated a claim based on the doctor's administrative act, not one involving direct patient care, and therefore the plaintiff did not need certification before filing suit. Acosta v. Byrum, — N.C. App. —, 638 S.E.2d 246, 2006 N.C. App. LEXIS 2503 (2006).

Applied in Haney v. Alexander, 71 N.C. App. 731, 323 S.E.2d 430 (1984); Brisson v. Kathy A. Santoriello, M.D., P.A., 351 N.C. 589, 528 S.E.2d 568 (2000); Brooks v. Wal-Mart Stores, Inc., 139 N.C. App. 637, 535 S.E.2d 55 (2000); Foster v. Crandell, — N.C. App. —, 638 S.E.2d 526, 2007 N.C. App. LEXIS 73 (2007).

Cited in Preston v. Thompson, 53 N.C. App. 290, 280 S.E.2d 780 (1981); Roberts v. Durham County Hosp. Corp., 56 N.C. App. 533, 289 S.E.2d 875 (1982); Tice v. Hall, 310 N.C. 589, 313 S.E.2d 565 (1984); Burns v. Forsyth County Hosp. Auth., 81 N.C. App. 556, 344 S.E.2d 839 (1986); Reich v. Price, 110 N.C. App. 255, 429 S.E.2d 372 (1993); Davis v. North Carolina Dep't of Human Resources, 121 N.C. App. 105, 465 S.E.2d 2 (1995); Horton v. Carolina Medicorp, Inc., 344 N.C. 133, 472 S.E.2d 778 (1996); Lewis v. Setty, 130 N.C. App. 606, 503 S.E.2d 673 (1998); Formyduval v. Bunn, 138 N.C. App. 381, 530 S.E.2d 96 (2000); Hylton v. Koontz, 138 N.C. App. 511, 530 S.E.2d 108 (2000); Thigpen v. Ngo, 143 N.C. App. 209, 545 S.E.2d 477, cert. granted, 353 N.C. 734, 552 S.E.2d 634, cert. granted, 353 N.C. 734, 552 S.E.2d 635 (2001); Edwards v. Wall, 142 N.C. App. 111, 542 S.E.2d 258 (2001); Estate of Waters v. Jarman, 144 N.C. App. 98, 547 S.E.2d 142, cert. denied, 354 N.C. 68, 553 S.E.2d 213 (2001); Iodice v. United States, 289 F.3d 270 (4th Cir. 2002); Coffman v. Roberson, 153 N.C. App. 618, 571 S.E.2d 255 (2002), cert. denied, 356 N.C. 668, 577 S.E.2d 111 (2003); Frazier v. Angel Med. Ctr., 308 F. Supp. 2d 671 (W.D.N.C. 2004).

§ 90-21.12. Standard of health care.

In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action. (1975, 2nd Sess., c. 977, s. 4.)

Legal Periodicals. — For comment on the statutory standard of care for North Carolina health care providers, see 1 Campbell L. Rev. 111 (1979).

For article discussing the North Carolina medical malpractice statute, see 62 N.C.L. Rev. 711 (1984).

For 1984 survey, "North Carolina Court of Appeals Recognizes Wrongful Birth and Wrongful Life Claims," see 63 N.C.L. Rev. 1327 (1985).

For note suggesting the need for a new tort of breach of confidence, in light of Watts v. Cumberland County Hospital System, 75 N.C. App. 1, 330 S.E.2d 242 (1985), see 8 Campbell L. Rev. 145 (1985).

For note, "Psychiatrists' Liability to Third Parties for Harmful Acts Committed by Dangerous Patients," see 64 N.C.L. Rev. 1534 (1986).

For article, "The American Medical Association vs. The American Tort System," see 8 Campbell L. Rev. 241 (1986).

For note on expansion of the application of res ipsa loquitur in medical malpractice, in light of Parks v. Perry, 68 N.C. App. 202, 314 S.E.2d 287, cert. denied, 311 N.C. 761, 321 S.E.2d 142 (1984), see 21 Wake Forest L. Rev. 537 (1986).

For note, "Nurse Malpractice in North Carolina: The Standard of Care," see 65 N.C.L. Rev. 579 (1987).

For note, "Liability in the Absence of a Traditional Physician-Patient Relationship: What Every 'On Call' Doctor Should Know: Mozingo v. Pitt County Memorial Hospital," see 28 Wake

Forest L. Rev. 747 (1993).

For note, "The Evolution and Status of the Contributory Negligence Defense to Medical Malpractice Actions in North Carolina — McGill v. French," 16 Campbell L. Rev. 103 (1994).

For comment, "North Carolina's Limited Liability Company Act: A Legislative Mandate for Professional Limited Liability," see 29 Wake Forest L. Rev. 857 (1994).

CASE NOTES

Legislative Intent. — The North Carolina legislature: 1) specifically dealt with blood banks with the enactment of G.S. 90-220.13; 2) expressly intended that blood banks be held subject to an ordinary standard of care; and 3) intentionally omitted blood banks from inclusion in this section because it acted with knowledge of G.S. 90-220.13 when it enacted this section in 1975. Doe v. American Nat'l Red Cross, 798 F. Supp. 301 (E.D.N.C. 1992).

Intended purpose of this section was merely to conform the statute more closely to the existing case law applying a "same or similar community" standard of care. Wall v. Stout, 310 N.C. 184, 311 S.E.2d 571 (1984).

This section does not abrogate the common-law standards of care required of a physician. Wall v. Stout, 310 N.C. 184, 311 S.E.2d 571 (1984).

The General Assembly did intend to eliminate the previously existing common-law obligations of a physician to his patient. Wall v. Stout, 310 N.C. 184, 311 S.E.2d 571 (1984).

This section does not abrogate the duty of medical professionals to exercise their best judgment and reasonable care and diligence in the treatment and care of patients. Makas v. Hillhaven, Inc., 589 F. Supp. 736 (M.D.N.C. 1984).

The standard of care adopted in this section reflects the decisional law of the courts. Tice v. Hall, 63 N.C. App. 27, 303 S.E.2d 832 (1983), aff'd, 310 N.C. 589, 313 S.E.2d 565 (1984).

This section does not alter the standard of care developed in case law. Makas v. Hillhaven, Inc., 589 F. Supp. 736 (M.D.N.C. 1984).

This Article controls the standard of care for health care providers, including the practice of nursing. Page v. Wilson Mem. Hosp., 49 N.C. App. 533, 272 S.E.2d 8 (1980).

This section codified the standard of health care necessary for the trier of the facts to establish a defendant's liability. Simons v. Georgiade, 55 N.C. App. 483, 286 S.E.2d 596, cert. denied, 305 N.C. 587, 292 S.E.2d 571 (1982).

In negligence actions against health care providers, this section sets the applicable standard of care. Thus, there is no reason to resort to the negligence per se presumption. To do so would be in conscious disregard of this section. Makas v. Hillhaven, Inc., 589 F. Supp. 736 (M.D.N.C. 1984).

Nursing Home Patients' Bill of Rights Not Substitute for Standard of Care. — The Nursing Home Patients' Bill of Rights, § 131E-115 et seq., is not a substitute, through the doctrine of negligence per se, for the well-established standard of care to be applied in negligence actions for damages against health care providers. Makas v. Hillhaven, Inc., 589 F. Supp. 736 (M.D.N.C. 1984).

Testimony as to National Standard. — Expert witness's testimony that, in his opinion, defendant doctor met the highest standard of care found anywhere in the United States met the requirements of this section, although he did not testify that he was familiar with the local standard. Marley v. Graper, 135 N.C. App. 423, 521 S.E.2d 129 (1999).

The court rejected the defendant pharmacy's argument that this section does not encompass a nationwide standard of care for pharmacists and that the plaintiff's witness's testimony concerning the standard of care applicable to the defendant pharmacist was erroneously based upon a nationwide standard as not properly before it, where the defendant failed to move to strike the standard of care testimony by the witness which it challenged on appeal, while presenting on cross-examination essentially the same testimony to which it had objected, and where it failed to object to the tender of the witness as an expert in pharmacy or to request a voir dire hearing pursuant to G.S. 8C-1, Rule 705 to explore the bases for his opinion. Brooks v. Wal-Mart Stores, Inc., 139 N.C. App. 637, 535 S.E.2d 55 (2000).

Expert testimony as to a national standard of care held inadmissible where defendants' conduct concerned complicated medical procedures, i.e. the prenatal care of a patient with gestational diabetes and the delivery of an infant suffering from shoulder dystocia. Henry v. Southeastern OB-GYN Assocs., P.A., 142 N.C. App. 561, 543 S.E.2d 911 (2001).

Trial court properly excluded expert testimony offered by a patient to support a malpractice claim because the patient's expert practiced orthopedic surgery in Virginia and was not familiar with the standard of care imposed on orthopedists who practiced in North Carolina. Smith v. Whitmer, 159 N.C. App. 192, 582 S.E.2d 669 (2003).

Appellate court has rejected any argument that testimony regarding a nationwide standard of care for healthcare providers is always insufficient under G.S. 90-21.12. Cox v. Steffes, 161 N.C. App. 237, 587 S.E.2d 908 (2003).

By adopting the similar community rule in this section, it was the intent of the General Assembly to avoid the adoption of a national or regional standard of care for health care providers and not to exclude testimony where it was shown that the witness was familiar with the standards of hospitals in adjoining and nearby communities. Page v. Wilson Mem. Hosp., 49 N.C. App. 533, 272 S.E.2d 8 (1980).

It is clear from the wording of this statute that the test is not that of a statewide standard of health care, but rather a standard of practice among members of the same health care profession situated in the same or similar communities. Dailey v. North Carolina State Bd. of Dental Exmrs., 60 N.C. App. 441, 299 S.E.2d 473, rev'd on other grounds, 309 N.C. 710, 309 S.E.2d 219 (1983).

Because this section was designed to overcome the strict "locality" rule that had previously existed in North Carolina, the "similar community" requirement in this section is not confined to North Carolina but would apply to communities within or without the State. Baynor v. Cook, 125 N.C. App. 274, 480 S.E.2d 419 (1997), cert. denied, 346 N.C. 275, 487 S.E.2d 537 (1997).

In enacting this section the legislature did not depart from established principles of malpractice law or create a new standard of care by which a defendant's actions are judged. Makas v. Hillhaven, Inc., 589 F. Supp. 736 (M.D.N.C. 1984).

The statute refines the definition of same or similar communities and specifically identifies health care providers whose conduct is to be judged by the applicable standard of care. That standard requires health care providers who render services to patients to exercise their best judgment and reasonable care and diligence, and to comply with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities. Makas v. Hillhaven, Inc., 589 F. Supp. 736 (M.D.N.C. 1984).

Duty to Meet Statutory Standard of Care Applies to Consensual Physician-Patient Relationship. — When a physician and a patient enter into a consensual physician-patient relationship for the provision of medical services, a duty arises requiring the physician to conform to the statutory standard of care. Mozingo ex rel. Thomas v. Pitt County Mem. Hosp., 101 N.C. App. 578, 400 S.E.2d 747 (1991), aff'd, 331 N.C. 182, 415 S.E.2d 341 (1992).

A duty to meet the statutory standard of care may arise absent a consensual physician-patient relationship. Mozingo ex rel. Thomas v. Pitt County Mem. Hosp., 101 N.C. App. 578, 400 S.E.2d 747 (1991), aff'd, 331 N.C. 182, 415 S.E.2d 341 (1992).

Where defendant physician was responsible for supervision of residents at the hospital pursuant to contract between physicians' association and hospital, physician owed statutory duty of care to obstetrics patient even though he did not have direct consensual physician-patient relationship with patient. Mozingo ex rel. Thomas v. Pitt County Mem. Hosp., 101 N.C. App. 578, 400 S.E.2d 747 (1991), aff'd, 331 N.C. 182, 415 S.E.2d 341 (1992).

This section does not displace res ipsa loquitur in medical malpractice cases. Res ipsa loquitur allows an issue of whether a particular health care provider complied with the statutory standard under certain circumstances, usually when foreign bodies such as sponges, instruments, etc., are left in a patient's body during surgery, to be submitted to the jury, even in the absence of direct proof of negligence. Makas v. Hillhaven, Inc., 589 F. Supp. 736 (M.D.N.C. 1984).

As to application of res ipsa loquitur in medical malpractice actions, see Schaffner v. Cumberland County Hosp. Sys., 77 N.C. App. 689, 336 S.E.2d 116 (1985), cert. denied, 316 N.C. 195, 341 S.E.2d 578, 341 S.E.2d 579 (1986).

Medical Malpractice Not Within Professional Services Exclusion in Insurance Policy. — Negligence actions against health care providers may be based upon breaches of the ordinary duty of reasonable care where the alleged breach does not involve rendering or failing to render professional services requiring special skills. Therefore, a claim for medical malpractice as defined by statute does not as a matter of law fall within a professional services exclusion in an insurance policy which is strictly construed in favor of coverage. Duke Univ. v. St. Paul Fire & Marine Ins. Co., 96 N.C. App. 635, 386 S.E.2d 762, cert. denied, 326 N.C. 595, 393 S.E.2d 876 (1990).

Health Clinic as Health Care Provider. — Where action arose from alleged malpractice of doctor who practiced in a small, rural health clinic, if health clinic were ultimately determined to be responsible for any negligence by doctor, health clinic would be a "health care provider" under the statutory definition. Shumaker v. United States, 714 F. Supp. 154 (M.D.N.C. 1988).

Violation of Health Care Regulation. — Although this section codifies the common-law obligation of the health care provider to the patient and establishes the standard of care, violation of a health care regulation may be proof of a negligent deviation from that standard of care. Griggs v. Morehead Mem. Hosp., 82 N.C. App. 131, 345 S.E.2d 430 (1986).

A hospital has a duty to exercise ordinary care to keep its premises in a reasonably safe condition so as not to expose the patient unnecessarily to danger. Burns v. Forsyth County Hosp. Auth., 81 N.C. App. 556, 344 S.E.2d 839 (1986).

The duty a hospital owes its patients is to exercise reasonable or ordinary care to maintain in a reasonably safe condition that part of the hospital designed for the patients' use. This duty imparts the additional duties owed to an invitee, that is, the duty to warn the patient of hidden unsafe conditions and the duty to discover hidden unsafe conditions by reasonable inspection and supervision. However, these duties are limited to unsafe conditions of which the hospital has notice. Burns v. Forsyth County Hosp. Auth., 81 N.C. App. 556, 344 S.E.2d 839 (1986).

Showing Required in Malpractice Cases. — In malpractice cases, plaintiff must demonstrate by the testimony of a qualified expert that the treatment administered by defendant was in negligent violation of the accepted standard of medical care in the same or similar communities and that defendant's treatment proximately caused plaintiff's injury. Tripp v. Pate, 49 N.C. App. 329, 271 S.E.2d 407 (1980); Moore v. Reynolds, 63 N.C. App. 160, 303 S.E.2d 839 (1983).

In actions for damages for personal injury arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care, the health care provider's liability is conditioned on proof by the plaintiff that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action. A showing that the health care provider violated such standards of practice satisfies a plaintiff's burden of proof as to professional malpractice. Mazza v. Huffaker, 61 N.C. App. 170, 300 S.E.2d 833, cert. denied, 309 N.C. 132, 305 S.E.2d 734 (1983).

In medical malpractice cases, this section requires that, in order to be entitled to recover, the plaintiff must show that the defendant physician provided the plaintiff with a level of care not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action. Generally, expert testimony is necessary to establish this standard of care. Warren v. Canal Indus., Inc., 61 N.C. App. 211, 300 S.E.2d 557 (1983).

The defendant physician's negligence must be established by showing the standard of care owed to plaintiff and that defendant violated that standard of care. Beaver v. Hancock, 72 N.C. App. 306, 324 S.E.2d 294 (1985).

In a medical malpractice case, the plaintiff must prove that defendant was negligent in his care of plaintiff and that such negligence was the proximate cause of plaintiff's injuries and damage. The defendant physician's negligence must be established by showing the standard of care owed to plaintiff and that defendant violated that standard of care. Mozingo ex rel. Thomas v. Pitt County Mem. Hosp., 101 N.C. App. 578, 400 S.E.2d 747 (1991), aff'd, 331 N.C. 182, 415 S.E.2d 341 (1992).

The court did not err in excluding plaintiff's medical testimony regarding the standard of care applicable to the defendant physician, where the form of the plaintiff's question to the expert was directed at the expert's familiarity with the standard of care applicable to him, not to the defendant physician. Heatherly v. Industrial Health Council, 130 N.C. App. 616, 504 S.E.2d 102 (1998).

Parents of baby who suffered an injury during delivery established the applicable standard of care through the expert testimony of an obstetrician gynecologist with a subspecialty in perinatology who was licensed to practice in South Carolina and Alabama; the expert testified as to the proper procedures the doctor should have utilized in delivering the baby, the proper local standard of care, and the failure of the doctor to correctly perform the procedures. Leatherwood v. Ehlinger, 151 N.C. App. 15, 564 S.E.2d 883 (2002), cert. denied, 357 N.C. 164, 580 S.E.2d 368 (2003).

Showing When Breach Does Not Involve Special Skills. — When the alleged breach does not involve the rendering of or failure to render professional nursing or medical services requiring special skills, it is not necessary to establish the standard of due care prevailing among hospitals in like situations in order to develop a case of negligence. In such cases Wall v. Stout, 310 N.C. 184, 311 S.E.2d 571 (1984) is not appropriate. Burns v. Forsyth County Hosp. Auth., 81 N.C. App. 556, 344 S.E.2d 839 (1986).

When a physician holds himself out as a specialist, he is required to bring to the care of his patients more than the average degree of skill possessed by general practitioners. Wall v. Stout, 310 N.C. 184, 311 S.E.2d 571 (1984).

An instruction using the term "honest error" could easily be interpreted by the jury to mean that a physician could not be liable for negligence unless he was somehow dishonest, particularly when the term is not defined with reference to the physician's other obligations to the patient. Wall v. Stout, 310 N.C. 184, 311 S.E.2d 571 (1984).

Because of the potentially misleading and exculpatory import of the term, the phrase "honest error" is inappropriate in an instruction on the liability of a doctor for medical malpractice and should not hereafter be given. Language in prior cases which may have sanctioned the use of this term in defining a physician's liability for medical negligence is expressly disapproved. Wall v. Stout, 310 N.C. 184, 311 S.E.2d 571 (1984).

Instruction fully explaining doctor's duty to his patient must combine elements of both this section and phraseology from earlier cases. Wall v. Stout, 310 N.C. 184, 311 S.E.2d 571 (1984).

An instruction stating that a physician is not an insurer of results should not be given when no issue concerning a guarantee has been raised. Wall v. Stout, 310 N.C. 184, 311 S.E.2d 571 (1984).

Trial Court Erred When Reciting Section Verbatim to Jury. — In a malpractice action, the trial court committed reversible error in reciting this section verbatim when instructing the jury on the health care provider's duties of care, as the jury was thereby in effect told that defendants could be liable only for a breach of the duty to provide care in accordance with the standard of health care required by law. Donaldson v. Charlotte Mem. Hosp. & Medical Center, 96 N.C. App. 663, 387 S.E.2d 60, cert. denied, 327 N.C. 137, 394 S.E.2d 171 (1990).

Instruction Held Proper. — Portion of jury instruction in medical malpractice case charging jury that "if you are unable to determine where the truth lies" they should render a verdict in favor of defendant did not contain the potential defects which the conference of judges sought to cure by revising North Carolina Pattern Jury Instructions Civil 809.00, 809.03 (1987); therefore, it was properly given. Clark v. Dickstein, 92 N.C. App. 207, 374 S.E.2d 142 (1988), cert. denied, 324 N.C. 246, 377 S.E.2d 753 (1989).

Inapplicable to Dental Licensing Board Disciplinary Hearing. — While this section establishes a standard of care below which a health care provider may be held civilly liable in damages, G.S. 90-41 and this section serve different purposes. Admittedly the violations for which a dentist may be subject to discipline include acts of "malpractice," pursuant to G.S. 90-41(a)(19). However, this language was not intended to incorporate a standard applicable in actions for damages "for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of . . . dental . . . care." In fact, G.S. 90-41 was first enacted in 1935, long before the 1975 enactment of this section. Therefore, the standard of health care enunciated under this section is inapplicable to a professional licensing board disciplinary hearing. Dailey v. North Carolina State Bd. of Dental Exmrs., 309 N.C. 710, 309 S.E.2d 219 (1983).

In order to withstand a motion for a directed verdict under this section, plaintiff must offer evidence which establishes the following elements: (1) the standard of care; (2) breach of the standard of care; (3) proximate causation; and (4) damages. Failure to establish sufficient evidence on any one element entitles the defendant to a directed verdict. Lowery v. Newton, 52 N.C. App. 234, 278 S.E.2d 566.

When a defendant moves for a directed verdict in a medical malpractice case, the question raised is whether plaintiff has offered evidence of each of the following elements of his claim for relief: (1) the standard of care; (2) breach of the standard of care; (3) proximate causation; and (4) damages. Mitchell v. Parker, 68 N.C. App. 458, 315 S.E.2d 76, cert. denied, 311 N.C. 760, 321 S.E.2d 140, 321 S.E.2d 141 (1984); Makas v. Hillhaven, Inc., 589 F. Supp. 736 (M.D.N.C. 1984).

Standard of Care Must Be Established by Other Practitioners or Experts. — In malpractice cases the applicable standard of care must be established by other practitioners in the particular field of practice or by other expert witnesses equally familiar and competent to testify to that limited field of practice. Lowery v. Newton, 52 N.C. App. 234, 278 S.E.2d 566; White v. Hunsinger, 88 N.C. App. 382, 363 S.E.2d 203 (1988).

Usually the question of what is the standard of care required of a physician or surgeon is one concerning highly specialized knowledge with respect to which a layman can have no reliable information. As to this, both the court and jury must be dependent on expert testimony. Ordinarily there can be no other guide. Mazza v. Huffaker, 61 N.C. App. 170, 300 S.E.2d 833, cert. denied, 309 N.C. 132, 305 S.E.2d 734 (1983).

Usually, expert testimony is required to establish the standard, to show its negligent violation, and to show that such negligent violation was the proximate cause of the injury complained of. Tice v. Hall, 63 N.C. App. 27, 303 S.E.2d 832 (1983), aff'd, 310 N.C. 589, 313 S.E.2d 565 (1984).

Usually, but not in all cases, the accepted standard of care and its violation must be established by expert testimony. Beaver v. Hancock, 72 N.C. App. 306, 324 S.E.2d 294 (1985).

Trial court's grant of a directed verdict in favor of the medical care providers and against the family was proper as their medical malpractice action was inadequately supported by expert testimony, since the family medical expert was only familiar with the national standard of care and N.C. Gen. Stat. G.S. 90-21.12 specifically required that a medical expert had to be familiar with the medical care provided in the same or similar community in which the malpractice allegedly occurred in order for the expert's testimony to be relevant. Henry v. Southeastern OB-GYN Assocs., P.A., 145 N.C. App. 208, 550 S.E.2d 245, aff'd, 354 N.C. 570, 557 S.E.2d 530 (2001).

Nurse's testimony that in certain situations the failure to discontinue the use of pitocin could constitute a violation of the standard of care required of nurses was properly excluded where the plaintiffs failed to present any expert testimony as to the standard of care, her testimony shed no light on whether the direction in a hospital's policy manual that pitocin be turned off under the conditions present at the time of a child's birth was in accordance with the standard of care, and the plaintiffs did not voir dire the nurse or tender her as an expert witness outside the jury's presence. O'Mara v. Wake Forest Univ. Health Scis., — N.C. App. —, 646 S.E.2d 400, 2007 N.C. App. LEXIS 1478 (2007).

Standard Must Be Established by Other Practitioners or Experts. — In a medical malpractice case, generally there must be expert testimony that tends to show a deviation from the normal standard of care. Assaad v. Thomas, 87 N.C. App. 276, 360 S.E.2d 503 (1987), appeal dismissed and cert. denied, 321 N.C. 471, 364 S.E.2d 917 (1988).

Where neither the defendant nor the doctors averred that they were familiar with the standards of practice among members of the same health care profession with similar training and experience to that of the defendant situated in that particular county or a similar community at the time of the alleged negligence giving rise to the suit, defendant failed to meet his burden with regard to his motion for summary judgment and genuine issues of material fact exist as to the appropriate standard of care and as to whether defendant acted in accordance with that standard. Mozingo ex rel. Thomas v. Pitt County Mem. Hosp., 101 N.C. App. 578, 400 S.E.2d 747 (1991), aff'd, 331 N.C. 182, 415 S.E.2d 341 (1992).

Qualification of Expert Witness as to Standard of Care. — Trial court erred in excluding a doctor from testifying for the estate administratrix as to the standard of care in a wrongful death medical malpractice case because the doctor established his (1) knowledge of the standard of care in a similar community in light of his equivalent skill and training, (2) familiarity with the equipment and techniques used by the physician who performed the surgery, (3) first-hand investigation of the community and its hospital, and (4) knowledge as to the similarity in the communities where he had practiced and the community at issue. Pitts v. Nash Day Hosp., Inc., 167 N.C. App. 194, 605 S.E.2d 154 (2004), aff'd, 359 N.C. 626, 614 S.E.2d 267 (2005).

Because plaintiffs' sole standard of care expert was not competent to testify regarding the standard of care under G.S. 90-20.12 as it existed in 1998, the trial court correctly concluded that plaintiffs had failed to forecast sufficient evidence to meet one of the essential elements of their medical malpractice claim and that summary judgment should be granted. Purvis v. Moses H. Cone Mem'l Hosp. Serv. Corp., 175 N.C. App. 474, 624 S.E.2d 380, 2006 N.C. App. LEXIS 128 (2006).

Neurologist, who practiced in Baltimore, Maryland and was a professor at John Hopkins University School of Medicine, could testify, as an expert witness, about the relevant standard of care at a county regional medical center in North Carolina, as he established that he was familiar with the community or a similar community by his previous work at Duke University Medical Center for three years, where he completed his residency and fellowship; additionally, he testified that he was familiar with the standard of care for neurologists practicing in the relevant area from his previous personal experience working in North Carolina, his experience with patients that were sent from outlying areas, as well as his studying the demographic data of the county where the regional medical center was located. Billings v. Rosenstein, 174 N.C. App. 191, 619 S.E.2d 922, 2005 N.C. App. LEXIS 2293 (2005), cert. denied, — N.C. —, 630 S.E.2d 664 (2006).

In a wrongful death action based on a medical specialist's medical malpractice, the trial court erred in failing to allow the specialist to cross-examine the medical expert for the decedent's estate as to whether the other treating doctor, a former codefendant, acted in accordance with the standard of care, because evidence of the former co-defendant's standard of care was relevant to show whether the specialist's conduct was the proximate cause of the injury, as G.S. 90-21.12 permits a physician, otherwise qualified under G.S. 8C-1, Rule 702, to testify regarding the applicable standard of care in a medical malpractice case. However, any error was harmless because there was other expert testimony admitted for both parties that contained the same substance, and it could not be said that a different outcome would have resulted. Boykin v. Kim, 174 N.C. App. 278, 620 S.E.2d 707, 2005 N.C. App. LEXIS 2396 (2005).

Testimony of the plaintiffs' expert witness was properly excluded where it was impossible to assess whether the expert met the standard of G.S. 90-21.12 because his deposition was not included in the appellate record. O'Mara v. Wake Forest Univ. Health Scis., — N.C. App. —, 646 S.E.2d 400, 2007 N.C. App. LEXIS 1478 (2007).

Specialists May Be Disqualified from Testifying Against General Practitioner by G.S. 8C-1, Rule 702. — All three of the plaintiff's witnesses were disqualified from testifying against the defendant, a general practitioner, regardless of whether they were more highly qualified, because they were specialists as that term is used in the statute. One was board certified in oncology; another, in emergency medicine and family practice; and the third held himself out as a specialist in emergency medicine. Consequently, the defendant's motion for a directed verdict was properly granted. Formyduval v. Bunn, 138 N.C. App. 381, 530 S.E.2d 96 (2000).

Testimony as to Standard in Similar Communities. — An expert witness, otherwise qualified, may state his opinion as to whether the treatment and care given by the defendant to the particular patient came up to the standard prevailing in similar communities, with which the witness is familiar, even though the witness is not actually acquainted with actual medical practices in the particular community in which the service was rendered at the time it was performed. Howard v. Piver, 53 N.C. App. 46, 279 S.E.2d 876 (1981).

It is not necessary for the witness testifying as to the standard of care to have actually practiced in the same community as the defendant as long as the witness is familiar with the standard. Moreover, as long as the witness is shown to be familiar with the applicable standard of care, the fact that the question asked of the witness does not track the language of this section does not necessarily render the answer inadmissible. Warren v. Canal Indus., Inc., 61 N.C. App. 211, 300 S.E.2d 557 (1983).

Trial court properly admitted the expert testimony of two doctors pursuant to G.S. 90-21.12, because the doctors testified to familiarity with the standard of care in communities similar to the community in question. Coffman v. Roberson, 153 N.C. App. 618, 571 S.E.2d 255 (2002), cert. denied, 356 N.C. 668, 577 S.E.2d 111 (2003).

Trial court erred in granting the healthcare providers' motion for a judgment notwithstanding the verdict pursuant to G.S. 1A-1, N.C. R. Civ. P. 50, as the trial court improperly refused to consider the testimony of a patient's expert where: (1) the patient's expert testified that the healthcare providers had failed to meet the standard of care in Level 2 hospitals, (2) the healthcare providers' expert testified that the standard of care was the same across the nation, (3) both experts' testimony regarding Level 2 hospitals was sufficient to establish that the patient's expert's knowledge of practices in Reading, Pennsylvania qualified him to testify as to the standard in communities similar to Fayetteville, (4) given the healthcare providers' expert's testimony, the patient's expert's testimony, which defense counsel characterized on cross-examination as testimony regarding the national standard, was sufficient to support the jury's verdict under G.S. 90-21.12. Cox v. Steffes, 161 N.C. App. 237, 587 S.E.2d 908 (2003).

Trial court erred admitting standard of care testimony of a doctor amounting to an opinion of another doctor's compliance with the relevant standard of care when defendants failed to establish that the testifying doctor was familiar with the standard of care in a particular city, or similar communities. Barham v. Hawk, 165 N.C. App. 708, 600 S.E.2d 1 (2004), aff'd, 360 N.C. 358, 625 S.E.2d 778 (2006).

Expert Need Not Be Familiar with Local Standard Where Same Across Country. — Where the standard of care is the same across the country, an expert witness familiar with that standard may testify despite his lack of familiarity with the defendant's community. Haney v. Alexander, 71 N.C. App. 731, 323 S.E.2d 430 (1984), cert. denied, 313 N.C. 329, 327 S.E.2d 889 (1985).

This section does not require expert witnesses to have actually practiced in a similar community at the exact time of the alleged act. White v. Hunsinger, 88 N.C. App. 382, 363 S.E.2d 203 (1988).

Expert Must Be Familiar with Standard of Care in Community. — Trial court did not err in medical malpractice case by excluding the testimony of plaintiff's medical expert as to the standard of care where the expert failed to testify that he was familiar with the standard of care in the community in which the alleged malpractice took place, or to a similarly situated community. Tucker v. Meis, 127 N.C. App. 197, 487 S.E.2d 827 (1997).

Expert Need Not Have Practiced at Time of Alleged Act. — It would be unduly restrictive under this section to require an expert to have knowledge of the standard of care in a similar community at the time of the alleged act only by having practiced in the particular field at that time. Simons v. Georgiade, 55 N.C. App. 483, 286 S.E.2d 596, cert. denied, 305 N.C. 587, 292 S.E.2d 571 (1982).

Expert Testimony Not Always Required. — It has never been the rule in this State that expert testimony is needed in all medical malpractice cases to establish either the standard of care or proximate cause. Indeed, when the jury, based on its common knowledge and experience, is able to understand and judge the action of a physician or surgeon, expert testimony is not needed. Powell v. Shull, 58 N.C. App. 68, 293 S.E.2d 259, cert. denied, 306 N.C. 743, 295 S.E.2d 479 (1982).

Expert Testimony Not Required to Show Contributory Negligence. — In a medical malpractice case, medical expert testimony, although useful, is not required to show the causal connection between plaintiff's alleged contributory negligence and his injuries.

McGill v. French, 333 N.C. 209, 424 S.E.2d 108 (1993).

Use of Nonexpert Testimony to Show Departure from Standard of Care. — Once the standard of care is established, whether by expert or nonexpert testimony, a doctor's departure from that standard of care may be shown by nonexpert witnesses. Powell v. Shull, 58 N.C. App. 68, 293 S.E.2d 259, cert. denied, 306 N.C. 743, 295 S.E.2d 479 (1982).

Sexual Assault. — When a plaintiff alleges to have been sexually assaulted by a health care professional, a cause of action may arise from the failure of a health care provider to meet the relevant standard of care. Johnson v. Amethyst Corp., 120 N.C. App. 529, 463 S.E.2d 397 (1995), cert. granted, 467 S.E.2d 713 (1996).

Therapist's Sexual Involvement with Patient. — Evidence showing that defendant therapist engaged in a sexual relationship with plaintiff client constituted evidence of professional malpractice sufficient to withstand defendant's motion for a directed verdict. MacClements v. LaFone, 104 N.C. App. 179, 408 S.E.2d 878 (1991), cert. denied, 330 N.C. 613, 412 S.E.2d 87 (1992).

Duty of Physician in Rendering Family Planning Services. — Whatever a woman's reason for desiring to avoid pregnancy, when a physician undertakes to provide medical care or advice to her for that purpose, he must provide professional services in that case, just as in the rendering of professional services in any instance, according to the established professional standards. Jackson v. Bumgardner, 318 N.C. 172, 347 S.E.2d 743 (1986).

A claim for "wrongful conception" or "wrongful pregnancy" is recognizable in this State. Jackson v. Bumgardner, 318 N.C. 172, 347 S.E.2d 743 (1986).

A cause of action exists in North Carolina when a health care provider negligently provides counseling and information which induces a couple to conceive a defective child. Gallagher v. Duke Univ., 638 F. Supp. 979 (M.D.N.C. 1986), aff'd in part and vacated in part on other grounds, 852 F.2d 773 (4th Cir. 1988).

Negligence for Failing to Report Test Results Resulting in Ill Child. — Plaintiffs stated a claim for medical malpractice where their complaint alleged that defendant was negligent in his failure to report results of blood tests he performed, so that plaintiffs were unable to make an informed choice and that plaintiff/wife became pregnant with a child with sickle cell anemia. McAllister v. Ha, 347 N.C. 638, 496 S.E.2d 577 (1998).

Damages for "Wrongful Conception". — In an action for "wrongful conception," plaintiff wife may recover damages for the expenses associated with her pregnancy, but plaintiffs may not recover for the costs of rearing their child. Jackson v. Bumgardner, 318 N.C. 172, 347 S.E.2d 743 (1986).

For case involving the birth of an unplanned child due to physician's negligent failure to maintain in place or reinsert an intrauterine device, see Jackson v. Bumgardner, 71 N.C. App. 107, 321 S.E.2d 541 (1984), aff'd in part and rev'd in part, 318 N.C. 172, 347 S.E.2d 743 (1986).

For case involving the birth of a child with Down's Syndrome due to physician's alleged failure to inform parents of the risks of genetic defects, see Azzolino v. Dingfelder, 71 N.C. App. 289, 322 S.E.2d 567 (1984), aff'd in part and rev'd in part, 315 N.C. 103, 337 S.E.2d 528 (1985), cert. denied, 479 U.S. 835, 107 S. Ct. 131, 93 L. Ed. 2d 75 (1986).

A physician's assistant is not subject to the same standard of practice as a medical doctor. Paris v. Kreitz, 75 N.C. App. 265, 331 S.E.2d 234, cert. denied, 315 N.C. 185, 337 S.E.2d 858 (1985).

Action Against Pharmacist for Wrongful Death. — While a pharmacist has no duty to advise absent knowledge of the circumstances, once a pharmacist is alerted to specific facts and he or she undertakes to advise a customer, the pharmacist then has a duty to advise correctly; therefore, where plaintiff alleged, among other things, that her decedent "sought out and was relying upon the skill, judgment and expertise of defendant with respect to the safety of taking the drug Indocin given the fact that plaintiff's intestate suffered the aforementioned medical condition," she stated a claim upon which relief could be granted. Ferguson v. Williams, 92 N.C. App. 336, 374 S.E.2d 438 (1988).

Absent evidence in the record as to what defendant did or failed to do in performance of duties to plaintiff, the court was obligated to direct a verdict for defendant. Assaad v. Thomas, 87 N.C. App. 276, 360 S.E.2d 503 (1987).

Testimony of Obstetrician as to Actions of Pediatrician. — Physician specializing in obstetrics and gynecology was not rendered incompetent as a matter of law to testify as to when defendant pediatrician should have referred patient to a neurosurgeon solely because he was not a pediatrician. White v. Hunsinger, 88 N.C. App. 382, 363 S.E.2d 203 (1988).

As To Application of Res Ipsa Loquitur in Medical Malpractice Actions. — Patient who claimed he was injured by negligent failure to provide sufficient padding during his four hours of surgery failed to produce relevant expert testimony as to causation and res ipsa loquitur did not apply, so adverse judgment was entered. Wright v. United States, 280 F. Supp. 2d 472 (M.D.N.C. 2003).

Instructions as to Standard of Care. — Jury was properly instructed as to the law where neither case law nor G.S. 90-21.12 supported the notion that the jury's own views could establish a standard of care. O'Mara v. Wake Forest Univ. Health Scis., — N.C. App. —, 646 S.E.2d 400, 2007 N.C. App. LEXIS 1478 (2007).

Applied in Vassey v. Burch, 45 N.C. App. 222, 262 S.E.2d 865 (1980); Shuffler v. Blue Ridge Radiology Assocs., 73 N.C. App. 232, 326 S.E.2d 96 (1985); Bailey v. Jones, 112 N.C. App. 380, 435 S.E.2d 787 (1993); Brisson v. Kathy A. Santoriello, M.D., P.A., 351 N.C. 589, 528 S.E.2d 568 (2000).

Cited in Thompson v. Lockert, 34 N.C. App. 1, 237 S.E.2d 259 (1977); Tatham v. Hoke, 469 F. Supp. 914 (W.D.N.C. 1979); Hart v. Warren, 46 N.C. App. 672, 266 S.E.2d 53 (1980); Preston v. Thompson, 53 N.C. App. 290, 280 S.E.2d 780 (1981); Roberts v. Durham County Hosp. Corp., 56 N.C. App. 533, 289 S.E.2d 875 (1982); Wall v. Stout, 61 N.C. App. 576, 301 S.E.2d 467 (1983); Willoughby v. Wilkins, 65 N.C. App. 626, 310 S.E.2d 90 (1983); Tice v. Hall, 310 N.C. 589, 313 S.E.2d 565 (1984); Grad v. Kaasa, 68 N.C. App. 128, 314 S.E.2d 755 (1984); Elliott v. Owen, 99 N.C. App. 465, 393 S.E.2d 347 (1990); Reich v. Price, 110 N.C. App. 255, 429 S.E.2d 372 (1993); Davis v. North Carolina Dep't of Human Resources, 121 N.C. App. 105, 465 S.E.2d 2 (1995); Weatherford v. Glassman, 129 N.C. App. 618, 500 S.E.2d 466 (1998); Thigpen v. Ngo, 143 N.C. App. 209, 545 S.E.2d 477, cert. granted, 353 N.C. 734, 552 S.E.2d 634, cert. granted, 353 N.C. 734, 552 S.E.2d 635 (2001); Edwards v. Wall, 142 N.C. App. 111, 542 S.E.2d 258 (2001); Estate of Waters v. Jarman, 144 N.C. App. 98, 547 S.E.2d 142, cert. denied, 354 N.C. 68, 553 S.E.2d 213 (2001); Iodice v. United States, 289 F.3d 270 (4th Cir. 2002); Suarez v. Wotring, 155 N.C. App. 20, 573 S.E.2d 746, 2002 N.C. App. LEXIS 1594 (2002), cert. denied, 357 N.C. 66, 579 S.E.2d 107, cert. dismissed, 357 N.C. 66, 579 S.E.2d 107 (2003); Frazier v. Angel Med. Ctr., 308 F. Supp. 2d 671 (W.D.N.C. 2004); Smith v. Serro, — N.C. App. —, 648 S.E.2d 566, 2007 N.C. App. LEXIS 1801 (2007).

OPINIONS OF ATTORNEY GENERAL

It is not unlawful for a physician to deviate from the procedures set out in the Right to Natural Death Act, but the physician who does so will lose the benefit of the absolute defense provided in the Act. As a result, the standard of care by which the physician's acts or omissions will be judged will be the general standard of care for physicians which is set out in statutory and common law. See Opinion of Attorney General to C. Robin Britt, Sr., Secretary, Department, of Human Resources, — N.C.A.G. — (January 5, 1995).

§ 90-21.12A. Nonresident physicians.

A patient may bring a medical malpractice claim in the courts of this State against a nonresident physician who practices medicine or surgery by use of any electronic or other media in this State. (1997-514, s. 2.)

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 469.

§ 90-21.13. Informed consent to health care treatment or procedure.

(a) No recovery shall be allowed against any health care provider upon the grounds that the health care treatment was rendered without the informed consent of the patient or other person authorized to give consent for the patient where:

(1) The action of the health care provider in obtaining the consent of the patient or other person authorized to give consent for the patient was in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities; and

(2) A reasonable person, from the information provided by the health care provider under the circumstances, would have a general understanding of the procedures or treatments and of the usual and most frequent risks and hazards inherent in the proposed procedures or treatments which are recognized and followed by other health care

providers engaged in the same field of practice in the same or similar communities; or

(3) A reasonable person, under all the surrounding circumstances, would have undergone such treatment or procedure had he been advised by the health care provider in accordance with the provisions of subdivisions (1) and (2) of this subsection.

(b) A consent which is evidenced in writing and which meets the foregoing standards, and which is signed by the patient or other authorized person, shall be presumed to be a valid consent. This presumption, however, may be subject to rebuttal only upon proof that such consent was obtained by fraud, deception or misrepresentation of a material fact. A consent that meets the foregoing standards, that is given by a patient, or other authorized person, who under all the surrounding circumstances has capacity to make and communicate health care decisions, is a valid consent.

(c) The following persons, in the order indicated, are authorized to consent to medical treatment on behalf of a patient who is comatose or otherwise lacks capacity to make or communicate health care decisions:

(1) A guardian of the patient's person, or a general guardian with powers over the patient's person, appointed by a court of competent jurisdiction pursuant to Article 5 of Chapter 35A of the General Statutes; provided that, if the patient has a health care agent appointed pursuant to a valid health care power of attorney, the health care agent shall have the right to exercise the authority to the extent granted in the health care power of attorney and to the extent provided in G.S. 32A-19(b) unless the Clerk has suspended the authority of that health care agent in accordance with G.S. 35A-1208(a);

(2) A health care agent appointed pursuant to a valid health care power of attorney, to the extent of the authority granted;

(3) An attorney-in-fact, with powers to make health care decisions for the patient, appointed by the patient pursuant to Article 1 or Article 2 of Chapter 32A of the General Statutes, to the extent of the authority granted;

(4) The patient's spouse;

(5) A majority of the patient's reasonably available parents and children who are at least 18 years of age;

(6) A majority of the patient's reasonably available siblings who are at least 18 years of age; or

(7) An individual who has an established relationship with the patient, who is acting in good faith on behalf of the patient, and who can reliably convey the patient's wishes.

(c1) If none of the persons listed under subsection (c) of this section is reasonably available, then the patient's attending physician, in the attending physician's discretion, may provide health care treatment without the consent of the patient or other person authorized to consent for the patient if there is confirmation by a physician other than the patient's attending physician of the patient's condition and the necessity for treatment; provided, however, that confirmation of the patient's condition and the necessity for treatment are not required if the delay in obtaining the confirmation would endanger the life or seriously worsen the condition of the patient.

(d) No action may be maintained against any health care provider upon any guarantee, warranty or assurance as to the result of any medical, surgical or diagnostic procedure or treatment unless the guarantee, warranty or assurance, or some note or memorandum thereof, shall be in writing and signed by the provider or by some other person authorized to act for or on behalf of such provider.

(e) In the event of any conflict between the provisions of this section and those of G.S. 35A-1245, 90-21.17, and 90-322, Articles 1A and 19 of Chapter 90, and Article 3 of Chapter 122C of the General Statutes, the provisions of those sections and Articles shall control and continue in full force and effect. (1975, 2nd Sess., c. 977, s. 4; 2003-13, s. 5; 2007-502, s. 13.)

Cross References. — As to application of this section to surgical operations on inmates of State penal institutions, see G.S. 148-22.2. As to application of this section to treatment of prisoners' self-inflicted injuries, see G.S. 148-46.2.

Editor's Note. — Session Laws 2007-502, s. 18, provides: "The Legislative Research Commission shall study the issue of whether North Carolina law should be amended to allow a person to require life-prolonging measures. The LRC shall involve all stakeholders in the study. The LRC shall report its recommendations to the 2008 Session of the 2007 General Assembly."

Session Laws 2007-502, s. 18, provides: "The North Carolina Institute of Medicine (Institute) shall study issues related to the provision of end-of-life medical care in North Carolina. As part of the study, the Division of Health Service Regulation, Department of Health and Human Services, and the North Carolina Board of Medicine shall provide to the Institute nonidentifying information regarding claims and complaints related to end-of-life medical treatment by health care providers that was contrary to the express wishes of either the patient or a person authorized by law to make treatment decisions on behalf of the patient. The Institute may review any other data related to end-of-life medical care and treatment the Institute determines is relevant.

"The purpose of this study is to determine whether statutory changes related to advance directives and health care powers of attorney impact the type and quantity of end-of-life medical care provided to patients, whether the patient's or patient representative's express wishes regarding the provision of treatment at the end of life are being honored, and whether there is any change in the number of persons who request continued treatment at the end of their lives, but do not receive that treatment.

"The Institute shall report its findings to the following entities no later than January 30, 2013:

"(1) The 2013 General Assembly.

"(2) The North Carolina Bar Association.

"(3) The North Carolina Medical Society."

Effect of Amendments. — Session Laws 2007-502, s. 13, effective October 1, 2007, deleted "the patient's spouse, parent, guardian, nearest relative or" following "consent of the patient or" in the introductory paragraph in subsection (a); added the last sentence in subsection (b); rewrote subsection (c); added subsection (c1); in subsection (e), inserted "90-21.17, and 90-322," inserted "Article 3 of Chapter 122C of the General Statutes," and inserted "sections and."

Legal Periodicals. — For article discussing the North Carolina medical malpractice statute, see 62 N.C.L. Rev. 711 (1984).

For note suggesting the need for a new tort of breach of confidence, see 8 Campbell L. Rev. 145 (1985).

For article, "The American Medical Association vs. The American Tort System," see 8 Campbell L. Rev. 241 (1986).

For comment surveying North Carolina's treatment of the doctrine of informed consent, see 21 Wake Forest L. Rev. 757 (1986).

For note, see "North Carolina's New Aids Discrimination Protection: Who Do They Think They're Fooling?," see 12 Campbell L. Rev. 475 (1990).

CASE NOTES

Constitutionality. — See Dixon v. Peters, 63 N.C. App. 592, 306 S.E.2d 477 (1983).

Applicability to Cases Pending on Effective Date. — This section became effective on July 1, 1976, and expressly did not apply to cases pending on that date. Simons v. Georgiade, 55 N.C. App. 483, 286 S.E.2d 596, cert. denied, 305 N.C. 587, 292 S.E.2d 571 (1982).

Causes Arising But Not Pending Before Effective Date. — There is no provision in this section regarding applicability to causes of action which arose before the effective date but in which no litigation was pending on the effective date, and this section therefore must apply to litigation which commenced after the effective date of July 1, 1976. Simons v. Georgiade, 55 N.C. App. 483, 286 S.E.2d 596, cert. denied, 305 N.C. 587, 292 S.E.2d 571 (1982).

Section Codifies Standard of Health Care. — Subdivision (a)(1) of this section establishes the standard required of health care providers in obtaining the consent of the patient to be "in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities," which was also the standard in this

State prior to the statute. Nelson v. Patrick, 58 N.C. App. 546, 293 S.E.2d 829 (1982).

No Requirement That All Three Subdivisions Be Complied with. — Neither the plain language of subsection (a) of this section nor the legislative purpose in enacting it requires that compliance with all three subdivisions of subsection (a) be shown in every case. Foard v. Jarman, 326 N.C. 24, 387 S.E.2d 162 (1990).

Subsection (a) is in the disjunctive and does not require the health care provider to establish compliance with all three subdivisions; it is sufficient if the provider can demonstrate that no genuine issue of fact exists under subdivisions (a)(1) and (a)(2). Foard v. Jarman, 326 N.C. 24, 387 S.E.2d 162 (1990).

Subdivision (a)(2) establishes an objective standard, etc. to determine whether the patient would have obtained a general understanding of the procedures or treatments contemplated and of the usual and most frequent risks and hazards inherent in them. Nelson v. Patrick, 58 N.C. App. 546, 293 S.E.2d 829 (1982).

Under subdivision (a)(2), physicians must indicate the status and risk of a procedure but need not inform patients in every instance that a procedure is experimental in nature. Osburn v. Danek Medical, Inc., 135 N.C. App. 234, 520 S.E.2d 88 (1999), cert. denied, 351 N.C. 359, 530 S.E.2d 54 (2000).

Subdivision (a)(3) establishes an objective standard to determine whether the patient would have undergone the proposed treatment or procedure had he been advised by the health care provider in accordance with the statute. Nelson v. Patrick, 58 N.C. App. 546, 293 S.E.2d 829 (1982).

Subsection (b) Does Not Encompass Innocent or Negligent Misrepresentation. — The General Assembly, in enacting G.S. 90-21.13(b), intended the word "misrepresentation" to refer only to intentional misrepresentation, and not to encompass innocent or negligent misrepresentation. Liborio v. King, 150 N.C. App. 531, 564 S.E.2d 272, cert. denied, 356 N.C. 304, 570 S.E.2d 726 (2002).

Expert Testimony Required to Establish the Standard of Care. — The standard of care required of a health care provider in a particular case generally concerns specialized knowledge and is thus unfamiliar to most laypersons. Consequently, our courts have consistently held that in the usual medical malpractice or medical negligence case, testimony of a qualified expert is required to establish the standard of care. Clark v. Perry, 114 N.C. App. 297, 442 S.E.2d 57 (1994).

No Affirmative Duty for Health Care Provider to Discuss Experience. — Subsection (a) of this section imposes no affirmative duty on the health care provider to discuss his or her experience, and the court will not impose such a duty in a case where plaintiff's allegations are founded on her speculative and erroneous assumptions about the location of defendant's surgical experience. Foard v. Jarman, 326 N.C. 24, 387 S.E.2d 162 (1990).

No Duty to Discuss Qualifications of Assistants. — There is no statutory or common law duty for an attending surgeon to inform a patient of the particular qualifications of individuals who will be assisting in an operation. Bowlin v. Duke Univ., 108 N.C. App. 145, 423 S.E.2d 320 (1992), cert. denied, 333 N.C. 461, 427 S.E.2d 618 (1993).

In cases of purely elective surgery, including cosmetic or weight reduction surgery, it would be most difficult for a provider to prove that a reasonable person "would have undergone such treatment" upon receipt of proper advice, pursuant to subdivision (a)(3) of this section. The most that can be shown in such cases is that some reasonable persons choose to undergo elective surgical procedures when advised in accordance with the statute. Foard v. Jarman, 326 N.C. 24, 387 S.E.2d 162 (1990).

"Reasonable Person" Test. — This section, governing informed consent to health care treatment or procedure, utilizes a "reasonable person" test to show a valid consent. Simons v. Georgiade, 55 N.C. App. 483, 286 S.E.2d 596, cert. denied, 305 N.C. 587, 292 S.E.2d 571 (1982).

The provider may not be held liable in an informed consent cause if a reasonable person, under the surrounding circumstances, would have undergone the treatment or procedure had he or she been advised in accordance with subdivisions (a)(1) and (a)(2). Foard v. Jarman, 326 N.C. 24, 387 S.E.2d 162 (1990).

Subsection (d) Applicable in Contract Actions. — Subsection (d) clearly and unequivocally relates to an agreement, a contract, between the health care provider and the patient to achieve a definite result, and thus is applicable to actions brought on a theory of contract as well as actions brought on malpractice theories. Preston v. Thompson, 53 N.C. App. 290, 280 S.E.2d 780, appeal dismissed and cert. denied, 304 N.C. 392, 285 S.E.2d 833 (1981).

Subsection (d) held inapplicable to an action for medical malpractice and wrongful pregnancy arising from physician's alleged negligent failure to maintain in place or reinsert an intrauterine device. This was not a suit upon a guaranteed result, since plaintiffs did not allege that defendant physician guaranteed his performance to yield a specific result, but rather, alleged that he totally failed to perform as he had promised. Jackson v. Bumgardner, 71 N.C. App. 107, 321 S.E.2d 541 (1984), aff'd in part and rev'd in part, 318 N.C. 172, 347 S.E.2d 743 (1986).

To meet the statutory standard for informed consent causes, the health care provider must provide the patient with sufficient information about the proposed treatment and its attendant risks to conform to the customary practice of members of the same profession with similar training and experience situated in the same or similar communities. In addition, the health care provider must impart enough information to permit a reasonable person to gain a "general understanding" of both the treatment or procedure and the "usual and most frequent risks and hazards" associated with the treatment. Foard v. Jarman, 326 N.C. 24, 387 S.E.2d 162 (1990).

Informed Consent and Expert Testimony. — Regarding actions based upon a health care provider's failure to obtain informed consent, subsection (a)(1) requires the use of expert medical testimony by the party seeking to establish the standard of care. Clark v. Perry, 114 N.C. App. 297, 442 S.E.2d 57 (1994).

Plaintiffs' expert was qualified to discuss the standard of practice in the city where the surgery was performed, given the testimony of the physician's expert that there was no difference in the standard between that city or any other city in the state and plaintiffs' expert statement that he was familiar with the standard of practice in the state. Handa v. Munn, — N.C. App. —, 642 S.E.2d 540, 2007 N.C. App. LEXIS 658 (2007).

Signed Consent Form Is Not Conclusive. — The General Assembly chose not to give the signed consent form conclusive weight. The form thus constitutes only some evidence of valid consent, and summary judgment may not be granted solely thereon when the adequacy of the underlying representations is disputed. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Although a husband had signed a consent form to elective eye surgery, there were issues of fact requiring a trial where he testified that he could not read the consent form because his vision was blurry due to the procedures that took place in the physician's office and that no one from the physician's office reviewed the consent form with him. Handa v. Munn, — N.C. App. —, 642 S.E.2d 540, 2007 N.C. App. LEXIS 658 (2007).

Consent As to Experimental Devices. — Contrary to appellant's assertions, the trial court's instructions satisfied the requirements of this section and alerted the jury that evidence of the investigational or experimental status of the devices inserted in his back was properly considered in its resolution of the issue of the defendant's negligence. Osburn v. Danek Medical, Inc., 135 N.C. App. 234, 520 S.E.2d 88 (1999), cert. denied, 351 N.C. 359, 530 S.E.2d 54 (2000).

Informed consent by an experimental subject is required in the nontherapeutic context where the researcher does not have as an objective to benefit the subject. Whitlock v. Duke Univ., 637 F. Supp. 1463 (M.D.N.C. 1986), aff'd, 829 F.2d 1340 (4th Cir. 1987).

Disclosure of Risks in Nontherapeutic Context. — While informed consent in the nontherapeutic context would have similarities with informed consent in the nonexperimental therapeutic context controlled by this section, the degree of required disclosure of risks is higher in the nontherapeutic context than is required under this section. Whitlock v. Duke Univ., 637 F. Supp. 1463 (M.D.N.C. 1986), aff'd, 829 F.2d 1340 (4th Cir. 1987).

This section would not be applied per se in the nontherapeutic context to determine the standards for informed consent. Whitlock v. Duke Univ., 637 F. Supp. 1463 (M.D.N.C. 1986), aff'd, 829 F.2d 1340 (4th Cir. 1987).

For discussion of reasonable standards of informed consent to an experimental procedure, see Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Hospital's Standard of Care Required. — Plaintiff's failure to present prima facie evidence of the standard of care applicable to hospital in obtaining plaintiff's informed consent to undergo a blood transfusion was fatal to claim against defendant hospital. Clark v. Perry, 114 N.C. App. 297, 442 S.E.2d 57 (1994).

Consent to Radiation Therapy. — In order to receive the benefits of subdivision (a)(1) of this section, defendant radiologists had a positive duty to obtain the informed consent of plaintiff to the radiation therapy in accordance with the subdivision; they could not shift their duty to the referring physician. Nelson v. Patrick, 58 N.C. App. 546, 293 S.E.2d 829 (1982).

For case comparing standards of care under this section and under the Nuremberg Code and 45 C.F.R. § 46.116(a)(2), see Whitlock v. Duke Univ., 637 F. Supp. 1463 (M.D.N.C. 1986), aff'd, 829 F.2d 1340 (4th Cir. 1987).

Duty of Physician in Rendering Family Planning Services. — Whatever a woman's reason for desiring to avoid pregnancy, when a physician undertakes to provide medical care or advice to her for that purpose, he or she must provide the professional services in that case, just as in the rendering of professional services in any instance, according to the established professional standards. Jackson v. Bumgardner, 318 N.C. 172, 347 S.E.2d 743 (1986).

A claim for "wrongful conception" or "wrongful pregnancy" is recognizable in this State. Jackson v. Bumgardner, 318 N.C. 172, 347 S.E.2d 743 (1986); Gallagher v. Duke Univ., 852 F.2d 773 (4th Cir. 1988).

Damages for "Wrongful Conception". — In an action for "wrongful conception," plaintiff wife may recover damages for the expenses associated with her pregnancy, but plaintiffs may not recover for the costs of rearing their child. Jackson v. Bumgardner, 318 N.C. 172, 347 S.E.2d 743 (1986).

Lack of Informed Consent Not Supported by Evidence. — Where patient had a stomach stapling operation to help him lose weight, patient failed to present any evidence to make a case for lack of informed consent; the record established that a reasonable person would have consented to the procedure where the record showed that patient was morbidly obese, that patient had a history of physical maladies arising from his overweight condition, and that patient's life expectancy without the gastric stapling procedure would have been five to six years. Snipes v. United States, 711 F. Supp. 827 (W.D.N.C. 1989).

Trial Court Properly Entered Summary Judgment. — Where the record established without question or contradiction that defendant physician discussed gastroplasty procedure generally with plaintiff patient and provided her with detailed written information on the surgery and its risks, that plaintiff did in fact read the information provided and accepted the risks described therein, and that defendant's treatment of plaintiff accorded with the standard of care "in every respect," the trial court properly entered summary judgment for defendant on informed consent claim. Foard v. Jarman, 326 N.C. 24, 387 S.E.2d 162 (1990).

Applied in Nelson v. Patrick, 73 N.C. App. 1, 326 S.E.2d 45 (1985); Ipock v. Gilmore, 73 N.C. App. 182, 326 S.E.2d 271 (1985).

Cited in McPherson v. Ellis, 305 N.C. 266, 287 S.E.2d 892 (1982); Crawford v. Fayez, 112 N.C. App. 328, 435 S.E.2d 545 (1993).

§ 90-21.14. First aid or emergency treatment; liability limitation.

(a) Any person, including a volunteer medical or health care provider at a facility of a local health department as defined in G.S. 130A-2 or at a nonprofit community health center or a volunteer member of a rescue squad, who receives no compensation for his services as an emergency medical care provider, who renders first aid or emergency health care treatment to a person who is unconscious, ill or injured,

(1) When the reasonably apparent circumstances require prompt decisions and actions in medical or other health care, and

(2) When the necessity of immediate health care treatment is so reasonably apparent that any delay in the rendering of the treatment would seriously worsen the physical condition or endanger the life of the person,

shall not be liable for damages for injuries alleged to have been sustained by the person or for damages for the death of the person alleged to have occurred by reason of an act or omission in the rendering of the treatment unless it is established that the injuries were or the death was caused by gross negligence, wanton conduct or intentional wrongdoing on the part of the person rendering the treatment.

(a1) Recodified as G.S. 90-21.16 by Session Laws 2001-230, s. 1(a), effective October 1, 2001.

(b) Nothing in this section shall be deemed or construed to relieve any person from liability for damages for injury or death caused by an act or omission on the part of such person while rendering health care services in the normal and ordinary course of his business or profession. Services provided by a volunteer health care provider who receives no compensation for his services and who renders first aid or emergency treatment to members of athletic teams are deemed not to be in the normal and ordinary course of the volunteer health care provider's business or profession.

(c) In the event of any conflict between the provisions of this section and those of G.S. 20-166(d), the provisions of G.S. 20-166(d) shall control and continue in full force and effect. (1975, 2nd Sess., c. 977, s. 4; 1985, c. 611, s. 2; 1989, cc. 498, 655; 1991, c. 655, s. 1; 1993, c. 439, s. 1; 1995, c. 85, s. 1; 2000-5, s. 4; 2001-230, ss. 1(a), 2.)

Cross References. — As to immunity from liability of persons rendering first aid or emergency assistance at the scene of a motor vehicle accident, see G.S. 20-166(d). As to application of this section to surgical operations on inmates of State penal institutions, see G.S. 148-22.2. As to application of this section to treatment of prisoners' self-inflicted injuries, see G.S. 148-46.2.

Editor's Note. — G.S. 90-21.14(a1) was recodified as G.S. 90-21.16 by Session Laws 2001-230, s. 1(a) effective October 1, 2001, and applicable to acts or omissions occuring on and after that date.

Legal Periodicals. — For article discussing the North Carolina medical malpractice statute, see 62 N.C.L. Rev. 711 (1984).

For 1984 survey, "North Carolina Court of Appeals Recognizes Wrongful Birth and Wrongful Life Claims," see 63 N.C.L. Rev. 1327 (1985).

CASE NOTES

Cited in Tatham v. Hoke, 469 F. Supp. 914 (W.D.N.C. 1979); Black v. Littlejohn, 312 N.C. 626, 325 S.E.2d 469 (1985).

OPINIONS OF ATTORNEY GENERAL

Applicability of Subsection (a) to Emergency Medical Care Personnel. — Subsection (a) is inapplicable to emergency medical care personnel who are called to the scene of a medical emergency. Opinion of Attorney General to Mr. I.O. Wilkerson, Director, Division of Facility Services, Department of Human Resources, 46 N.C.A.G. 42 (1976).

§ 90-21.15. Emergency treatment using automated external defibrillator; immunity.

(a) It is the intent of the General Assembly that, when used in accordance with this section, an automated external defibrillator may be used during an emergency for the purpose of attempting to save the life of another person who is in or who appears to be in cardiac arrest.

(b) For purposes of this section:

(1) "Automated external defibrillator" means a device, heart monitor, and defibrillator that meets all of the following requirements:
  a. The device has received approval from the United States Food and Drug Administration of its premarket notification filed pursuant to 21 U.S.C. § 360(k), as amended.
  b. The device is capable of recognizing the presence or absence of ventricular fibrillation or rapid ventricular tachycardia and is capable of determining, without intervention by an operator, whether defibrillation should be performed.
  c. Upon determining that defibrillation should be performed, the device automatically charges and requests delivery of, or delivers, an electrical impulse to an individual's heart.

(2) "Person" means an individual, corporation, limited liability company, partnership, association, unit of government, or other legal entity.

(3) "Training" means a nationally recognized course or training program in cardiopulmonary resuscitation (CPR) and automated external defibrillator use including the programs approved and provided by the:
  a. American Heart Association.
  b. American Red Cross.

(c) The use of an automated external defibrillator when used to attempt to save or to save a life shall constitute "first-aid or emergency health care treatment" under G.S. 90-21.14(a).

(d) The person who provides the cardiopulmonary resuscitation and automated external defibrillator training to a person using an automated external defibrillator, the person responsible for the site where the automated external defibrillator is located when the person has provided for a program of training, and a North Carolina licensed physician writing a prescription without compensation for an automated external defibrillator whether or not required by any federal or state law, shall be immune from civil liability arising from the use of an automated external defibrillator used in accordance with subsection (c) of this section.

(e) The immunity from civil liability otherwise existing under law shall not be diminished by the provisions of this section.

(f) Nothing in this section requires the purchase, placement, or use of automated external defibrillators by any person, entity, or agency of State, county, or local government. Nothing in this section applies to a product's liability claim against a manufacturer or seller as defined in G.S. 99B-1.

(g) In order to enhance public health and safety, a seller of an automated external defibrillator shall notify the North Carolina Department of Health and Human Services, Division of Health Service Regulation, Office of Emergency Medical Services of the existence, location, and type of automated external defibrillator. (2000-113, s. 1; 2007-182, s. 1.1.)

Editor's Note. — Session Laws 2005-276, s. 10.57(a), provides: "The Department of Health and Human Services, Division of Public Health, shall develop a pilot program to place Automated External Defibrillators (AED) in public buildings, including public gymnasiums, that do not have an operational AED in place. In selecting pilot sites, the Department shall ensure geographic representation of the State."

Session Laws 2005-276, s. 10.57(b), provides: "Of the funds appropriated in this act to the Department of Health and Human Services, the sum of seventeen thousand dollars ($17,000) for the 2005-2006 fiscal year, and the sum of six thousand dollars ($6,000) for the 2006-2007 fiscal year shall be used to purchase AED units, conduct on-site training at the pilot sites, and conduct ongoing education and awareness campaigns to the general public in the piloted sites. The Department shall ensure that training in the use of an AED shall be conducted in accordance with G.S. 90-21.15(b)(3). The Heart Disease and Stroke Prevention Branch of the Division of Public Health shall be responsible for the purchase of AEDs, the training of pilot program participants, and evaluation of the pilot program."

Session Laws 2005-276, s. 10.57(c), provides: "The Department of Health and Human Services shall report on the location, establishment, and implementation of the pilot sites to the Senate Appropriations Committee on Health and Human Services, the House of Representatives Appropriations Subcommittee on Health and Human Services, and the Fiscal Research Division on or before March 1, 2006."

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-182, s. 1.1, effective July 5, 2007, substituted "Division of Health Service Regulation" for "Division of Facilities Services" in subsection (g).

§ 90-21.16. Volunteer health care professionals; liability limitation.

(a) This section applies as follows:

(1) Any volunteer medical or health care provider at a facility of a local health department or at a nonprofit community health center,

(2) Any volunteer medical or health care provider rendering services to a patient referred by a local health department as defined in G.S. 130A-2(5) or nonprofit community health center at the provider's place of employment,

(3) Any volunteer medical or health care provider serving as medical director of an emergency medical services (EMS) agency,

(4) Any retired physician holding a "Limited Volunteer License" under G.S. 90-12(d), or

(5) Any volunteer medical or health care provider licensed or certified in this State who provides services within the scope of the provider's license or certification at a free clinic facility,

who receives no compensation for medical services or other related services rendered at the facility, center, agency, or clinic, or who neither charges nor receives a fee for medical services rendered to the patient referred by a local health department or nonprofit community health center at the provider's place of employment shall not be liable for damages for injuries or death alleged to have occurred by reason of an act or omission in the rendering of the services unless it is established that the injuries or death were caused by gross negligence, wanton conduct, or intentional wrongdoing on the part of the person rendering the services. The free clinic, local health department facility, nonprofit community health center, or agency shall use due care in the selection of volunteer medical or health care providers, and this subsection shall not excuse the free clinic, health department facility, community health center, or agency for the failure of the volunteer medical or health care provider to use ordinary care in the provision of medical services to its patients.

(b) Nothing in this section shall be deemed or construed to relieve any person from liability for damages for injury or death caused by an act or omission on the part of such person while rendering health care services in the normal and ordinary course of his or her business or profession. Services provided by a medical or health care provider who receives no compensation for his or her services and who voluntarily renders such services at facilities of free clinics, local health departments as defined in G.S. 130A-2, nonprofit community health centers, or as a volunteer medical director of an emergency medical services (EMS) agency, are deemed not to be in the normal and ordinary course of the volunteer medical or health care provider's business or profession.

(c) As used in this section, a "free clinic" is a nonprofit, 501(c)(3) tax-exempt organization organized for the purpose of providing health care services without charge or for a minimum fee to cover administrative costs and that maintains liability insurance covering the acts and omissions of the free clinic and any liability pursuant to subsection (a) of this section. (1991, c. 655, s. 1,; 1993, c. 439, s. 1; 1995, c. 85, s. 1; 2000-5, s. 4; 2001-230, ss. 1(a), 1(b).)

Editor's Note. — This section was formerly codified as G.S. 90-21.14(a1). It was recodified as G.S. 90-21.16 by Session Laws 2001-230, s. 1(a), which was effective October 1, 2001, and applicable to acts or omissions occurring on or after that date.

G.S. 90-12, referred to in subdivision (a)(4) above, was repealed by Session Laws 2007-346, s. 12, effective October 1, 2007. For current provisions, see G.S. 90-12.01A.

§ 90-21.17. Portable do not resuscitate order and Medical Order for Scope of Treatment.

(a) It is the intent of this section to recognize a patient's desire and right to withhold cardiopulmonary resuscitation and other life-prolonging measures to avoid loss of dignity and unnecessary pain and suffering through the use of a portable do not resuscitate ("DNR") order or a Medical Order for Scope of Treatment (MOST).

This section establishes an optional and nonexclusive procedure by which a patient or the patient's representative may exercise this right.

(b) A physician may issue a portable DNR order or MOST for a patient:

(1) With the consent of the patient;

(2) If the patient is a minor, with the consent of the patient's parent or guardian; or

(3) If the patient is not a minor but is incapable of making an informed decision regarding consent for the order, with the consent of the patient's representative.

The physician shall document the basis for the DNR order or MOST in the patient's medical record. When the order is a MOST, the patient or the patient's representative must sign the form, provided, however, that if it is not practicable for the patient's representative to sign the original MOST form, the patient's representative shall sign a copy of the completed form and return it to the health care professional completing the form. The copy of the form with the signature of the patient's representative, whether in paper or electronic form, shall be placed in the patient's medical record. When the signature of the patient's representative is on a separate copy of the MOST form, the original MOST form must indicate in the appropriate signature field that the signature is "on file".

(c) The Department of Health and Human Services shall develop a portable DNR order form and a MOST form. The official DNR form shall include fields for the name of the patient; the name, address, and telephone number of the physician; the signature of the physician; and other relevant information. At a minimum, the official MOST form shall include fields for: the name of the patient; an advisory that a patient is not required to have a MOST; the name, telephone number, and signature of the physician, physician assistant, or nurse practitioner authorizing the order; the name and contact information of the health care professional who prepared the form with the patient or the patient's representative; information on who agreed (i.e., the patient or the patient's representative) to the options selected on the MOST form; a range of options for cardiopulmonary resuscitation, medical interventions, antibiotics, medically administered fluids and nutrition; patient or patient representative's name, contact information, and signature; effective date of the form and review dates; a prominent advisory that directions in a MOST form may suspend, while those MOST directions are in effect, any conflicting directions in a patient's previously executed declaration of an advance directive for a natural death ("living will"), health care power of attorney, or other legally authorized instrument; and an advisory that the MOST may be revoked by the patient or the patient's representative. The official MOST form shall also include the following statement written in boldface type directly above the signature line: 'You are not required to sign this form to receive treatment.' The form may be approved by reference to a standard form that meets the requirements of this subsection. For purposes of this section, the "patient's representative" means an individual from the list of persons authorized to consent to the withholding of life-prolonging measures pursuant to G.S. 90-322.

(d) No physician, emergency medical professional, hospice provider, or other health care provider shall be subject to criminal prosecution, civil liability, or disciplinary action by any professional licensing or certification agency for withholding cardiopulmonary resuscitation or other life-prolonging measures from a patient in good faith reliance on an original DNR order or MOST form adopted pursuant to subsection (c) of this section, provided that (i) there are no reasonable grounds for doubting the validity of the order or the identity of the patient, and (ii) the provider does not have actual knowledge of the revocation of the portable DNR order or MOST. No physician, emergency medical professional, hospice provider, or other health care provider shall be subject to criminal prosecution, civil liability, or disciplinary action by any professional licensing or certification agency for failure to follow a DNR order or MOST form adopted pursuant to subsection (c) of this section if the provider had no actual knowledge of the existence of the DNR order or MOST.

(e) A health care facility may develop policies and procedures that authorize the facility's provider to accept a portable DNR order or MOST as if it were an order of the medical staff of that facility. This section does not prohibit a physician in a health care facility from issuing a written order, other than a portable DNR order or MOST not to resuscitate a patient in the event of cardiac or respiratory arrest, or to use, withhold, or withdraw additional medical interventions as provided in the MOST, in accordance with acceptable medical practice and the facility's policies.

(f) Nothing in this section shall affect the validity of portable DNR order or MOST forms in existence prior to the effective date of this section. (2001-445, s. 1; 2007-502, s. 14.)

Editor's Note. — The number of this section was assigned by the Revision of Statutes, the number in Session Laws 2001-445, s. 1, having been 90-21.16.

Session Laws 2007-502, s. 18, provides: "The Legislative Research Commission shall study the issue of whether North Carolina law should be amended to allow a person to require life-prolonging measures. The LRC shall involve all stakeholders in the study. The LRC shall report its recommendations to the 2008 Session of the 2007 General Assembly."

Session Laws 2007-502, s. 19, provides: "The North Carolina Institute of Medicine (Institute) shall study issues related to the provision of end-of-life medical care in North Carolina. As part of the study, the Division of Health Service Regulation, Department of Health and Human Services, and the North Carolina Board of Medicine shall provide to the Institute nonidentifying information regarding claims and complaints related to end-of-life medical treatment by health care providers that was contrary to the express wishes of either the patient or a person authorized by law to make treatment decisions on behalf of the patient. The Institute may review any other data related to end-of-life medical care and treatment the Institute determines is relevant.

"The purpose of this study is to determine whether statutory changes related to advance directives and health care powers of attorney impact the type and quantity of end-of-life medical care provided to patients, whether the patient's or patient representative's express wishes regarding the provision of treatment at the end of life are being honored, and whether there is any change in the number of persons who request continued treatment at the end of their lives, but do not receive that treatment.

"The Institute shall report its findings to the following entities no later than January 30, 2013:

"(1) The 2013 General Assembly.

"(2) The North Carolina Bar Association.

"(3) The North Carolina Medical Society."

Effect of Amendments. — Session Laws 2007-502, s. 14, effective October 1, 2007, inserted "and Medical Order for Scope of Treatment" in the section heading; in subsection (a), inserted "and other life-prolonging measures" and inserted "or a Medical Order for Scope of Treatment (MOST)"; in subsection (b), inserted "or MOST" in the introductory language, and inserted "DNR" and "or" in the first sentence and added the last three sentences in the concluding language; in subsection (c), inserted "and a MOST form" in the first sentence, inserted "DNR" in the second sentence, added the third and fourth sentences, substituted "life-prolonging measures" for "extraordinary care," and deleted "or an individual who has an established relationship with the patient, who is acting in good faith on behalf of the patient, and who can reliably convey the patient's wishes" at the end; in subsection (d), inserted "or other life-prolonging measures" in the first sentence, inserted "order or MOST" following "DNR" twice, and inserted "or MOST" twice following "DNR order"; in subsection (e), inserted "or MOST" following "DNR order," inserted "order or MOST" following "DNR," and inserted "or to use, withhold, or withdraw additional medical interventions as provided in the MOST"; inserted "order or MOST" in subsection (f).

§ 90-21.18. Medical directors; liability limitation.

A medical director of a licensed nursing home shall not be named a defendant in an action pursuant to this Article except under any of the following circumstances:

(1) Where allegations involve a patient under the direct care of the medical director.

(2) Where allegations involve willful or intentional misconduct, recklessness, or gross negligence in connection with the failure to supervise, or

other acts performed or failed to be performed, by the medical director in a supervisory or consulting role. (2004-149, s. 2.9.)

Editor's Note. — This section was originally enacted as G.S. 90-21.18A. It has been renumbered as this section at the direction of the Revisor of Statutes.

§ **90-21.19:** Reserved for future codification purposes.

Article 1C.

Physicians and Hospital Reports.

§ 90-21.20. Reporting by physicians and hospitals of wounds, injuries and illnesses.

(a) Such cases of wounds, injuries or illnesses as are enumerated in subsection (b) shall be reported as soon as it becomes practicable before, during or after completion of treatment of a person suffering such wounds, injuries, or illnesses. If such case is treated in a hospital, sanitarium or other medical institution or facility, such report shall be made by the Director, Administrator, or other person designated by the Director or Administrator, or if such case is treated elsewhere, such report shall be made by the physician or surgeon treating the case, to the chief of police or the police authorities of the city or town of this State in which the hospital or other institution, or place of treatment is located. If such hospital or other institution or place of treatment is located outside the corporate limits of a city or town, then the report shall be made by the proper person in the manner set forth above to the sheriff of the respective county or to one of his deputies.

(b) Cases of wounds, injuries or illnesses which shall be reported by physicians, and hospitals include every case of a bullet wound, gunshot wound, powder burn or any other injury arising from or caused by, or appearing to arise from or be caused by, the discharge of a gun or firearm, every case of illness apparently caused by poisoning, every case of a wound or injury caused, or apparently caused, by a knife or sharp or pointed instrument if it appears to the physician or surgeon treating the case that a criminal act was involved, and every case of a wound, injury or illness in which there is grave bodily harm or grave illness if it appears to the physician or surgeon treating the case that the wound, injury or illness resulted from a criminal act of violence.

(c) Each report made pursuant to subsections (a) and (b) above shall state the name of the wounded, ill or injured person, if known, and the age, sex, race, residence or present location, if known, and the character and extent of his injuries.

(d) Any hospital, sanitarium, or other like institution or Director, Administrator, or other designated person, or physician or surgeon participating in good faith in the making of a report pursuant to this section shall have immunity from any liability, civil or criminal, that might otherwise be incurred or imposed as the result of the making of such report. (1971, c. 4; 1977, c. 31; c. 843, s. 2.)

Editor's Note. — This Article, as enacted by Session Laws 1971, c. 4, and amended by Session Laws 1971, c. 594, was originally applicable to New Hanover and Alamance Counties only, and was therefore not codified. The 1971 act was amended by Session Laws 1977, c. 31, and by Session Laws 1977, c. 843, s. 1, effective July 1, 1977, so as to make it applicable to thirty counties. The 1977 acts having rendered the 1971 act general within the definition adopted for the General Statutes, the Article was codified.

Thus, as originally enacted, this section only applied to certain counties, which were set out in G.S. 90-21.21. However, Session Laws 1979, c. 529 repealed G.S. 90-21.21.

§ 90-21.20A. Reporting by physicians of pilots' mental or physical disabilities or infirmities.

(a) A physician who reports to a government agency responsible for pilots' licenses or certificates or a government agency responsible for air safety that a pilot or an applicant for a pilot's license or certificate suffers from or probably suffers from a physical disability or infirmity that the physician believes will or reasonably could affect the person's ability to safely operate an aircraft shall have immunity, civil or criminal, that might otherwise be incurred or imposed as the result of making such a report.

(b) A physician who gives testimony about a pilot's or an applicant's mental or physical disability or infirmity in any administrative hearing or other proceeding held to consider the issuance, renewal, revocation, or suspension of a pilot's license or certificate shall have immunity from any liability, civil or criminal, that might otherwise be incurred or imposed as the result of such testimony. (1997-464, s. 2.)

§ 90-21.20B. Access to and disclosure of medical information for certain purposes.

(a) Notwithstanding G.S. 8-53 or any other provision of law, a health care provider may disclose to a law enforcement officer protected health information only to the extent that the information may be disclosed under the federal Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. § 164.512(f) and is not specifically prohibited from disclosure by other state or federal law.

(a1) Notwithstanding any other provision of law, if a person is involved in a vehicle crash:

(1) Any health care provider who is providing medical treatment to the person shall, upon request, disclose to any law enforcement officer investigating the crash the following information about the person: name, current location, and whether the person appears to be impaired by alcohol, drugs, or another substance.

(2) Law enforcement officers shall be provided access to visit and interview the person upon request, except when the health care provider requests temporary privacy for medical reasons.

(3) A health care provider shall disclose a certified copy of all identifiable health information related to that person as specified in a search warrant or an order issued by a judicial official.

(b) A prosecutor or law enforcement officer receiving identifiable health information under this section shall not disclose this information to others except as necessary to the investigation or otherwise allowed by law.

(c) A certified copy of identifiable health information, if relevant, shall be admissible in any hearing or trial without further authentication.

(d) As used in this section, "health care provider" has the same meaning as in G.S. 90-21.11.

(e) Notwithstanding G.S. 8-53 or any other provision of law, a health care provider may disclose protected health information for purposes of treatment, payment, or health care operations to the extent that disclosure is permitted under 45 C.F.R. § 164.506 and is not specifically prohibited by other state or federal law. As used in this subsection, "treatment, payment, or health care operations" are as defined in the Standards for Privacy of Individually Identifiable Health Information. (2006-253, s. 17; 2007-115, s. 3.)

Editor's Note. — Session Laws 2006-253, s. 17, makes this section effective December 1, 2006, and applicable to offenses committed on or after that date.

Effect of Amendments. — Session Laws 2007-115, s. 3, effective June 27, 2007, substituted "certain" for "law enforcement" in the section heading; added subsection (a); redesignated former subsection (a) as present subsection (a1); and added subsection (e).

§ 90-21.21: Repealed by Session Laws 1979, c. 529, s. 1.

ARTICLE 1D.

Peer Review.

§ 90-21.22. Peer review agreements.

(a) The North Carolina Medical Board may, under rules adopted by the Board in compliance with Chapter 150B of the General Statutes, enter into agreements with the North Carolina Medical Society and its local medical society components, and with the North Carolina Academy of Physician Assistants for the purpose of conducting peer review activities. Peer review activities to be covered by such agreements shall include investigation, review, and evaluation of records, reports, complaints, litigation and other information about the practices and practice patterns of physicians licensed by the Board, and of physician assistants approved by the Board, and shall include programs for impaired physicians and impaired physician assistants. Agreements between the Academy and the Board shall be limited to programs for impaired physicians and physician assistants and shall not include any other peer review activities.

(b) Peer review agreements shall include provisions for the society and for the Academy to receive relevant information from the Board and other sources, conduct the investigation and review in an expeditious manner, provide assurance of confidentiality of nonpublic information and of the review process, make reports of investigations and evaluations to the Board, and to do other related activities for promoting a coordinated and effective peer review process. Peer review agreements shall include provisions assuring due process.

(c) Each society which enters a peer review agreement with the Board shall establish and maintain a program for impaired physicians licensed by the Board. The Academy, after entering a peer review agreement with the Board, shall either enter an agreement with the North Carolina Medical Society for the inclusion of physician assistants in the Society's program for impaired physicians, or shall establish and maintain the Academy's own program for impaired physician assistants. The purpose of the programs shall be to identify, review, and evaluate the ability of those physicians and physician assistants to function in their professional capacity and to provide programs for treatment and rehabilitation. The Board may provide funds for the administration of impaired physician and impaired physician assistant programs and shall adopt rules with provisions for definitions of impairment; guidelines for program elements; procedures for receipt and use of information of suspected impairment; procedures for intervention and referral; monitoring treatment, rehabilitation, post-treatment support and performance; reports of individual cases to the Board; periodic reporting of statistical information; assurance of confidentiality of nonpublic information and of the review process.

(d) Upon investigation and review of a physician licensed by the Board, or a physician assistant approved by the Board, or upon receipt of a complaint or other information, a society which enters a peer review agreement with the Board, or the Academy if it has a peer review agreement with the Board, as appropriate, shall report immediately to the Board detailed information about any physician or physician assistant licensed or approved by the Board if:

(1) The physician or physician assistant constitutes an imminent danger to the public or to himself by reason of impairment, mental illness, physical illness, the commission of professional sexual boundary violations, or any other reason;

(2) The physician or physician assistant refuses to cooperate with the program, refuses to submit to treatment, or is still impaired after treatment and exhibits professional incompetence; or

(3) It reasonably appears that there are other grounds for disciplinary action.

(e) Any confidential patient information and other nonpublic information acquired, created, or used in good faith by the Academy or a society pursuant to this section shall remain confidential and shall not be subject to discovery or subpoena in a civil case. No person participating in good faith in the peer review or impaired physician or impaired physician assistant programs of this section shall be required in a civil case to disclose any information acquired or opinions, recommendations, or evaluations acquired or developed solely in the course of participating in any agreements pursuant to this section.

(f) Peer review activities conducted in good faith pursuant to any agreement under this section shall not be grounds for civil action under the laws of this State and are deemed to be State directed and sanctioned and shall constitute State action for the purposes of application of antitrust laws. (1987, c. 859, s. 15; 1993, c. 176, s. 1; 1995, c. 94, s. 23; 2006-144, s. 8.)

Effect of Amendments. — Session Laws 2006-144, s. 8, effective October 1, 2006, added "by reason of impairment, mental illness, physical illness, the commission of professional sexual boundary violations, or any other reason" at the end of subdivision (d)(1).

CASE NOTES

Legislature Intended a Broad Privilege. — Nonpublic documents in the possession of defendant/hospital, pertaining to defendant/doctor's participation in a physician's impairment treatment program, were privileged; the Legislature intended to create a broader privilege to information in this section than in peer review statutes such as G.S. 131E-95. Sharpe v. Worland, 137 N.C. App. 82, 527 S.E.2d 75 (2000).

Disclosure of physician drug abuse. — Nothing in G.S. 90-21.22 evinces a legislative intent to insulate a participant from disclosing the details of his drug abuse merely because he related the details of his drug abuse to a medical society administering an impaired physicians program during the course of his participation in that program. Armstrong v. Barnes, 171 N.C. App. 287, 614 S.E.2d 371, 2005 N.C. App. LEXIS 1262 (2005), cert. denied, 360 N.C. 60, 621 S.E.2d 173 (2005).

Order Affecting Substantial Rights Is Immediately Reviewable. — When a party asserts a statutory privilege, such as that set out by subsection (e) of this section, which directly relates to a matter to be disclosed under an interlocutory discovery order, and where the assertion is not otherwise frivolous or insubstantial, the challenged order affects a substantial right under G.S. 1-277(a) and 7A-27(d)(1) and is immediately reviewable; to the extent that cases like Kaplan v. Prolife Action League of Greensboro, 123 N.C.App. 677, 474 S.E.2d 408 (1996) differ, they are overruled. Sharpe v. Worland, 351 N.C. 159, 522 S.E.2d 577 (1999).

Cited in Sharpe v. Worland, 132 N.C. App. 223, 511 S.E.2d 35 (1999).

§ 90-21.22A. Medical review and quality assurance committees.

(a) As used in this section, the following terms mean:

(1) "Medical review committee." — A committee composed of health care providers licensed under this Chapter that is formed for the purpose of evaluating the quality of, cost of, or necessity for health care

services, including provider credentialing. "Medical review committee" does not mean a medical review committee established under G.S. 131E-95.

(2) "Quality assurance committee." — Risk management employees of an insurer licensed to write medical professional liability insurance in this State, who work in collaboration with health care providers licensed under this Chapter, and insured by that insurer, to evaluate and improve the quality of health care services.

(b) A member of a duly appointed medical review or quality assurance committee who acts without malice or fraud shall not be subject to liability for damages in any civil action on account of any act, statement, or proceeding undertaken, made, or performed within the scope of the functions of the committee.

(c) The proceedings of a medical review or quality assurance committee, the records and materials it produces, and the materials it considers shall be confidential and not considered public records within the meaning of G.S. 132-1, 131E-309, or 58-2-100; and shall not be subject to discovery or introduction into evidence in any civil action against a provider of health care services who directly provides services and is licensed under this Chapter, a PSO licensed under Article 17 of Chapter 131E of the General Statutes, an ambulatory surgical facility licensed under Chapter 131E of the General Statutes, or a hospital licensed under Chapter 122C or Chapter 131E of the General Statutes or that is owned or operated by the State, which civil action results from matters that are the subject of evaluation and review by the committee. No person who was in attendance at a meeting of the committee shall be required to testify in any civil action as to any evidence or other matters produced or presented during the proceedings of the committee or as to any findings, recommendations, evaluations, opinions, or other actions of the committee or its members. However, information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee. Documents otherwise available as public records within the meaning of G.S. 132-1 do not lose their status as public records merely because they were presented or considered during proceedings of the committee. A member of the committee may testify in a civil action but cannot be asked about the person's testimony before the committee or any opinions formed as a result of the committee hearings.

(d) This section applies to a medical review committee, including a medical review committee appointed by one of the entities licensed under Articles 1 through 67 of Chapter 58 of the General Statutes.

(e) Subsection (c) of this section does not apply to proceedings initiated under G.S. 58-50-61 or G.S. 58-50-62. (1997-519, s. 4.3; 1998-227, s. 3; 2002-179, s. 18; 2004-149, s. 2.6.)

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 469.

CASE NOTES

Information not immune from discovery. — Physician, as an original source, could not invoke G.S. 131E-95(b) and G.S. 90-21.22A(c) to shield himself from answering deposition questions during a malpractice suit regarding the details of his drug abuse merely because he disclosed those details during credentialing committee proceedings and the details were presumably included in the committee's records. Armstrong v. Barnes, 171 N.C. App. 287, 614 S.E.2d 371, 2005 N.C. App. LEXIS 1262 (2005), cert. denied, 360 N.C. 60, 621 S.E.2d 173 (2005).

Section Did Not Apply to Nursing Homes. — G.S. 90-21.22A did not provide privilege protection to nursing homes; 2003 version of G.S. 131E-107 applied to nursing homes, but did not provide privilege from discovery for materials produced by peer review committees, so a trial court did not err in holding that nursing home peer review reports were not privileged. Windman v. Britthaven, Inc., 173 N.C. App. 630, 619 S.E.2d 522, 2005 N.C. App. LEXIS 2113 (2005).

Incident reports prepared by nurses at a nursing home were not privileged under G.S. 90-21.22A and G.S. 131E-107, as the reports were not part of the proceedings of the home's quality improvement team, produced by the team, or considered by the team; the fact that the team could have reviewed the reports or might do so in the future did not make them privileged. Hayes v. Premier Living, Inc., — N.C. App. —, 641 S.E.2d 316, 2007 N.C. App. LEXIS 370 (2007).

Interlocutory Appeal of Order Compelling Production Was Proper. — Because a corporation asserted that ordered documents were protected from discovery under G.S. 90-21.22A, and that assertion was not frivolous or insubstantial, the discovery order compelling production of the documents affected a substantial right and the appeal fell under an exception to the rule that there was no right to appeal from an interlocutory order. Windman v. Britthaven, Inc., 173 N.C. App. 630, 619 S.E.2d 522, 2005 N.C. App. LEXIS 2113 (2005).

Cited in Sharpe v. Worland, 137 N.C. App. 82, 527 S.E.2d 75 (2000).

§ 90-21.23. Election by State.

For the purpose of making applicable in the State the early opt-in provisions of Title 4 of the "Health Care Quality Improvement Act of 1986," P.L. 99-660, the State elects to exercise on October 1, 1987, the provisions of Title 4, Section 411(c)(2)(A) of that act to promote good faith professional review activities. (1987, c. 859, s. 19.)

Article 1E.

Certificate of Public Advantage.

§ 90-21.24. Findings.

The General Assembly of North Carolina makes the following findings:

(1) That technological and scientific developments in health care have enhanced the prospects for further improvement in the quality of care provided to North Carolina citizens.

(2) That the cost of improved technology and improved scientific methods for the provision of health care contributes substantially to the increasing cost of health care. Cost increases make it increasingly difficult for physicians in rural areas of North Carolina to offer care.

(3) That cooperative agreements among physicians, hospitals, and others for the provision of health care services may foster improvements in the quality of health care for North Carolina citizens, moderate increases in cost, and improve access to needed services in rural areas of North Carolina.

(4) That physicians are often in the best position to identify and structure cooperative arrangements that enhance quality of care, improve access, and achieve cost-efficiency in the provision of care.

(5) That federal and State antitrust laws may prohibit or discourage cooperative arrangements that are beneficial to North Carolina citizens, despite their potential for or actual reduction in competition, and that such agreements should be permitted and encouraged.

(6) That competition as currently mandated by federal and State antitrust laws should be supplanted by a regulatory program to permit and encourage cooperative agreements between physicians or between physicians, hospitals, and others, that are beneficial to North Carolina citizens when the benefits of cooperative agreements out-

weigh their disadvantages caused by their potential or actual adverse effects on competition.

(7) That regulatory as well as judicial oversight of cooperative agreements should be provided to ensure that the benefits of cooperative agreements permitted and encouraged in North Carolina outweigh any disadvantages attributable to any reduction in competition likely to result from the agreements. (1995, c. 395, s. 2.)

§ 90-21.25. Definitions.

As used in this Article, the following terms have the meanings specified:

(1) "Attorney General" means the Attorney General of the State of North Carolina, or any attorney to whom the Attorney General delegates authority and responsibility to act pursuant to this Article.

(2) "Cooperative agreement" means an agreement among two or more physicians, or between a physician, hospital, or any other person or persons, for the sharing, allocation, or referral of patients, personnel, instructional programs, support services and facilities, or medical, diagnostic, or laboratory facilities or equipment, or procedures or other services traditionally offered by physicians. Cooperative agreement shall not include any agreement that would permit self-referrals of patients by a health care provider that is otherwise prohibited by law.

(3) "Department" means the North Carolina Department of Health and Human Services.

(4) "Federal or State antitrust laws" means any and all federal or State laws prohibiting monopolies or agreements in restraint of trade, including, but not limited to, the federal Sherman Act, Clayton Act, and Federal Trade Commission Act, and the North Carolina laws codified in Chapter 75 of the General Statutes.

(5) "Hospital" means any hospital required to be licensed under Chapter 131E or 122C of the General Statutes.

(6) "Person" means any individual, firm, partnership, corporation, association, public or private institution, political subdivision, or government agency.

(7) "Physician" means an individual licensed to practice medicine pursuant to Article 1 of this Chapter. (1995, c. 395, s. 2; 1997-443, s. 11A.118(a).)

Editor's Note. — The periods at the end of the subdivisions in this section were added at the direction of the Revisor of Statutes.

§ 90-21.26. Certificate of public advantage; application.

(a) A physician and any person who is a party to a cooperative agreement with a physician may negotiate, enter into, and conduct business pursuant to a cooperative agreement without being subject to damages, liability, or scrutiny under any State antitrust law if a certificate of public advantage is issued for the cooperative agreement, or in the case of activities to negotiate or enter into a cooperative agreement, if an application for a certificate of public advantage is filed in good faith. It is the intention of the General Assembly that immunity from federal antitrust laws shall also be conferred by this statute and the State regulatory program that it establishes.

(b) Parties to a cooperative agreement may apply to the Department for a certificate of public advantage governing that cooperative agreement. The application must include an executed written copy of the cooperative agreement or letter of intent with respect to the agreement, a description of the nature and scope of the activities and cooperation in the agreement, any consideration passing to any party under the agreement, and any additional materials necessary to fully explain the agreement and its likely effects. A copy of the application and all additional related materials shall be submitted to the Attorney General at the same time the application is made to the Department. (1995, c. 395, s. 2.)

§ 90-21.27. Procedure for review; standards for review.

(a) The Department shall review the application in accordance with the standards set forth in subsection (b) of this section and shall hold a public hearing with the opportunity for the submission of oral and written public comments in accordance with rules adopted by the Department. The Department shall determine whether the application should be granted or denied within 90 days of the date of filing of an application. Provided, however, that the Department may extend the review period for a specified period of time upon notice to the parties.

(b) The Department shall determine that a certificate of public advantage should be issued for a cooperative agreement, if it determines that the applicant has demonstrated by clear and convincing evidence that the benefits likely to result from the agreement outweigh the disadvantages likely to result from a reduction in competition from the agreement.

(1) In evaluating the potential benefits of a cooperative agreement, the Department shall consider whether one or more of the following benefits may result from the cooperative agreement:
   a. Enhancement of the quality of health care provided to North Carolina citizens;
   b. Preservation of other health care facilities in geographical proximity to the communities traditionally served by those facilities;
   c. Lower costs of, or gains in the efficiency of delivering, health care services;
   d. Improvements in the utilization of health care resources and equipment;
   e. Avoidance of duplication of health care resources; and
   f. The extent to which medically underserved populations are expected to utilize the proposed services.

(2) In evaluating the potential disadvantages of a cooperative agreement, the Department shall consider whether one or more of the following disadvantages may result from the cooperative agreement:
   a. The extent to which the agreement may increase the costs or prices of health care at the locations of parties to the cooperative agreement;
   b. The extent to which the agreement may have an adverse impact on patients in the quality, availability, and price of health care services;
   c. The extent to which the agreement may reduce competition among the parties to the agreement and the likely effects thereof;
   d. The extent to which the agreement may have an adverse impact on the ability of health maintenance organizations, preferred provider organizations, managed health care service agents, or other health care payors to negotiate optimal payment and service arrangements with hospitals, physicians, allied health care professionals, or other health care providers;
   e. The extent to which the agreement may result in a reduction in competition among physicians, allied health professionals, other

health care providers, or other persons furnishing health care services; and

f. The availability of arrangements that are less restrictive to competition and achieve the same benefits or a more favorable balance of benefits over disadvantages attributable to any reduction in competition.

(3) In making its determination, the Department may consider other benefits or disadvantages that may be identified. (1995, c. 395, s. 2; 1997-456, s. 27.)

§ 90-21.28. Issuance of a certificate.

If the Department determines that the likely benefits of a cooperative agreement outweigh the likely disadvantages attributable to reduction of competition as a result of the agreement by clear and convincing evidence, and the Attorney General has not stated any objection to issuance of a certificate during the review period, the Department shall issue a certificate of public advantage for the cooperative agreement at the conclusion of the review period. Such certificate shall include any conditions of operation under the agreement that the Department, in consultation with the Attorney General, determines to be appropriate in order to ensure that the cooperative agreement and activities engaged in pursuant thereto are consistent with this Article and its purpose to limit health care costs. The Department shall include conditions to control prices of health care services provided under the cooperative agreement. Consideration shall be given to assure that access to health care is provided to all areas of the State. The Department shall publish its decisions on applications for certificates of public advantage in the North Carolina Register. (1995, c. 395, s. 2.)

§ 90-21.29. Objection by Attorney General.

If the Attorney General is not persuaded that the applicant has demonstrated by clear and convincing evidence that the benefits likely to result from the agreement outweigh the likely disadvantages of any reduction of competition to result from the agreement as set forth in G.S. 90-21.27, the Attorney General may, within the review period, state an objection to the issuance of a certificate of public advantage and may extend the review period for a specified period of time. Notice of the objection and any extension of the review period shall be provided in writing to the applicant, together with a general explanation of the concerns of the Attorney General. The parties may attempt to reach agreement with the Attorney General on modifications to the agreement or to conditions in the certificate so that the Attorney General no longer objects to issuance of a certificate. If the Attorney General withdraws the objection and the Department maintains its determination that a certificate should be issued, the Department shall issue a certificate of public advantage with any appropriate conditions as soon as practicable following withdrawal of the objection. If the Attorney General does not withdraw the objection, a certificate shall not be issued. (1995, c. 395, s. 2.)

§ 90-21.30. Record keeping.

The Department shall maintain on file all cooperative agreements for which certificates of public advantage are in effect and a copy of the certificate, including any conditions imposed. Any party to a cooperative agreement who terminates an agreement shall file a notice of termination with the Department within 30 days after termination. These files shall be public records as set forth in Chapter 132 of the General Statutes. (1995, c. 395, s. 2.)

§ 90-21.31. Review after issuance of certificate.

If at any time following the issuance of a certificate of public advantage, the Department or the Attorney General has questions concerning whether the parties to the cooperative agreement have complied with any condition of the certificate or whether the benefits or likely benefits resulting from a cooperative agreement may no longer outweigh the disadvantages or likely disadvantages attributable to a reduction in competition resulting from the agreement, the Department or the Attorney General shall advise the parties to the agreement and either the Department or the Attorney General shall request any information necessary to complete a review of the matter. (1995, c. 395, s. 2.)

§ 90-21.32. Periodic reports.

(a) During the time that a certificate is in effect, a report of activities pursuant to the cooperative agreement must be filed every two years with the Department on or by the anniversary day on which the certificate was issued. A copy of the periodic report shall be submitted to the Attorney General at the same time it is filed with the Department. A report shall include all of the following:

(1) A description of the activities conducted pursuant to the agreement.
(2) Price and cost information.
(3) The nature and scope of the activities pursuant to the agreement anticipated for the next two years and the likely effect of those activities.
(4) A signed certificate by each party to the agreement that the benefits or likely benefits of the cooperative agreement as conditioned continue to outweigh the disadvantages or likely disadvantages of any reduction in competition from the agreement as conditioned.
(5) Any additional information requested by the Department or the Attorney General.

The Department shall give public notice in the North Carolina Register that a report has been received. After notice is given, the public shall have 30 days to file written comments on the report and on the benefits and disadvantages of continuing the certificate of public advantage. Periodic reports, public comments, and information submitted in response to a request shall be public records as set forth in Chapter 132 of the General Statutes.

(b) Failure to file a periodic report required by this section after notice of default, or failure to provide information requested pursuant to a review under G.S. 90-21.31 are grounds for revocation of the certificate by the Attorney General or the Department.

(c) The Department shall review each periodic report, public comments, and information submitted in response to a request under G.S. 90-21.31 to determine whether the advantages or likely advantages of the cooperative agreement continue to outweigh the disadvantages or likely disadvantages of any reduction in competition from the agreement, and to determine what, if any, changes in the conditions of the certificate should be made. In the review the Department shall consider the benefits and disadvantages set forth in G.S. 90-21.27. Within 60 days of the filing of a periodic report, the Department shall determine whether the certificate should remain in effect and whether any changes to the conditions in the certificate should be made. Provided, however, that the Department may extend the review period an additional 30 days. If the Department or Attorney General determines that the parties to the cooperative agreement have not complied with any condition of the certificate, the Department or the Attorney General shall revoke the certificate and the parties shall be notified. If the certificate is revoked, the parties shall be entitled to no benefits under this Article, beginning on the date of revocation. If the Department determines that the certificate should remain in effect and the Attorney General has not stated any objection to the certificate remaining in effect during the review period, the certificate shall remain in effect subject to any changes in the conditions of the certificate imposed by the Department. The parties shall be notified in writing of the Department's decision and of any changes in the conditions of the certificate. The Department shall publish its decision and any changes in the conditions in the North Carolina Register.

If the Department determines that the benefits or likely benefits of the agreement and the unavoidable costs of terminating the agreement do not continue to outweigh the disadvantages or likely disadvantages of any reduction in competition from the agreement, or if the Attorney General objects to the certificate remaining in effect based upon a review of the benefits and disadvantages set forth in G.S. 90-21.27, the Department shall notify the parties to the agreement in writing of its determination or the objections of the Attorney General and shall provide a summary of any concerns of the Department or Attorney General to the parties. (1995, c. 395, s. 2.)

§ 90-21.33. Right to judicial action.

(a) Any applicant or other person aggrieved by a decision to issue or not issue a certificate of public advantage is entitled to judicial review of the action or inaction in superior court. Suit for judicial review under this subsection shall be filed within 30 days of public notice of the decision to issue or deny issuance of the certificate. To prevail in any action for judicial review brought under this subsection, the plaintiff or petitioner must establish that the determination by the Department or the Attorney General was arbitrary or capricious.

(b) Any party or other person aggrieved by a decision to allow the certificate to remain in effect or to make changes in the conditions of the certificate is entitled to judicial review of the decision in superior court. Suit for judicial review under this subsection shall be filed within 30 days of public notice of the decision to allow the certificate to remain in effect or to make changes in the conditions of the certificate. To prevail in any action for judicial review brought under this subsection, the plaintiff or petitioner must establish that the determination by the Department or the Attorney General was arbitrary or capricious.

(c) If the Department or the Attorney General determines the certificate should not remain in effect, the Attorney General may bring suit in the Superior Court of Wake County on behalf of the Department or on its own behalf to seek an order to authorize the cancellation of the certificate. To prevail in the action, the Attorney General must establish that the benefits resulting from the agreement are outweighed by the disadvantages attributable to reduction in competition resulting from the agreement.

(d) In any action instituted under this section, the work product of the Department or the Attorney General or his staff is not a public record under Chapter 132 of the General Statutes and shall not be discoverable or admissible, nor shall the Attorney General or any member of the Attorney General's staff be compelled to be a witness, whether in discovery or at any hearing or trial. (1995, c. 395, s. 2.)

CASE NOTES

Cited in McCormick v. Hanson Aggregates Southeast, Inc., 164 N.C. App. 459, 596 S.E.2d 431 (2004).

§ 90-21.34. Fees for applications and periodic reports.

(a) The Department and the Attorney General shall establish and collect administrative fees for filing of an application for a certificate of public advantage based on the total cost of the project for which the application is made, in an amount not to exceed fifteen thousand dollars ($15,000), and an administrative fee for filing each periodic report required to be filed in an amount not to exceed two thousand five hundred dollars ($2,500). The fee schedule established should generate sufficient revenue to offset the costs of the program. An application filing fee must be paid to the Department at the time an application for a certificate of public advantage is submitted pursuant to G.S. 90-21.26. A periodic report filing fee must be paid to the Department at the time a periodic report is submitted to it pursuant to G.S. 90-21.32.

(b) If the Department or the Attorney General determines that consultants are needed to complete a review of an application, an additional application fee may be established by prior agreement with the applicants before the application is considered. The amount of the additional fee may not exceed the costs of contracting with the necessary consultants. The additional fee shall not be considered in determining whether an application fee exceeds the maximum application fee amount set in subsection (a) of this section. (1995, c. 395, s. 2.)

§ 90-21.35. Department and Attorney General authority.

The Department and Attorney General shall adopt rules to conduct review of applications for certificates of public advantage and of periodic reports filed in connection therewith and to bring actions in the Superior Court of Wake County as required under G.S. 90-21.33. This Article shall not limit the authority of the Attorney General under federal or State antitrust laws. (1995, c. 395, s. 2.)

§ 90-21.36. Effects of certificate of public advantage; other laws.

(a) Activities conducted pursuant to a cooperative agreement for which a certificate of public advantage has been issued are immunized from challenge or scrutiny under State antitrust laws. In addition, conduct in negotiating and entering into a cooperative agreement for which an application for a certificate of public advantage is filed in good faith shall be immune from challenge or scrutiny under State antitrust laws, regardless of whether a certificate is issued. It is the intention of the General Assembly that this Article shall also immunize covered activities from challenge or scrutiny under any noncompetition provisions of the federal antitrust law.

(b) Nothing in this Article shall exempt physicians or others from compliance with State or federal laws governing certificate of need, licensure, or other regulatory requirements.

(c) Any dispute among the parties to cooperative agreement concerning its meaning or terms is governed by normal principles of contract law. (1995, c. 395, s. 2.)

§§ 90-21.37 through 90-21.40: Reserved for future codification purposes.

Article 1F.

Psychotherapy Patient/Client Sexual Exploitation Act.

§ 90-21.41. Definitions.

The following definitions apply in this Article:

(1) Client. — A person who may also be called patient or counselee who seeks or obtains psychotherapy, whether or not the person is charged for the service. The term "client" includes a former client.

(2) Psychotherapist. — A psychiatrist licensed in accordance with Article 1 of Chapter 90 of the General Statutes, a psychologist as defined in G.S. 90-270.2(9), a licensed professional counselor as defined in G.S. 90-330(a)(2), a substance abuse professional as defined in G.S. 90-113.31(8), a social worker engaged in a clinical social work practice as defined in G.S. 90B-3(6), a fee-based pastoral counselor as defined in G.S. 90-382(4), a licensed marriage and family therapist as defined in G.S. 90-270.47(3), or a mental health service provider, who performs or purports to perform psychotherapy.

(3) Psychotherapy. — The professional treatment or professional counseling of a mental or emotional condition that includes revelation by the client of intimate details of thoughts and emotions of a very personal nature to assist the client in modifying behavior, thoughts and emotions that are maladjustive or contribute to difficulties in living.

(4) Sexual exploitation. — Either of the following, whether or not it occurred with the consent of a client or during any treatment, consultation, evaluation, interview, or examination:

a. Sexual contact which includes any of the following actions:

1. Sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, into the oral, genital, or anal openings of the client's body by any part of the psychotherapist's body or by any object used by the psychotherapist for the purpose of sexual stimulation or gratification of either the psychotherapist or the client; or any intrusion, however slight, into the oral, genital, or anal openings of the psychotherapist's body by any part of the client's body or by any object used by the client for the purpose of sexual stimulation or gratification of either the psychotherapist or the client, if agreed to, or not resisted by the psychotherapist.

2. Kissing of, or the intentional touching by the psychotherapist of, the client's lips, genital area, groin, inner thigh, buttocks, or breast, or of the clothing covering any of these body parts, for the purpose of sexual stimulation or gratification of either the psychotherapist or the client, or kissing of, or the intentional touching by the client of, the psychotherapist's lips, genital area, groin, inner thigh, buttocks, or breast, or of the clothing covering any of these body parts, if agreed to or not resisted by the psychotherapist, for the purpose of sexual stimulation or gratification to either the psychotherapist or the client.

b. Any act done or statement made by the psychotherapist for the purpose of sexual stimulation or gratification of the client or psychotherapist which includes any of the following actions:

1. The psychotherapist's relating to the client the psychotherapist's own sexual fantasies or the details of the psychotherapist's own sexual life.
2. The uncovering or display of breasts or genitals of the psychotherapist to the client.
3. The showing of sexually graphic pictures to the client for purposes other than diagnosis or treatment.
4. Statements containing sexual innuendo, sexual threats, or sexual suggestions regarding the relationship between the psychotherapist and the client.

(5) Sexual history. — Sexual activity of the client other than that conduct alleged by the client to constitute sexual exploitation in an action pursuant to this Article.

(6) Therapeutic deception. — A representation by a psychotherapist that sexual contact with the psychotherapist is consistent with or part of the client's treatment. (1998-213, s. 1.)

§ 90-21.42. Action for sexual exploitation.

Any client who is sexually exploited by the client's psychotherapist shall have remedy by civil action for sexual exploitation if the sexual exploitation occurred:

(1) At any time between and including the first date and last date the client was receiving psychotherapy from the psychotherapist;

(2) Within three years after the termination of the psychotherapy; or

(3) By means of therapeutic deception. (1998-213, s. 1.)

§ 90-21.43. Remedies.

A person found to have been sexually exploited as provided under this Article may recover from the psychotherapist actual or nominal damages, and reasonable attorneys' fees as the court may allow. The trier of fact may award punitive damages in accordance with the provisions of Chapter 1D of the General Statutes. (1998-213, s. 1.)

CASE NOTES

Punitive Damages Award Excepted From Bankruptcy Discharge. — Creditor proved by a preponderance of the evidence that a punitive damages award against a debtor in North Carolina was a debt for willful and malicious injury by the debtor that was excepted from discharge, pursuant to 11 U.S.C. § 523(a)(6), because the debtor was bound, under collateral estoppel, by the findings of the jury in the state court action that the creditor, a patient, was injured when the debtor sexually exploited her while serving as her psychotherapist and because the debtor testified that he knew that the acts described in the instructions were wrongful and certain to cause harm to a patient if committed by a psychotherapist. Spell v. Longenecker (In re Longenecker), — Bankr. —, 2007 Bankr. LEXIS 801 (Bankr. M.D.N.C. Feb. 26, 2007).

§ 90-21.44. Scope of discovery.

(a) In an action under this Article, evidence of the client's sexual history is not subject to discovery, except under the following conditions:

(1) The client claims impairment of sexual functioning.

(2) The psychotherapist requests a hearing prior to conducting discovery and makes an offer of proof of the relevancy of the evidence, and the court finds that the information is relevant and that the probative value of the history outweighs its prejudicial effect.

(b) The court shall allow the discovery only of specific information or examples of the client's conduct that are determined by the court to be relevant. The court order shall detail the information or conduct that is subject to discovery. (1998-213, s. 1.)

§ 90-21.45. Admissibility of evidence of sexual history.

(a) At the trial of an action under this Article, evidence of the client's sexual history is not admissible unless:

(1) The psychotherapist requests a hearing prior to trial and makes an offer of proof of the relevancy of the sexual history; and

(2) The court finds that, in the interest of justice, the evidence is relevant and that the probative value of the evidence substantially outweighs its prejudicial effect.

(b) The court shall allow the admission only of specific information or examples of instances of the client's conduct that are determined by the court to be relevant. The court's order shall detail the conduct that is admissible, and no other such evidence may be introduced.

(c) Sexual history otherwise admissible pursuant to this section may not be proved by reputation or opinion. (1998-213, s. 1.)

§ 90-21.46. Prohibited defense.

It shall not be a defense in any action brought pursuant to this Article that the client consented to the sexual exploitation or that the sexual contact with a client occurred outside a therapy or treatment session or that it occurred off the premises regularly used by the psychotherapist for therapy or treatment sessions. (1998-213, s. 1.)

§ 90-21.47. Statute of limitations.

An action for sexual exploitation must be commenced within three years after the cause of action accrues. A cause of action for sexual exploitation accrues at the later of either:

(1) The last act of the psychotherapist giving rise to the cause of action.

(2) At the time the client discovers or reasonably should discover that the sexual exploitation occurred; however, no cause of action shall be commenced more than 10 years from the last act of the psychotherapist giving rise to the cause of action. (1998-213, s. 1.)

§ 90-21.48. Agreements to not pursue complaint before licensing entity void.

Any provision of a settlement agreement of a claim based in whole or part on an allegation of sexual exploitation as defined in this Article, which prohibits a party from initiating or pursuing a complaint before the regulatory entity responsible for overseeing the conduct or licensing of the psychotherapist, is void. (1998-213, s. 1.)

§ 90-21.49: Reserved for future codification purposes.

ARTICLE 1G.

Health Care Liability.

§ 90-21.50. Definitions.

As used in this Article, unless the context clearly indicates otherwise, the term:

G.S. 90-21.50(1), (6), and (7) are set out twice. See Note.

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(1) **(Effective until July 1, 2008)** "Health benefit plan" means an accident and health insurance policy or certificate; a nonprofit hospital or medical service corporation contract; a health maintenance organization subscriber contract; a self-insured indemnity program or prepaid hospital and medical benefits plan offered under the Teachers' and State Employees' Comprehensive Major Medical Plan and subject to the requirements of Article 3 of Chapter 135 of the General Statutes, a plan provided by a multiple employer welfare arrangement; or a plan provided by another benefit arrangement, to the extent permitted by the Employee Retirement Income Security Act of 1974, as amended, or by any waiver of or other exception to that act provided under federal law or regulation. Except for the Health Insurance Program for Children established under Part 8 of Article 2 of Chapter 108A of the General Statutes, "Health benefit plan" does not mean any plan implemented or administered by the North Carolina or United States Department of Health and Human Services, or any successor agency, or its representatives. "Health benefit plan" does not mean any of the following kinds of insurance:
a. Accident.
b. Credit.
c. Disability income.
d. Long-term or nursing home care.
e. Medicare supplement.
f. Specified disease.
g. Dental or vision.
h. Coverage issued as a supplement to liability insurance.
i. Workers' compensation.
j. Medical payments under automobile or homeowners.
k. Hospital income or indemnity.
l. Insurance under which benefits are payable with or without regard to fault and that is statutorily required to be contained in any liability policy or equivalent self-insurance.
m. Short-term limited duration health insurance policies as defined in Part 144 of Title 45 of the Code of Federal Regulations.

(1) **(Effective July 1, 2008)** "Health benefit plan" means an accident and health insurance policy or certificate; a nonprofit hospital or medical service corporation contract; a health maintenance organization subscriber contract; a self-insured indemnity program or prepaid hospital and medical benefits plan offered under the State Health Plan for Teachers and State Employees and subject to the requirements of Article 3 of Chapter 135 of the General Statutes, a plan provided by a multiple employer welfare arrangement; or a plan provided by another benefit arrangement, to the extent permitted by the Employee Retirement Income Security Act of 1974, as amended, or by any waiver of or other exception to that act provided under federal law or regulation. Except for the Health Insurance Program for Children established under Part 8 of Article 2 of Chapter 108A of the General Statutes, "Health benefit plan" does not mean any plan implemented or administered by the North Carolina or United States Department of Health and Human Services, or any successor agency, or its representatives. "Health benefit plan" does not mean any of the following kinds of insurance:
a. Accident.
b. Credit.

G.S. 90-21.50(1), (6), and (7) are set out twice. See Note.

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c. Disability income.
d. Long-term or nursing home care.
e. Medicare supplement.
f. Specified disease.
g. Dental or vision.
h. Coverage issued as a supplement to liability insurance.
i. Workers' compensation.
j. Medical payments under automobile or homeowners.
k. Hospital income or indemnity.
l. Insurance under which benefits are payable with or without regard to fault and that is statutorily required to be contained in any liability policy or equivalent self-insurance.
m. Short-term limited duration health insurance policies as defined in Part 144 of Title 45 of the Code of Federal Regulations.

(2) "Health care decision" means a determination that is made by a managed care entity and is subject to external review under Part 4 of Article 50 of Chapter 58 of the General Statutes and is also a determination that:
a. Is a noncertification, as defined in G.S. 58-50-61, of a prospective or concurrent request for health care services, and
b. Affects the quality of the diagnosis, care, or treatment provided to an enrollee or insured of the health benefit plan.

(3) "Health care provider" means:
a. An individual who is licensed, certified, or otherwise authorized under this Chapter to provide health care services in the ordinary course of business or practice of a profession or in an approved education or training program; or
b. A health care facility, licensed under Chapters 131E or 122C of the General Statutes, where health care services are provided to patients;

"Health care provider" includes: (i) an agent or employee of a health care facility that is licensed, certified, or otherwise authorized to provide health care services; (ii) the officers and directors of a health care facility; and (iii) an agent or employee of a health care provider who is licensed, certified, or otherwise authorized to provide health care services.

(4) "Health care service" means a health or medical procedure or service rendered by a health care provider that:
a. Provides testing, diagnosis, or treatment of a health condition, illness, injury, or disease; or
b. Dispenses drugs, medical devices, medical appliances, or medical goods for the treatment of a health condition, illness, injury, or disease.

(5) "Insured or enrollee" means a person that is insured by or enrolled in a health benefit plan under a policy, plan, certificate, or contract issued or delivered in this State by an insurer.

(6) **(Effective until July 1, 2008)** "Insurer" means an entity that writes a health benefit plan and that is an insurance company subject to Chapter 58 of the General Statutes, a service corporation organized under Article 65 of Chapter 58 of the General Statutes, a health maintenance organization organized under Article 67 of Chapter 58 of the General Statutes, a self-insured health maintenance organization or managed care entity operated or administered by or under contract with the Executive Administrator and Board of Trustees of the

Teachers' and State Employees' Comprehensive Major Medical Plan pursuant to Article 3 of Chapter 135 of the General Statutes, a multiple employer welfare arrangement subject to Article 49 of Chapter 58 of the General Statutes, or the Teachers' and State Employees' Comprehensive Major Medical Plan.

(6) **(Effective July 1, 2008)** "Insurer" means an entity that writes a health benefit plan and that is an insurance company subject to Chapter 58 of the General Statutes, a service corporation organized under Article 65 of Chapter 58 of the General Statutes, a health maintenance organization organized under Article 67 of Chapter 58 of the General Statutes, a self-insured health maintenance organization or managed care entity operated or administered by or under contract with the Executive Administrator and Board of Trustees of the State Health Plan for Teachers and State Employees pursuant to Article 3 of Chapter 135 of the General Statutes, a multiple employer welfare arrangement subject to Article 49 of Chapter 58 of the General Statutes, or the State Health Plan for Teachers and State Employees.

(7) **(Effective until July 1, 2008)** "Managed care entity" means an insurer that:

a. Delivers, administers, or undertakes to provide for, arrange for, or reimburse for health care services or assumes the risk for the delivery of health care services; and

b. Has a system or technique to control or influence the quality, accessibility, utilization, or costs and prices of health care services delivered or to be delivered to a defined enrollee population.

Except for the Teachers' and State Employees' Comprehensive Major Medical Plan and the Health Insurance Program for Children, "managed care entity" does not include: (i) an employer purchasing coverage or acting on behalf of its employees or the employees of one or more subsidiaries or affiliated corporations of the employer, or (ii) a health care provider.

(7) **(Effective July 1, 2008)** "Managed care entity" means an insurer that:

a. Delivers, administers, or undertakes to provide for, arrange for, or reimburse for health care services or assumes the risk for the delivery of health care services; and

b. Has a system or technique to control or influence the quality, accessibility, utilization, or costs and prices of health care services delivered or to be delivered to a defined enrollee population.

Except for the State Health Plan for Teachers and State Employees and the Health Insurance Program for Children, "managed care entity" does not include: (i) an employer purchasing coverage or acting on behalf of its employees or the employees of one or more subsidiaries or affiliated corporations of the employer, or (ii) a health care provider.

(8) "Ordinary care" means that degree of care that, under the same or similar circumstances, a managed care entity of ordinary prudence would have used at the time the managed care entity made the health care decision.

(9) "Physician" means:

a. An individual licensed to practice medicine in this State;

b. A professional association or corporation organized under Chapter 55B of the General Statutes; or

c. A person or entity wholly owned by physicians.

(10) "Successor external review process" means an external review process equivalent in all respects to G.S. 58-50-75 through G.S. 58-50-95

that is approved by the Department and implemented by a health benefit plan in the event that G.S. 58-50-75 through G.S. 58-50-95 are found by a court of competent jurisdiction to be void, unenforceable, or preempted by federal law, in whole or in part. (2001-446, s. 4.7; 2007-323, s. 28.22A(o); 2007-345, s. 12.)

Subsections (1), (6), and (7) Set Out Twice. — The first version of subsections (1), (6), and (7) set out above are effective until July 1, 2008. The second version of subsections (1), (6), and (7) set out above are effective July 1, 2008.

Editor's Note. — Session Laws 2001-446, s. 8, provides: "Nothing in this act obligates the General Assembly to appropriate funds to implement this act."

Some of the definitions in this section have been renumbered in alphabetical order at the direction of the Revisor of Statutes.

Session Laws 2007-323, s. 28.22A(n), provides: "If on July 1, 2008, there are State employees or retired employees that are enrolled in the Teachers' and State Employees' Comprehensive Major Medical Plan (indemnity plan) on June 30, 2008, and that have not elected one of the optional PPO benefit plans available under the State Health Plan for Teachers and State Employees, then the Plan shall enroll those employees or retired employees in the Standard PPO Option, or its equivalent, effective July 1, 2008."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 28.22A(o), as amended by Session Laws 2007-345, s. 12, effective July 1, 2008, substituted "State Health Plan for Teachers and State Employees" for "Teachers' and State Employees' Comprehensive Major Medical Plan" in subdivision (1), twice in subdivision (6), and in the undesignated language following subdivision (7).

§ 90-21.51. Duty to exercise ordinary care; liability for damages for harm.

(a) Each managed care entity for a health benefit plan has the duty to exercise ordinary care when making health care decisions and is liable for damages for harm to an insured or enrollee proximately caused by its failure to exercise ordinary care.

(b) In addition to the duty imposed under subsection (a) of this section, each managed care entity for a health benefit plan is liable for damages for harm to an insured or enrollee proximately caused by decisions regarding whether or when the insured or enrollee would receive a health care service made by:

(1) Its agents or employees; or

(2) Representatives that are acting on its behalf and over whom it has exercised sufficient influence or control to reasonably affect the actual care and treatment of the insured or enrollee which results in the failure to exercise ordinary care.

(c) It shall be a defense to any action brought under this section against a managed care entity for a health benefit plan that:

(1) The managed care entity and its agents or employees, or representatives for whom the managed care entity is liable under subsection (b) of this section, did not control or influence or advocate for the decision regarding whether or when the insured or enrollee would receive a health care service; or

(2) The managed care entity did not deny or delay payment for any health care service or treatment prescribed or recommended by a physician or health care provider to the insured or enrollee.

(d) In an action brought under this Article against a managed care entity, a finding that a physician or health care provider is an agent or employee of the managed care entity may not be based solely on proof that the physician or health care provider appears in a listing of approved physicians or health care providers made available to insureds or enrollees under the managed care entity's health benefit plan.

(e) An action brought under this Article is not a medical malpractice action as defined in Article 1B of this Chapter. A managed care entity may not use as a defense in an action brought under this Article any law that prohibits the corporate practice of medicine.

(f) A managed care entity shall not be liable for the independent actions of a health care provider, who is not an agent or employee of the managed care entity, when that health care provider fails to exercise the standard of care required by G.S. 90-21.12. A health care provider shall not be liable for the independent actions of a managed care entity when the managed care entity fails to exercise the standard of care required by this Article.

(g) Nothing in this Article shall be construed to create an obligation on the part of a managed care entity to provide to an insured or enrollee a health care service or treatment that is not covered under its health benefit plan.

(h) A managed care entity shall not enter into a contract with a health care provider, or with an employer or employer group organization, that includes an indemnification or hold harmless clause for the acts or conduct of the managed care entity. Any such indemnification or hold harmless clause is void and unenforceable to the extent of the restriction. (2001-446, s. 4.7.)

Legal Periodicals. — For comment, "Patients' Bill of Rights; Legislative Cure-All or Prescription for Disaster?," see 81 N.C.L. Rev. 653 (2003).

§ 90-21.52. No liability under this Article on the part of an employer or employer group organization that purchases coverage or assumes risk on behalf of its employees or a physician or health care provider; liability of State Health Plan under State Tort Claims Act.

(a) Except as otherwise provided in subsection (b) of this section, this Article does not create any liability on the part of an employer or employer group purchasing organization that purchases health care coverage or assumes risk on behalf of its employees.

(b) **(Effective until July 1, 2008)** Liability in tort of the Teachers' and State Employees' Comprehensive Major Medical Plan for its health care decisions shall be under Article 31 of Chapter 143 of the General Statutes.

(b) **(Effective July 1, 2008)** Liability in tort of the State Health Plan for Teachers and State Employees for its health care decisions shall be under Article 31 of Chapter 143 of the General Statutes.

(c) This Article does not create any liability on the part of a physician or health care provider in addition to that otherwise imposed under existing law. No managed care entity held liable under this Article shall be entitled to contribution under Chapter 1B of the General Statutes. No managed care entity held liable under this Article shall have a right to indemnity against physicians, health care providers, or entities wholly owned by physicians or health care providers or any combination thereof, except when:

(1) The liability of the managed care entity is based on an administrative decision to approve or disapprove payment or reimbursement for, or denial, reduction, or termination of coverage, for a health care service

and the physician organizations, health care providers, or entities wholly owned by physicians or health care providers or any combination thereof, which have made the decision at issue, have agreed explicitly, in a written addendum or agreement separate from the managed care organization's standard professional service agreement, to assume responsibility for making noncertification decisions under G.S. 58-50-61(13) with respect to certain insureds or enrollees; and

(2) The managed care entity has not controlled or influenced or advocated for the decision regarding whether or when payment or reimbursement should be made or whether or when the insured or enrollee should receive a health care service.

The right to indemnity set forth herein shall not apply to professional medical or health care services provided by a physician or health care provider, and shall only apply where the agreement to assume responsibility for making noncertification decisions for the managed care entity is shown to have been undertaken voluntarily and the managed care organization has not adversely affected the terms and conditions of the relationship with the health care provider based upon the willingness to execute or refusal to execute an agreement under G.S. 58-50-61(13). (2001-446, s. 4.7; 2001-508, s. 2; 2007-323, s. 28.22A(o); 2007-345, s. 12.)

Subsection (b) Set Out Twice. — The first version of subsection (b) set out above is effective until July 1, 2008. The second version of subsection (b) set out above is effective July 1, 2008.

Editor's Note. — Session Laws 2007-323, s. 28.22A(n), provides: "If on July 1, 2008, there are State employees or retired employees that are enrolled in the Teachers' and State Employees' Comprehensive Major Medical Plan (indemnity plan) on June 30, 2008, and that have not elected one of the optional PPO benefit plans available under the State Health Plan for Teachers and State Employees, then the Plan shall enroll those employees or retired employees in the Standard PPO Option, or its equivalent, effective July 1, 2008."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 28.22A(o), as amended by Session Laws 2007-345, s. 12, effective July 1, 2008, substituted "State Health Plan for Teachers and State Employees" for "Teachers' and State Employees' Comprehensive Major Medical Plan" in subsection (b).

§ 90-21.53. Separate trial required.

Upon motion of any party in an action that includes a claim brought pursuant to this Article involving a managed care entity, the court shall order separate discovery and a separate trial of any claim, cross-claim, counterclaim, or third-party claim against any physician or other health care provider. (2001-446, s. 4.7.)

Legal Periodicals. — For comment, "Patients' Bill of Rights; Legislative Cure-All or Prescription for Disaster?," see 81 N.C.L. Rev. 653 (2003).

§ 90-21.54. Exhaustion of administrative remedies and appeals.

No action may be commenced under this Article until the plaintiff has exhausted all administrative remedies and appeals, including those internal remedies and appeals established under G.S. 58-50-61 through G.S. 58-50-62, and G.S. 58-50-75 through G.S. 58-50-95, and including those established under any successor external review process. (2001-446, s. 4.7.)

§ 90-21.55. External review decision.

(a) Either the insured or enrollee or the personal representative of the insured or enrollee or the managed care entity may use an external review decision made in accordance with G.S. 58-50-75 through G.S. 58-50-95, or made in accordance with any successor external review process, as evidence in any cause of action which includes an action brought under this Part, provided that an adequate foundation is laid for the introduction of the external review decision into evidence and the testimony is subject to cross-examination.

(b) Any information, documents, or other records or materials considered by the Independent Review Organization licensed under Part 4 of Article 50 of Chapter 58 of the General Statutes, or the successor review process, in conducting its review shall be admissible in any action commenced under this Article in accordance with Chapter 8 of the General Statutes and the North Carolina Rules of Evidence. (2001-446, s. 4.7.)

Legal Periodicals. — For comment, "Patients' Bill of Rights; Legislative Cure-All or Prescription for Disaster?," see 81 N.C.L. Rev. 653 (2003).

§ 90-21.56. Remedies.

(a) Except as provided in G.S. 90-21.52(b), an insured or enrollee who has been found to have been harmed by the managed care entity pursuant to an action brought under this Article may recover actual or nominal damages and, subject to the provisions and limitations of Chapter 1D of the General Statutes, punitive damages.

(b) This Article does not limit a plaintiff from pursuing any other remedy existing under the law or seeking any other relief that may be available outside of the cause of action and relief provided under this Article.

(c) The rights conferred under this Article as well as any rights conferred by the Constitution of North Carolina or the Constitution of the United States may not be waived, deferred, or lost pursuant to any contract between the insured or enrollee and the managed care entity that relates to a dispute involving a health care decision. Arbitration or mediation may be used to settle the controversy if, after the controversy arises, the insured or enrollee, or the estate of the insured or enrollee, voluntarily and knowingly consents in writing to use arbitration or mediation to settle the controversy. (2001-446, s. 4.7.)

Article 1H.

Voluntary Arbitration of Negligent Health Care Claims.

§ 90-21.60. Voluntary arbitration; prior agreements to arbitration void.

(a) Application of Article. — This Article applies to all claims for damages for personal injury or wrongful death based on alleged negligence in the provision of health care by a health care provider as defined in G.S. 90-21.11 where all parties have agreed to submit the dispute to arbitration under this Article in accordance with the requirements of G.S. 90-21.61.

(b) When Agreement Is Void. — Except as provided in G.S. 90-21.61(a), any contract provision or other agreement entered into prior to the commencement of an action that purports to require a party to elect arbitration under this Article is void and unenforceable. This Article does not impair the enforceability of any arbitration provision that does not specifically require arbitration under this Article. (2007-541, s. 1.)

Editor's Note. — Session Laws 2007-541, s. 3, made this article effective January 1, 2008, and applicable to agreements to arbitrate entered into on or after that date.

§ 90-21.61. Requirements for submitting to arbitration.

(a) Before Action Is Filed. — Before an action is filed, a person who claims damages for personal injury or wrongful death based on alleged negligence in the provision of health care by a health care provider as defined in G.S. 90-21.11 and the allegedly negligent health care provider may jointly submit their dispute to arbitration under this Article by, acting through their attorneys, filing a stipulation to arbitrate with the clerk of superior court in the county where the negligence allegedly occurred. The filing of such a stipulation provides jurisdiction to the superior court to enforce the provisions of this Article and tolls the statute of limitations.

(b) Once Action Is Filed. — The parties to an action for damages for personal injury or wrongful death based on alleged negligence in the provision of health care by a health care provider as defined in G.S. 90-21.11 may elect at any time during the pendency of the action to file a stipulation with the court in which all parties to the action agree to submit the dispute to arbitration under this Article.

(c) Declaration Not to Arbitrate. — In the event that the parties do not unanimously agree to submit a dispute to arbitration under subsection (b) of this section, the parties shall file a declaration with the court prior to the discovery scheduling conference required by G.S. 1A-1, Rule 26(f1).

The declaration shall state that the attorney representing the party has presented the party with a copy of the provisions of this Article, that the attorneys representing the parties have discussed the provisions of this Article with the parties and with each other, and that the parties do not unanimously agree to submit the dispute to arbitration under this Article. The declaration is without prejudice to the parties' subsequent agreement to submit the dispute to arbitration. (2007-541, s. 1.)

§ 90-21.62. Selection of arbitrator.

(a) Selection by Agreement. — An arbitrator shall be selected by agreement of all the parties no later than 45 days after the date of the filing of the stipulation where the parties agreed to submit the dispute to arbitration under this Article. The parties may agree to select more than one arbitrator to conduct the arbitration. The parties may agree in writing to the selection of a particular arbitrator or particular arbitrators as a precondition for a stipulation to arbitrate.

(b) Selection From List. — If all the parties are unable to agree to an arbitrator by the time specified in subsection (a) of this section, the arbitrator shall be selected from emergency superior court judges who agree to be on a list maintained by the Administrative Office of the Courts. Each party shall alternately strike one name on the list, and the last remaining name on the list shall be the arbitrator. The emergency superior court judge serving as an arbitrator would be compensated at the same rate as an emergency judge serving in superior court. (2007-541, s. 1.)

§ 90-21.63. Witnesses; discovery; depositions; subpoenas.

(a) General Conduct of Arbitration; Experts. — The arbitrator may conduct the arbitration in such manner as the arbitrator considers appropriate so as to aid in the fair and expeditious disposition of the proceeding subject to the requirements of this section and G.S. 90-21.64. Except as provided in subsection (b) of this section, each side shall be entitled to two experts on the issue of liability, two experts on the issue of damages, and one rebuttal expert.

(b) Experts in Case of Multiple Parties. — Where there are multiple parties on one side, the arbitrator shall determine the number of experts that are allowed based on the minimum number of experts necessary to ensure a fair and economic resolution of the action.

(c) Discovery. — Notwithstanding G.S. 90-21.64(a)(1), unless the arbitrator determines that exceptional circumstances require additional discovery, each party shall be entitled to all of the following discovery from any other party:

- (1) Twenty-five interrogatories, including subparts.
- (2) Ten requests for admission.
- (3) Whatever is allowed under applicable court rules for:
  - a. Requests for production of documents and things and for entry upon land for inspection and other purposes; and
  - b. Requests for physical and mental examinations of persons.

(d) Depositions. — Each party shall be entitled to all of the following depositions:

- (1) Depositions of any party and any expert that a party expects to call as a witness. — Except by order of the arbitrator for good cause shown, the length of the deposition of a party or an expert witness under this subdivision shall be limited to four hours.
- (2) Depositions of other witnesses. — Unless the arbitrator determines that exceptional circumstances require additional depositions, the total number of depositions of persons under this subdivision shall be limited to five depositions per side, each of which shall last no longer than two hours and for which each side shall be entitled to examine for one hour.

(e) Subpoenas. — An arbitrator may issue a subpoena for the attendance of a witness and for the production of records and other evidence at any hearing and may administer oaths. A subpoena shall be served in the manner for service of subpoenas in a civil action and, upon the motion to the court by a party to the arbitration proceeding or by the arbitrator, enforced in the manner for enforcement of subpoenas in a civil action. (2007-541, s. 1.)

§ 90-21.64. Time limitations for arbitration.

(a) Time Frames. — The time frames provided in this section shall run from the date of the filing of the stipulation where the parties agreed to submit the dispute to arbitration under the Article. Any arbitration under this Article shall be conducted according to the time frames as follows:

- (1) Within 45 days, the claimant shall provide a copy to the defendants of all relevant medical records. Alternatively, the claimant may provide to the defendants a release, in compliance with the federal Health Insurance Portability and Accountability Act, for all relevant medical records, along with the names and addresses of all health care providers who may have possession, custody, or control of the relevant medical records. The provisions of this subdivision shall not limit discovery conducted pursuant to G.S. 90-21.63(c).
- (2) Within 120 days, the claimant shall disclose to each defendant the name and curriculum vitae or other documentation of qualifications of any expert the claimant expects to call as a witness.

(3) Within 140 days, each defendant shall disclose to the claimant the name and curriculum vitae or other documentation of qualifications of any expert the defendant expects to call as a witness.
(4) Within 160 days, each party shall disclose to each other party the name and curriculum vitae or other documentation of qualifications of any rebuttal expert the party expects to call as a witness.
(5) Within 240 days, all discovery shall be completed.
(6) Within 270 days, the arbitration hearing shall commence.

(b) Scheduling Order. — The arbitrator shall issue a case scheduling order in every proceeding specifying the dates by which the requirements of subdivisions (2) through (6) of subsection (a) of this section shall be completed. The scheduling order also shall specify a deadline for the service of dispositive motions and briefs.

(c) Public Policy as to When Hearings Begin. — It is the express public policy of the General Assembly that arbitration hearings under this Article be commenced no later than 10 months after the parties file the stipulation where the parties agreed to submit the dispute to arbitration under this Article. The arbitrator may grant a continuance of the commencement of the arbitration hearing only where a party shows that exceptional circumstances create an undue and unavoidable hardship on the party or where all parties consent to the continuance. (2007-541, s. 1.)

§ 90-21.65. Written decision by arbitration.

(a) Issuing the Decision. — The arbitrator shall issue a decision in writing and signed by the arbitrator within 14 days after the completion of the arbitration hearing and shall promptly deliver a copy of the decision to each party or the party's attorneys.

(b) Limit on Damages. — The arbitrator shall not make an award of damages that exceeds a total of one million dollars ($1,000,000) for any dispute submitted to arbitration under this Article, regardless of the number of claimants or defendants that are parties to the dispute.

(c) Finding if Damages Awarded. — If the arbitrator makes an award of damages to the claimant, the arbitrator shall make a finding as to whether the injury or death was caused by the negligence of the defendant.

(d) Paying the Arbitrator. — The fees and expenses of the arbitrator shall be paid equally by the parties.

(e) Attorneys' Fees and Costs. — Each party shall bear its own attorneys' fees and costs. (2007-541, s. 1.)

§ 90-21.66. Judgment by court.

After a party to the arbitration proceeding receives notice of a decision, the party may file a motion with the court for a judgment in accordance with the decision at which time the court shall issue such a judgment unless the decision is modified, corrected, or vacated as provided in G.S. 90-21.68. (2007-541, s. 1.)

§ 90-21.67. Retention of jurisdiction by court.

The court shall retain jurisdiction over the action during the pendency of the arbitration proceeding. The court may, at the request of the arbitrator, enter orders necessary to enforce the provisions of this Article. (2007-541, s. 1.)

§ 90-21.68. Appeal of arbitrator's decision.

There is no right to a trial de novo on an appeal of the arbitrator's decision under this Article. An appeal of the arbitrator's decision is limited to the bases for appeal provided under G.S. 1-569.23 or G.S. 1-569.24. (2007-541, s. 1.)

§ 90-21.69. Revised Uniform Arbitration Act not applicable.

The provisions of Article 45C of Chapter 1 of the General Statutes do not apply to arbitrations conducted under this Article except to the extent specifically provided in this Article. (2007-541, s. 1.)

Article 2.

Dentistry.

§ 90-22. Practice of dentistry regulated in public interest; Article liberally construed; Board of Dental Examiners; composition; qualifications and terms of members; vacancies; nominations and elections; compensation; expenditures by Board.

(a) The practice of dentistry in the State of North Carolina is hereby declared to affect the public health, safety and welfare and to be subject to regulation and control in the public interest. It is further declared to be a matter of public interest and concern that the dental profession merit and receive the confidence of the public and that only qualified persons be permitted to practice dentistry in the State of North Carolina. This Article shall be liberally construed to carry out these objects and purposes.

(b) The North Carolina State Board of Dental Examiners heretofore created by Chapter 139, Public Laws 1879 and by Chapter 178, Public Laws 1915, is hereby continued as the agency of the State for the regulation of the practice of dentistry in this State. Said Board of Dental Examiners shall consist of six dentists who are licensed to practice dentistry in North Carolina, one dental hygienist who is licensed to practice dental hygiene in North Carolina and one person who shall be a citizen and resident of North Carolina and who shall be licensed to practice neither dentistry nor dental hygiene. The dental hygienist or the consumer member cannot participate or vote in any matters of the Board which involves the issuance, renewal or revocation of the license to practice dentistry in the State of North Carolina. The consumer member cannot participate or vote in any matters of the Board which involve the issuance, renewal or revocation of the license to practice dental hygiene in the State of North Carolina. Members of the Board licensed to practice dentistry in North Carolina shall have been elected in an election held as hereinafter provided in which every person licensed to practice dentistry in North Carolina and residing or practicing in North Carolina shall be entitled to vote. Each member of said Board shall be elected for a term of three years and until his successor shall be elected and shall qualify. Each year there shall be elected two dentists for such terms of three years each. Every three years there shall be elected one dental hygienist for a term of three years. Dental hygienists shall be elected to the Board in an election held in accordance with the procedures hereinafter provided in which those persons licensed to practice dental hygiene in North Carolina and residing or practicing in North Carolina shall be entitled to vote. Every three years a person who is a citizen and resident of North Carolina and licensed to practice neither dentistry nor dental hygiene shall be appointed to the Board for a term of three years by the Governor of North Carolina. Any vacancy occurring on said Board shall be filled by a majority vote of the remaining members of the Board to serve until the next regular election conducted by the Board, at which time the vacancy will be filled by the election process provided for in this Article, except that when the seat on the Board held by a person licensed to practice neither dentistry nor dental hygiene in North Carolina shall become vacant, the vacancy shall be filled by appointment by the Governor for the period of the unexpired term. No dentist shall be nominated for or elected to membership on said Board, unless, at the time of such nomination and election such person is licensed to practice dentistry in North Carolina and actually engaged in the practice of dentistry. No dental hygienist shall be nominated for or elected to membership on said Board unless, at the time of such nomination and election, such person is licensed to practice dental hygiene in North Carolina and is currently employed in dental hygiene in North Carolina. No person shall be nominated, elected, or appointed to serve more than two consecutive terms on said Board.

(c) Nominations and elections of members of the North Carolina State Board of Dental Examiners shall be as follows:

(1) An election shall be held each year to elect successors to those members whose terms are expiring in the year of the election, each successor to take office on the first day of August following the election and to hold office for a term of three years and until his successor has been elected and shall qualify; provided that if in any year the election of the members of such Board for that year shall not have been completed by August 1 of that year, then the said members elected that year shall take office immediately after the completion of the election and shall hold office until the first of August of the third year thereafter and until their successors are elected and qualified. Persons appointed to the Board by the Governor shall take office on the first day of August following their appointment and shall hold office for a term of three years and until such person's successor has been appointed and shall qualify; provided that if in any year the Governor shall not have appointed a person by August first of that year, then the said member appointed that year shall take office immediately after his appointment and shall hold office until the first of August of the third year thereafter and until such member's successor is appointed and qualified.

(2) Every dentist with a current North Carolina license residing or practicing in North Carolina shall be eligible to vote in elections of dentists to the Board. Every dental hygienist with a current North Carolina license residing or practicing in North Carolina shall be eligible to vote in elections of dental hygienists to the Board. The holding of such a license to practice dentistry or dental hygiene in North Carolina shall constitute registration to vote in such elections. The list of licensed dentists and dental hygienists shall constitute the registration list for elections to the appropriate seats on the Board.

(3) All elections shall be conducted by the Board of Dental Examiners which is hereby constituted a Board of Dental Elections. If a member of the Board of Dental Examiners whose position is to be filled at any election is nominated to succeed himself, and does not withdraw his name, he shall be disqualified to serve as a member of the Board of Dental Elections for that election and the remaining members of the Board of Dental Elections shall proceed and function without his participation.

(4) Nomination of dentists for election shall be made to the Board of Dental Elections by a written petition signed by not less than 10 dentists licensed to practice in North Carolina and residing or practicing in North Carolina. Nomination of dental hygienists for election shall be made to the Board of Dental Elections by a written petition signed by not less than 10 dental hygienists licensed to

practice in North Carolina and residing or practicing in North Carolina. Such petitions shall be filed with said Board of Dental Elections subsequent to January 1 of the year in which the election is to be held and not later than midnight of the twentieth day of May of such year, or not later than such earlier date (not before April 1) as may be set by the Board of Dental Elections: provided, that not less than 10 days' notice of such earlier date shall be given to all dentists or dental hygienists qualified to sign a petition of nomination. The Board of Dental Elections shall, before preparing ballots, notify all persons who have been duly nominated of their nomination.

(5) Any person who is nominated as provided in subdivision (4) above may withdraw his name by written notice delivered to the Board of Dental Elections or its designated secretary at any time prior to the closing of the polls in any election.

(6) Following the close of nominations, there shall be prepared, under and in accordance with such rules and regulations as the Board of Dental Elections shall prescribe, ballots containing, in alphabetical order, the names of all nominees; and each ballot shall have such method of identification, and such instructions and requirements printed thereon, as shall be prescribed by the Board of Dental Elections. At such time as may be fixed by the Board of Dental Elections a ballot and a return official envelope addressed to said Board shall be mailed to each person entitled to vote in the election being conducted, together with a notice by said Board designating the latest day and hour for return mailing and containing such other items as such Board may see fit to include. The said envelope shall bear a serial number and shall have printed on the left portion of its face the following:

"Serial No. of Envelope ______________________________
Signature of Voter ______________________________
Address of Voter ______________________________
____

(Note: The enclosed ballot is not valid unless the signature of the voter is on this envelope)."

The Board of Dental Elections may cause to be printed or stamped or written on said envelope such additional notice as it may see fit to give. No ballot shall be valid or shall be counted in an election unless, within the time hereinafter provided, it has been delivered to said Board by hand or by mail and shall be sealed. The said Board by rule may make provision for replacement of lost or destroyed envelopes or ballots upon making proper provisions to safeguard against abuse.

(7) The date and hour fixed by the Board of Dental Elections as the latest time for delivery by hand or mailing of said return ballots shall be not earlier than the tenth day following the mailing of the envelopes and ballots to the voters.

(8) The said ballots shall be canvassed by the Board of Dental Elections beginning at noon on a day and at a place set by said Board and announced by it in the notice accompanying the sending out of the ballots and envelopes, said date to be not later than four days after the date fixed by the Board for the closing of the balloting. The canvassing shall be made publicly and any licensed dentists may be present. The counting of ballots shall be conducted as follows: The envelopes shall be displayed to the persons present and an opportunity shall be given to any person present to challenge the qualification of the voter whose signature appears on the envelope or to challenge the validity of the envelope. Any envelope (with enclosed ballot) challenged shall be set

aside, and the challenge shall be heard later or at that time by said Board. After the envelopes have been so exhibited, those not challenged shall be opened and the ballots extracted therefrom, insofar as practicable without showing the marking on the ballots, and there shall be a final and complete separation of each envelope and its enclosed ballot. Thereafter each ballot shall be presented for counting, shall be displayed and, if not challenged, shall be counted. No ballot shall be valid if it is marked for more nominees than there are positions to be filled in that election: provided, that no ballot shall be rejected for any technical error unless it is impossible to determine the voter's choices or choice from the ballot. The counting of the ballots shall be continued until completed. During the counting, challenge may be made to any ballot on the grounds only of defects appearing on the face of the ballot. The said Board may decide the challenge immediately when it is made or it may put aside the ballot and determine the challenge upon the conclusion of the counting of the ballots.

(9)a. Where there is more than one nominee eligible for election to a single seat:

1. The nominee receiving a majority of the votes cast shall be declared elected.
2. In the event that no nominee receives a majority, a second election shall be conducted between the two nominees who receive the highest number of votes.

b. Where there are more than two nominees eligible for election to either of two seats at issue in the same election:

1. A majority shall be any excess of the sum ascertained by dividing the total number of votes cast for all nominees by four.
2. In the event that more than two nominees receive a majority of the votes cast, the two receiving the highest number of votes shall be declared elected.
3. In the event that only one of the nominees receives a majority, he shall be declared elected and the Board of Dental Examiners shall thereupon order a second election to be conducted between the two nominees receiving the next to highest number of votes.
4. In the event that no nominee receives a majority, a second election shall be conducted between the four candidates receiving the highest number of votes. At such second election, the two nominees receiving the highest number of votes shall be declared elected.

c. In any election, if there is a tie between candidates, the tie shall be resolved by the vote of the Board of Dental Examiners, provided that if a member of that Board is one of the candidates in the tie, he may not participate in such vote.

(10) In the event there shall be required a second election, there shall be followed the same procedure as outlined in the paragraphs above subject to the same limitations and requirements: provided, that if the second election is between four candidates, then the two receiving the highest number of votes shall be declared elected.

(11) In the case of the death or withdrawal of a candidate prior to the closing of the polls in any election, he shall be eliminated from the contest and any votes cast for him shall be disregarded. If, at any time after the closing of the period for nominations because of lack of plural or proper nominations or death, or withdrawal, or disqualification or

any other reason, there shall be (i) only two candidates for two positions, they shall be declared elected by the Board of Dental Elections, or (ii) only one candidate for one position, he shall be declared elected by the Board of Dental Elections, or (iii) no candidate for two positions, the two positions shall be filled by the Board of Dental Examiners, or (iv) no candidate for one position, the position shall be filled by the Board of Dental Examiners, or (v) one candidate for two positions, the one candidate shall be declared elected by the Board of Dental Elections and one qualified dentist shall be elected to the other position by the Board of Dental Examiners. In the event of the death or withdrawal of a candidate after election but before taking office, the position to which he was elected shall be filled by the Board of Dental Examiners. In the event of the death or resignation of a member of the Board of Dental Examiners, after taking office, his position shall be filled for the unexpired term by the Board of Dental Examiners.

(12) An official list of licensed dentists shall be kept at an office of the Board of Dental Elections and shall be open to the inspection of any person at all times. Copies may be made by any licensed dentist. As soon as the voting in any election begins a list of the licensed dentists shall be posted in such office of said Board and indication by mark or otherwise shall be made on that list to show whether a ballot-enclosing envelope has been returned.

(13) All envelopes enclosing ballots and all ballots shall be preserved and held separately by the Board of Dental Elections for a period of six months following the close of an election.

(14) From any decision of the Board of Dental Elections relative to the conduct of such elections, appeal may be taken to the courts in the manner otherwise provided by Chapter 150B of the General Statutes of North Carolina.

(15) The Board of Dental Elections is authorized to make rules and regulations relative to the conduct of these elections, provided same are not in conflict with the provisions of this section and provided that notice shall be given to all licensed dentists residing in North Carolina.

(d) For service on the Board of Dental Elections, the members of such Board shall receive the per diem compensation and expenses allowed by this Article for service as members of the Board of Dental Examiners. The Board of Dental Elections is authorized and empowered to expend from funds collected under the provisions of this Article such sum or sums as it may determine necessary in the performance of its duties as a Board of Dental Elections, said expenditures to be in addition to the authorization contained in G.S. 90-43 and to be disbursed as provided therein.

(e) The Board of Dental Elections is authorized to appoint such secretary or secretaries and/or assistant secretary or assistant secretaries to perform such functions in connection with such nominations and elections as said Board shall determine, provided that any protestant or contestant shall have the right to a hearing by said Board in connection with any challenge of a voter, or an envelope, or a ballot or the counting of an election. Said Board is authorized to designate an office or offices for the keeping of lists of registered dentists, for the issuance and the receipt of envelopes and ballots. (1935, c. 66, s. 1; 1957, c. 592, s. 1; 1961, c. 213, s. 1; 1971, c. 755, s. 1; 1973, c. 1331, s. 3; 1979, 2nd Sess., c. 1195, ss. 1-5; 1981, c. 751, ss. 1, 2; 1987, c. 827, s. 1.)

Cross References. — As to limited liability companies and their powers, see G.S. 57C-2-01 et seq.

Editor's Note. — Session Laws 2005-415, s. 3, provides: "The State licensing boards subject to G.S. 90-681 [renumbered as G.S. 90-701], as enacted by this act, and the Division of Facility Services [now the Division of Health Service Regulation] of the Department of Health and Human Services shall report to the 2006 Regular Session of the 2005 General Assembly upon its convening. The report shall indicate efforts made to apprise licensed practitioners and to evaluate licensed practitioners' and licensed health care facilities' compliance with the requirements of G.S. 90-681 [renumbered as G.S. 90-701], as enacted by this act."

CASE NOTES

Purpose of Article. — The whole purpose and tenor of this Article is to protect the public against the unprofessional, improper, unauthorized, and unqualified practice of dentistry and to secure the services of competent, trustworthy practitioners. In re Hawkins, 17 N.C. App. 378, 194 S.E.2d 540, cert. denied and appeal dismissed, 283 N.C. 393, 196 S.E.2d 275, cert. denied, 414 U.S. 1001, 94 S. Ct. 355, 38 L. Ed. 2d 237 (1973).

The Board of Dental Examiners, like all other professional licensing boards, was created to establish and enforce a uniform statewide minimum level of competency among its licensees. Dailey v. North Carolina State Bd. of Dental Exmrs., 309 N.C. 710, 309 S.E.2d 219 (1983).

Legislative Intent Regarding Composition of Board in Licensing Issues. — In determining that an orthodontist's treatment of three patients constituted negligence in the practice of dentistry within the meaning of G.S. 90-41(a)(12), the Board was authorized, under Leahy v. North Carolina Bd. of Nursing, 346 N.C. 775, 488 S.E.2d 245 (1997), to determine the appropriate standard of care for the orthodontist's treatment of his patients without expert testimony from an orthodontist because (1) like all licensed dentists, orthodontists were subject to the regulatory and disciplinary authority of the Dental Board as it was statutorily composed under G.S. 90-29(a) and G.S. 90-41(a); (2) the express exclusion of the two members of the Board who were not licensed dentists, i.e., the dental hygienist and lay members, from participating in licensing issues under G.S. 90-22(b) strongly suggested that the General Assembly gave due consideration to the competence of the Board as composed to adjudicate disciplinary matters, and, thus, did not see fit to make any special provision for disciplinary actions involving orthontists; and (3) although Leahy overruled another case to the extent that it implied the standard of care in licensing board cases must be established by expert testimony, it did not empower a licensing board to base its findings or conclusions on facts outside the record and did not excuse an agency from its statutory obligation to find substantial evidence under G.S. 150B-51(b)(5), and thus, Leahy did not undermine a licensee's right to seek meaningful judicial review of the board's decision. Watkins v. N.C. State Bd. of Dental Exam'rs, 358 N.C. 190, 593 S.E.2d 764 (2004).

The object of both granting and revoking a license is the same — to exclude the incompetent or unscrupulous from the practice of dentistry. In re Hawkins, 17 N.C. App. 378, 194 S.E.2d 540, cert. denied and appeal dismissed, 283 N.C. 393, 196 S.E.2d 275, cert. denied, 414 U.S. 1001, 94 S. Ct. 355, 38 L. Ed. 2d 237 (1973).

Board Serves Public Functions. — The Board of Dental Examiners, the Medical Care Commission (now Department of Human Resources) and the Mental Health Council are creatures of the State of North Carolina. The functions they serve are concededly public functions of the State. Hawkins v. North Carolina Dental Soc'y, 355 F.2d 718 (4th Cir. 1966).

Regulations Governing Dentists Employed at State Mental Hospital. — As a licensed dentist employed at a state mental hospital, petitioner was bound to follow both the rules and regulations of the Department of Human Resources, which regulate employees at those institutions, and the rules and regulations of the Board of Dental Examiners, which regulates the practice of all dentists practicing in North Carolina. Woodlief v. North Carolina State Bd. of Dental Exmrs., 104 N.C. App. 52, 407 S.E.2d 596 (1991).

Applied in Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs, 153 N.C. App. 527, 571 S.E.2d 52 (2002).

Cited in Best v. North Carolina State Bd. of Dental Exmrs., 108 N.C. App. 158, 423 S.E.2d 330 (1992); Armstrong v. North Carolina State Bd. of Dental Exmrs., 129 N.C. App. 153, 499 S.E.2d 462 (1998), cert. denied, 525 U.S. 1103, 119 S. Ct. 869, 142 L. Ed. 2d 770 (1999).

§ 90-23. Officers; common seal.

The North Carolina State Board of Dental Examiners shall, at each annual meeting thereof, elect one of its members president and one secretary-treasurer. The common seal which has already been adopted by said Board, pursuant to law, shall be continued as the seal of said Board. (1935, c. 66, s. 2.)

§ 90-24. Quorum; adjourned meetings.

A majority of the members of said Board shall constitute a quorum for the transaction of business and at any meeting of the Board, if a majority of the members are not present at the time and the place appointed for the meeting, those members of the Board present may adjourn from day to day until a quorum is present, and the action of the Board taken at any adjourned meeting thus had shall have the same force and effect as if had upon the day and at the hour of the meeting called and adjourned from day to day. (1935, c. 66, s. 2; 1981, c. 751, s. 3.)

§ 90-25. Records and transcripts.

The said Board shall keep a record of its transactions at all annual or special meetings and shall provide a record book in which shall be entered the names and proficiency of all persons to whom licenses may be granted under the provisions of law. The said book shall show, also, the license number and the date upon which such license was issued and shall show such other matters as in the opinion of the Board may be necessary or proper. Said book shall be deemed a book of record of said Board and a transcript of any entry therein or a certification that there is not entered therein the name, proficiency and license number or date of granting such license, certified under the hand of the secretary-treasurer, attested by the seal of the North Carolina State Board of Dental Examiners, shall be admitted as evidence in any court of this State when the same shall otherwise be competent. (1935, c. 66, s. 2.)

§ 90-26. Annual and special meetings.

The North Carolina State Board of Dental Examiners shall meet annually on the date and at the time and place as may be determined by the Board, and at such other dates, times, and places as may be determined by action of the Board or by any majority of the members thereof. Notice of the date, time, and place of the annual meeting and of the date, time, and place of any special or called meeting shall be given in writing, by registered or certified mail or personally, to each member of the Board at least 10 days prior to said meeting; provided the requirements of notice may be waived by any member of the Board. At the annual meeting or at any special or called meeting, the said Board shall have the power to conduct examination of applicants and to transact such other business as may come before it, provided that in case of a special meeting, the purpose for which said meeting is called shall be stated in the notice. (1935, c. 66, s. 3; 1961, c. 446, s. 1; 1981, c. 751, s. 4; 1995 (Reg. Sess., 1996), c. 584, s. 5.)

§ 90-27. Judicial powers; additional data for records.

The president of the North Carolina State Board of Dental Examiners, and/or the secretary-treasurer of said Board, shall have the power to administer oaths, issue subpoenas requiring the attendance of persons and the production of papers and records before said Board in any hearing, investigation or proceeding conducted by it. The sheriff or other proper official of any county of the State shall serve the process issued by said president or secretary-treasurer of said Board pursuant to its requirements and in the same manner as process issued by any court of record. The said Board shall pay for the service of all process, such fees as are provided by law for the service of like process in other cases.

Any person who shall neglect or refuse to obey any subpoena requiring him to attend and testify before said Board or to produce books, records or documents shall be guilty of a Class 1 misdemeanor.

The Board shall have the power, upon the production of any papers, records or data, to authorize certified copies thereof to be substituted in the permanent record of the matter in which such books, records or data shall have been introduced in evidence. (1935, c. 66, s. 4; 1993, c. 539, s. 616; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Applied in In re Hawkins, 17 N.C. App. 378, 194 S.E.2d 540 (1973).

§ 90-28. Bylaws and regulations; acquisition of property.

(a) The North Carolina State Board of Dental Examiners shall have the power to make necessary bylaws and regulations, not inconsistent with the provisions of this Article, regarding any matter referred to in this Article and for the purpose of facilitating the transaction of business by the Board.

(b) The Board shall have the power to acquire, hold, rent, encumber, alienate, and otherwise deal with real property in the same manner as a private person or corporation, subject only to approval of the Governor and the Council of State. Collateral pledged by the Board for an encumbrance is limited to the assets, income, and revenues of the Board. (1935, c. 66, s. 5; 2005-366, s. 3.)

CASE NOTES

Regulations Governing Dentists Employed at State Mental Hospital. — As a licensed dentist employed at a state mental hospital, petitioner was bound to follow both the rules and regulations of the Department of Human Resources, which regulate employees at those institutions, and the rules and regulations of the Board of Dental Examiners, which regulates the practice of all dentists practicing in North Carolina. Woodlief v. North Carolina State Bd. of Dental Exmrs., 104 N.C. App. 52, 407 S.E.2d 596 (1991).

§ 90-29. Necessity for license; dentistry defined; exemptions.

(a) No person shall engage in the practice of dentistry in this State, or offer or attempt to do so, unless such person is the holder of a valid license or certificate of renewal of license duly issued by the North Carolina State Board of Dental Examiners.

(b) A person shall be deemed to be practicing dentistry in this State who does, undertakes or attempts to do, or claims the ability to do any one or more of the following acts or things which, for the purposes of this Article, constitute the practice of dentistry:

(1) Diagnoses, treats, operates, or prescribes for any disease, disorder, pain, deformity, injury, deficiency, defect, or other physical condition of

the human teeth, gums, alveolar process, jaws, maxilla, mandible, or adjacent tissues or structures of the oral cavity;

(2) Removes stains, accretions or deposits from the human teeth;

(3) Extracts a human tooth or teeth;

(4) Performs any phase of any operation relative or incident to the replacement or restoration of all or a part of a human tooth or teeth with any artificial substance, material or device;

(5) Corrects the malposition or malformation of the human teeth;

(6) Administers an anesthetic of any kind in the treatment of dental or oral diseases or physical conditions, or in preparation for or incident to any operation within the oral cavity; provided, however, that this subsection shall not apply to a lawfully qualified nurse anesthetist who administers such anesthetic under the supervision and direction of a licensed dentist or physician;

(6a) Expired pursuant to Session Laws 1991, c. 678, s. 2.

(7) Takes or makes an impression of the human teeth, gums or jaws;

(8) Makes, builds, constructs, furnishes, processes, reproduces, repairs, adjusts, supplies or professionally places in the human mouth any prosthetic denture, bridge, appliance, corrective device, or other structure designed or constructed as a substitute for a natural human tooth or teeth or as an aid in the treatment of the malposition or malformation of a tooth or teeth, except to the extent the same may lawfully be performed in accordance with the provisions of G.S. 90-29.1 and 90-29.2;

(9) Uses a Roentgen or X-ray machine or device for dental treatment or diagnostic purposes, or gives interpretations or readings of dental Roentgenograms or X rays;

(10) Performs or engages in any of the clinical practices included in the curricula of recognized dental schools or colleges;

(11) Owns, manages, supervises, controls or conducts, either himself or by and through another person or other persons, any enterprise wherein any one or more of the acts or practices set forth in subdivisions (1) through (10) above are done, attempted to be done, or represented to be done;

(12) Uses, in connection with his name, any title or designation, such as "dentist," "dental surgeon," "doctor of dental surgery," "D.D.S.," "D.M.D.," or any other letters, words or descriptive matter which, in any manner, represents him as being a dentist able or qualified to do or perform any one or more of the acts or practices set forth in subdivisions (1) through (10) above;

(13) Represents to the public, by any advertisement or announcement, by or through any media, the ability or qualification to do or perform any of the acts or practices set forth in subdivisions (1) through (10) above.

(c) The following acts, practices, or operations, however, shall not constitute the unlawful practice of dentistry:

(1) Any act by a duly licensed physician or surgeon performed in the practice of his profession;

(2) The practice of dentistry, in the discharge of their official duties, by dentists in any branch of the military service of the United States or in the full-time employ of any agency of the United States;

(3) The teaching or practice of dentistry, in dental schools or colleges operated and conducted in this State and approved by the North Carolina State Board of Dental Examiners, by any person or persons licensed to practice dentistry anywhere in the United States or in any country, territory or other recognized jurisdiction until December 31, 2002. On or after January 1, 2003, all dentists previously practicing

under G.S. 90-29(c)(3) shall be granted an instructor's license upon application to the Board and payment of the required fee.

(4) The practice of dentistry in dental schools or colleges in this State approved by the North Carolina State Board of Dental Examiners by students enrolled in such schools or colleges as candidates for a doctoral degree in dentistry when such practice is performed as a part of their course of instruction and is under direct supervision of a dentist who is either duly licensed in North Carolina or qualified under subdivision (3) above as a teacher; additionally, the practice of dentistry by such students at State or county institutions with resident populations, hospitals, State or county health departments, area health education centers, nonprofit health care facilities serving low-income populations and approved by the State Health Director or his designee and approved by the Board of Dental Examiners, and State or county-owned nursing homes; subject to review and approval or disapproval by the said Board of Dental Examiners when in the opinion of the dean of such dental school or college or his designee, the students' dental education and experience are adequate therefor, and such practice is a part of the course of instruction of such students, is performed under the direct supervision of a duly licensed dentist acting as a teacher or instructor, and is without remuneration except for expenses and subsistence all as defined and permitted by the rules and regulations of said Board of Dental Examiners. Should the Board disapprove a specific program, the Board shall within 90 days inform the dean of its actions. Nothing herein shall be construed to permit the teaching of, delegation to or performance by any dental hygienist, dental assistant, or other auxiliary relative to any program of extramural rotation, of any function not heretofore permitted by the Dental Practice Act, the Dental Hygiene Act or by the rules and regulations of the Board;

(5) The temporary practice of dentistry by licensed dentists of another state or of any territory or country when the same is performed, as clinicians, at meetings of organized dental societies, associations, colleges or similar dental organizations, or when such dentists appear in emergency cases upon the specific call of a dentist duly licensed to practice in this State;

(6) The practice of dentistry by a person who is a graduate of a dental school or college approved by the North Carolina State Board of Dental Examiners and who is not licensed to practice dentistry in this State, when such person is the holder of a valid intern permit, or provisional license, issued to him by the North Carolina State Board of Dental Examiners pursuant to the terms and provisions of this Article, and when such practice of dentistry complies with the conditions of said intern permit, or provisional license;

(7) Any act or acts performed by a dental hygienist when such act or acts are lawfully performed pursuant to the authority of Article 16 of this Chapter 90 or the rules and regulations of the Board promulgated thereunder;

(8) Activity which would otherwise be considered the practice of dental hygiene performed by students enrolled in a school or college approved by the Board in a board-approved dental hygiene program under the direct supervision of a dental hygienist or a dentist duly licensed in North Carolina or qualified for the teaching of dentistry pursuant to the provisions of subdivision (3) above;

(9) Any act or acts performed by an assistant to a dentist licensed to practice in this State when said act or acts are authorized and

permitted by and performed in accordance with rules and regulations promulgated by the Board;

(10) Dental assisting and related functions as a part of their instructions by students enrolled in a course in dental assisting conducted in this State and approved by the Board, when such functions are performed under the supervision of a dentist acting as a teacher or instructor who is either duly licensed in North Carolina or qualified for the teaching of dentistry pursuant to the provisions of subdivision (3) above;

(11) The extraoral construction, manufacture, fabrication or repair of prosthetic dentures, bridges, appliances, corrective devices, or other structures designed or constructed as a substitute for a natural human tooth or teeth or as an aid in the treatment of the malposition or malformation of a tooth or teeth, by a person or entity not licensed to practice dentistry in this State, when the same is done or performed solely upon a written work order in strict compliance with the terms, provisions, conditions and requirements of G.S. 90-29.1 and 90-29.2.

(12) The use of a dental x-ray machine in the taking of dental radiographs by a dental hygienist, certified dental assistant, or a dental assistant who can show evidence of satisfactory performance on an equivalency examination, recognized by the Board of Dental Examiners, based on seven hours of instruction in the production and use of dental x rays and an educational program of not less than seven hours in clinical dental radiology.

(13) A dental assistant, or dental hygienist who shows evidence of education and training in Nitrous Oxide — Oxygen Inhalant Conscious Sedation within a formal educational program may aid and assist a licensed dentist in the administration of Nitrous Oxide — Oxygen Inhalant Conscious Sedation. Any dental assistant who can show evidence of having completed an educational program recognized by the Board of not less than seven clock hours on Nitrous Oxide — Oxygen Inhalant Conscious Sedation may also aid and assist a licensed dentist in the administration of Nitrous Oxide — Oxygen Inhalant Conscious Sedation. Any dental hygienist or dental assistant who has been employed in a dental office where Nitrous Oxide — Oxygen Inhalant Conscious Sedation was utilized, and who can show evidence of performance and instruction of not less than one year prior to July 1, 1980, qualifies to aid and assist a licensed dentist in the administration of Nitrous Oxide — Oxygen Inhalant Conscious Sedation.

(14) The operation of a nonprofit health care facility serving low-income populations and approved by the State Health Director or his designee and approved by the North Carolina State Board of Dental Examiners. (1935, c. 66, s. 6; 1953, c. 564, s. 3; 1957, c. 592, s. 2; 1961, c. 446, s. 2; 1965, c. 163, ss. 1, 2; 1971, c. 755, s. 2; 1977, c. 368; 1979, 2nd Sess., c. 1195, ss. 10, 15; 1991, c. 658, s. 1; c. 678, ss. 1, 2; 1997-481, ss. 5, 6; 2002-37, s. 8.)

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 469.

CASE NOTES

Legislature May Regulate Practice. — The legislature has constitutional authority to regulate the practice of dentistry. State v. Hicks, 143 N.C. 689, 57 S.E. 441 (1907).

Orthodontist Subject to Disciplinary Authority. — In determining that an orthodontist's treatment of three patients constituted negligence in the practice of dentistry within the meaning of G.S. 90-41(a)(12), the Board was authorized, under Leahy v. North Carolina Bd. of Nursing, 346 N.C. 775, 488 S.E.2d 245 (1997), to determine the appropriate standard of care for the orthodontist's treatment of his patients without expert testimony from an orthodontist because (1) like all licensed dentists, orthodontists were subject to the regulatory and disciplinary authority of the Dental Board as it was statutorily composed under G.S. 90-29(a) and G.S. 90-41(a); (2) the express exclusion of the two members of the Board who were not licensed dentists, i.e., the dental hygienist and lay members, from participating in licensing issues under G.S. 90-22(b) strongly suggested that the General Assembly gave due consideration to the competence of the Board as composed to adjudicate disciplinary matters, and, thus, did not see fit to make any special provision for disciplinary actions involving orthontists; and (3) although Leahy overruled another case to the extent that it implied the standard of care in licensing board cases must be established by expert testimony, it did not empower a licensing board to base its findings or conclusions on facts outside the record and did not excuse an agency from its statutory obligation to find substantial evidence under G.S. 150B-51(b)(5), and thus, Leahy did not undermine a licensee's right to seek meaningful judicial review of the board's decision. Watkins v. N.C. State Bd. of Dental Exam'rs, 358 N.C. 190, 593 S.E.2d 764 (2004).

Dental Board to Determine Nurse Qualifications. — The Dental Board was the correct agency to determine what kind of nurse qualified as a "lawfully qualified nurse" pursuant to subdivision (b)(6) of this section. Best v. North Carolina State Bd. of Dental Exmrs., 108 N.C. App. 158, 423 S.E.2d 330 (1992), cert. denied, 333 N.C. 461, 428 S.E.2d 184 (1993).

Dentists Held Not Employees of Federal Agency Within Meaning of Subdivision (c)(2). — Dentists in general practice who performed dental services under a federally financed program of the local school board that furnished dental treatment to medically indigent school children were not employees of a federal agency "in the discharge of their official duties" within the meaning of subdivision (c)(2) exempting such employees from statutory provisions regulating the practice of dentistry. In re Hawkins, 17 N.C. App. 378, 194 S.E.2d 540, cert. denied and appeal dismissed, 283 N.C. 393, 196 S.E.2d 275, cert. denied, 414 U.S. 1001, 94 S. Ct. 355, 38 L. Ed. 2d 237 (1973).

The mere want of a license does not raise any inference of negligence. If an unlicensed dentist exercises the requisite skill and care in administering treatment to a patient, he is not liable in damages for injury to the patient, merely because of his want of a license to practice dentistry. The failure to possess such license is immaterial on the question of due care. Grier v. Phillips, 230 N.C. 672, 55 S.E.2d 485 (1949).

Refusal to Treat as Negligent Practice of Dentistry. — Board of Dental Examiners was authorized to conclude that an orthodontist's refusal to treat a patient due to nonpayment was the "practice of dentistry" under G.S. 90-29(b) and substantial evidence supported its finding that the refusal to treat breached a duty to the patient and thus constituted negligence in the practice of dentistry under G.S. 90-41(a)(12). Watkins v. N.C. State Bd. of Dental Exam'rs, 358 N.C. 190, 593 S.E.2d 764 (2004).

Applied in Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs, 153 N.C. App. 527, 571 S.E.2d 52 (2002).

Cited in American Dental Servs., Inc. v. Fulp, 61 N.C. App. 592, 301 S.E.2d 121 (1983); In re DeLancy, 67 N.C. App. 647, 313 S.E.2d 880 (1984); Uicker v. North Carolina State Bd. of Dental Exmrs., 93 N.C. 295, 378 S.E.2d 45 (1989); Woodlief v. North Carolina State Bd. of Dental Exmrs., 104 N.C. App. 52, 407 S.E.2d 596 (1991); State v. Clemmons, 111 N.C. App. 569, 433 S.E.2d 748 (1993).

OPINIONS OF ATTORNEY GENERAL

Regulation by Board of Dental Laboratory Engaged in Acts Described in Subsection (b). — The Board of Dental Examiners may not regulate a dental laboratory engaging in the acts described in subsection (b) so long as the laboratory is following the advertising and work order procedures established in §§ 90-29.1 and 90-29.2. Opinion of Attorney General to Rep. W. S. Harris, 46 N.C.A.G. 203 (1977).

Provision of Services to Dental Practice Based on Revenues of Practice or Dentist Prohibited. — An arrangement whereby a business entity provides services to a dental practice constitutes the unlawful practice of dentistry if payment to the business entity under such arrangement is based in whole or in part on the revenues of the dental practice or one or more individual dentists. See opinion of Attorney General to Stanley L. Fleming, D.D.S., President, Delma H. Kinlaw, D.D.S., Secretary/Treasurer, and Christine Lockwood, Executive Director, N.C. State Board of Dental Examiners, 1999 N.C. AG LEXIS 32 (9/3/99).

§ 90-29.1. Extraoral services performed for dentists.

Licensed dentists may employ or engage the services of any person, firm or corporation to construct or repair, extraorally, prosthetic dentures, bridges, or other replacements for a part of a tooth, a tooth, or teeth. A person, firm, or corporation so employed or engaged, when constructing or repairing such dentures, bridges, or replacements, exclusively, directly, and solely on the written work order of a licensed member of the dental profession as hereafter provided, and not for the public or any part thereof, shall not be deemed or considered to be practicing dentistry as defined in this Article. (1957, c. 592, s. 3; 1961, c. 446, ss. 3, 4; 1979, 2nd Sess., c. 1195, s. 6.)

§ 90-29.2. Requirements in respect to written work orders; penalty.

(a) Any licensed dentist who employs or engages the services of any person, firm or corporation to construct or repair, extraorally, prosthetic dentures, bridges, orthodontic appliance, or other replacements, for a part of a tooth, a tooth or teeth, shall furnish such person, firm or corporation with a written work order on forms prescribed by the North Carolina State Board of Dental Examiners which shall contain:

(1) The name and address of the person, firm, or corporation to which the work order is directed.
(2) The patient's name or identification number. If a number is used, the patient's name shall be written upon the duplicate copy of the work order retained by the dentist.
(3) The date on which the work order was written.
(4) A description of the work to be done, including diagrams if necessary.
(5) A specification of the type and quality of materials to be used.
(6) The signature of the dentist and the number of his license to practice dentistry.

(b) The person, firm or corporation receiving a work order from a licensed dentist shall retain the original work order and the dentist shall retain a duplicate copy thereof for inspection at any reasonable time by the North Carolina State Board of Dental Examiners or its duly authorized agents, for a period of two years in both cases.

(c) If the person, firm or corporation receiving a written work order from a licensed dentist engages another person, firm or corporation (hereinafter referred to as "subcontractor") to perform some of the services relative to such work order, he or it shall furnish a written subwork order with respect thereto on forms prescribed by the North Carolina State Board of Dental Examiners which shall contain:

(1) The name and address of the subcontractor.
(2) A number identifying the subwork order with the original work order, which number shall be endorsed on the work order received from the licensed dentist.
(3) The date on which the subwork order was written.
(4) A description of the work to be done by the subcontractor, including diagrams if necessary.
(5) A specification of the type and quality of materials to be used.
(6) The signature of the person, firm or corporation issuing the subwork order.

The subcontractor shall retain the subwork order and the issuer thereof shall retain a duplicate copy, attached to the work order received from the licensed dentist, for inspection by the North Carolina State Board of Dental Examiners or its duly authorized agents, for a period of two years in both cases.

(d) Any licensed dentist who:

(1) Employs or engages the services of any person, firm or corporation to construct or repair extraorally, prosthetic dentures, bridges, or other dental appliances without first providing such person, firm, or corporation with a written work order; or

(2) Fails to retain a duplicate copy of the work order for two years; or

(3) Refuses to allow the North Carolina State Board of Dental Examiners to inspect his files of work orders

is guilty of a Class 1 misdemeanor and the North Carolina State Board of Dental Examiners may revoke or suspend his license therefor.

(e) Any such person, firm, or corporation, who:

(1) Furnishes such services to any licensed dentist without first obtaining a written work order therefor from such dentist; or

(2) Acting as a subcontractor as described in (c) above, furnishes such services to any person, firm or corporation, without first obtaining a written subwork order from such person, firm or corporation; or

(3) Fails to retain the original work order or subwork order, as the case may be, for two years; or

(4) Refuses to allow the North Carolina State Board of Dental Examiners or its duly authorized agents, to inspect his or its files of work orders or subwork orders shall be guilty of a Class 1 misdemeanor. (1961, c. 446, s. 5; 1993, c. 539, ss. 617, 618; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 90-29.3. Provisional license.

(a) The North Carolina State Board of Dental Examiners shall, subject to its rules and regulations, issue a provisional license to practice dentistry to any person who is licensed to practice dentistry anywhere in the United States or in any country, territory or other recognized jurisdiction, if the Board shall determine that said licensing jurisdiction imposed upon said person requirements for licensure no less exacting than those imposed by this State. A provisional licensee may engage in the practice of dentistry only in strict accordance with the terms, conditions and limitations of his license and with the rules and regulations of the Board pertaining to provisional license.

(b) A provisional license shall be valid until the date of the announcement of the results of the next succeeding Board examination of candidates for licensure to practice dentistry in this State, unless the same shall be earlier revoked or suspended by the Board.

(c) No person who has failed an examination conducted by the North Carolina State Board of Dental Examiners shall be eligible to receive a provisional license.

(d) Any person desiring to secure a provisional license shall make application therefor in the manner and form prescribed by the rules and regulations of the Board and shall pay the fee prescribed in G.S. 90-39 of this Article.

(e) A provisional licensee shall be subject to those various disciplinary measures and penalties set forth in G.S. 90-41 upon a determination of the Board that said provisional licensee has violated any of the terms or provisions of this Article. (1969, c. 804, s. 1.)

§ 90-29.4. Intern permit.

The North Carolina State Board of Dental Examiners may, in the exercise of the discretion of said Board, issue to a person who is not licensed to practice dentistry in this State and who is a graduate of a dental school, college, or institution approved by said Board, an intern permit authorizing such person to practice dentistry under the supervision or direction of a dentist duly licensed to practice in this State, subject to the following particular conditions:

(1) An intern permit shall be valid for no more than one year from the date the permit was issued. The Board may, in its discretion, renew the permit for not more than five additional one-year periods. However, no person who has attempted and failed a Board-approved written or clinical examination shall be granted an intern permit or intern permits embracing or covering an aggregate time span of more than 72 calendar months. An intern permit holder who has held an unrestricted dental license in a Board-approved state or jurisdiction for the five years immediately preceding the issuance of an intern permit in this State may, in the Board's discretion, have the intern permit renewed for additional one-year periods beyond 72 months if the intern permit holder's approved employing institution comes before the Board on the permit holder's behalf for each subsequent annual renewal;

(2) The holder of a valid intern permit may practice dentistry only under the supervision or direction of one or more dentists duly licensed to practice in this State;

(3) The holder of a valid intern permit may practice dentistry only (i) as an employee in a hospital, sanatorium, or a like institution which is licensed or approved by the State of North Carolina and approved by the North Carolina State Board of Dental Examiners; (ii) as an employee of a nonprofit health care facility serving low-income populations and approved by the State Health Director or his designee and approved by the North Carolina State Board of Dental Examiners; or (iii) as an employee of the State of North Carolina or an agency or political subdivision thereof, or any other governmental entity within the State of North Carolina, when said employment is approved by the North Carolina State Board of Dental Examiners;

(4) The holder of a valid intern permit shall receive no fee or fees or compensation of any kind or nature for dental services rendered by him other than such salary or compensation as might be paid to him by the entity specified in subdivision (3) above wherein or for which said services are rendered;

(5) The holder of a valid intern permit shall not, during the term of said permit or any renewal thereof, change the place of his internship without first securing the written approval of the North Carolina State Board of Dental Examiners;

(6) The practice of dentistry by the holder of a valid intern permit shall be strictly limited to the confines of and to the registered patients of the hospital, sanatorium or institution to which he is attached or to the persons officially served by the governmental entity by whom he is employed;

(7) Any person seeking an intern permit shall first file with the North Carolina State Board of Dental Examiners such papers and documents as are required by said Board, together with the application fee authorized by G.S. 90-39. A fee authorized by G.S. 90-39 shall be paid for any renewal of said intern permit. Such person shall further supply to the Board such other documents, materials or information as the Board may request;

(8) Any person seeking an intern permit or who is the holder of a valid intern permit shall comply with such limitations as the North Carolina State Board of Dental Examiners may place or cause to be placed, in writing, upon such permit, and shall comply with such rules and regulations as the Board might promulgate relative to the issuance and maintenance of said permit in the practice of dentistry relative to the same;

(9) The holder of an intern permit shall be subject to the provisions of G.S. 90-41. (1971, c. 755, s. 3; 1997-481, s. 7; 2002-37, s. 10; 2006-41, s. 1.)

Effect of Amendments. — Session Laws 2006-41, s. 1, effective June 29, 2006, rewrote subdivision (1).

§ 90-29.5. Instructor's license.

(a) The Board may issue an instructor's license to a person who is not otherwise licensed to practice dentistry in this State if the person meets both of the following conditions:

(1) Is licensed to practice dentistry anywhere in the United States or in any country, territory, or other recognized jurisdiction.

(2) Has met or been approved under the credentialing standards of a dental school or an academic medical center with which the person is to be affiliated; such dental school or academic medical center shall be accredited by the American Dental Association's Commission on Accreditation or the Joint Commission on Accreditation of Health Care Organizations.

(b) The holder of an instructor's license may teach and practice dentistry:

(1) In or on behalf of a dental school or college offering a doctoral degree in dentistry operated and conducted in this State and approved by the North Carolina State Board of Dental Examiners;

(2) In connection with an academic medical center; and

(3) At any teaching hospital adjacent to a dental school or an academic medical center.

(c) Application for an instructor's license shall be made in accordance with the rules of the North Carolina State Board of Dental Examiners. On or after January 1, 2003, all dentists previously practicing under G.S. 90-29(c)(3) shall be granted an instructor's license upon application to the Board and payment of the required fee. The holder of an instructor's license shall be subject to the provisions of this Article. (1979, 2nd Sess., c. 1195, s. 11; 2002-37, s. 7.)

§ 90-30. Examination and licensing of applicants; qualifications; causes for refusal to grant license; void licenses.

(a) The North Carolina State Board of Dental Examiners shall grant licenses to practice dentistry to such applicants who are graduates of a reputable dental institution, who, in the opinion of a majority of the Board, shall undergo a satisfactory examination of proficiency in the knowledge and practice of dentistry, subject, however, to the further provisions of this section and of the provisions of this Article.

The applicant for a license to practice dentistry shall be of good moral character, at least 18 years of age at the time the application is filed. The application for a dental license shall be made to the Board in writing and shall be accompanied by evidence satisfactory to the Board that the applicant is a person of good moral character, has an academic education, the standard of which shall be determined by the Board; that the applicant is a graduate of and has a diploma from a reputable dental college or the dental department of a reputable university or college recognized, accredited and approved as such by the Board; and that the applicant has passed a clinical licensing examination, the standard of which shall be determined by the Board.

The North Carolina State Board of Dental Examiners is authorized to conduct both written or oral and clinical examinations or to accept the results of other Board-approved regional or national independent third-party clinical examinations that shall include procedures performed on human subjects as part of the assessment of restorative clinical competencies and that are determined by the Board to be of such character as to thoroughly test the qualifications of the applicant, and may refuse to grant a license to any person who, in its discretion, is found deficient in the examination. The Board may refuse to grant a license to any person guilty of cheating, deception or fraud during the examination, or whose examination discloses to the satisfaction of the Board, a deficiency in academic or clinical education. The Board may employ such dentists found qualified therefor by the Board, in examining applicants for licenses as it deems appropriate.

The North Carolina State Board of Dental Examiners may refuse to grant a license to any person guilty of a crime involving moral turpitude, or gross immorality, or to any person addicted to the use of alcoholic liquors or narcotic drugs to such an extent as, in the opinion of the Board, renders the applicant unfit to practice dentistry.

Any license obtained through fraud or by any false representation shall be void ab initio and of no effect.

(b) The Department of Justice may provide a criminal record check to the North Carolina State Board of Dental Examiners for a person who has applied for a license through the Board. The Board shall provide to the Department of Justice, along with the request, the fingerprints of the applicant, any additional information required by the Department of Justice, and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The Board shall keep all information pursuant to this subsection privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this subsection. (1935, c. 66, s. 7; 1971, c. 755, s. 4; 1981, c. 751, s. 5; 2002-147, s. 7; 2005-366, s. 1.)

CASE NOTES

Mandamus to Procure License. — Under former G.S. 6631 of the Consolidated Statutes it was held that the courts could not by a mandamus compel the Board of Dental Examiners to certify contrary to what they had declared to be true. If the Board refused to examine an applicant, upon his compliance with the regulations, the court could by mandamus compel them to examine him, but not to issue him a certificate, when the preliminary qualification required by law, that the applicant should be found proficient and competent by the Examining Board, was lacking. Burton v. Furman, 115 N.C. 166, 20 S.E. 443 (1894); Loughran v. City of Hickory, 129 N.C. 281, 40 S.E. 46 (1901); Ewbank v. Turner, 134 N.C. 77, 46 S.E. 508 (1903).

§ 90-30.1. Standards for general anesthesia and enteral and parenteral sedation; fees authorized.

The North Carolina Board of Dental Examiners may establish by regulation reasonable education, training, and equipment standards for safe administration and monitoring of general anesthesia and enteral and parenteral sedation for outpatients in the dental setting. Regulatory standards may include a permit process for general anesthesia and enteral and parenteral sedation by dentists. The requirements of any permit process adopted under the authority of this section shall include provisions that will allow a dentist to qualify for continued use of enteral sedation, if he or she is licensed to practice dentistry in North Carolina and shows the Board that he or she has been utilizing enteral sedation in a competent manner for the five years preceding January 1, 2002, and his or her office facilities pass an on-site examination and inspection by qualified representatives of the Board. For purposes of this section, oral premedication administered for minimal sedation (anxiolysis) shall not be included in the definition of enteral sedation. In order to provide the means of regulating general anesthesia and enteral and parenteral sedation, including examination and inspection of dental offices involved, the Board may charge and collect fees established by its rules for each permit application, each annual permit renewal, and each office inspection in an amount not to exceed the maximum fee amounts set forth in G.S. 90-39. (1987 (Reg. Sess., 1988), c. 1073; 1989, c. 648; 1989 (Reg. Sess., 1990), c. 1066, s. 12(a); 1995 (Reg. Sess., 1996), c. 584, s. 2; 2001-511, s. 1.)

§ 90-31. Annual renewal of licenses.

The laws of North Carolina now in force, having provided for the annual renewal of any license issued by the North Carolina State Board of Dental Examiners, it is hereby declared to be the policy of this State, that all licenses heretofore issued by the North Carolina State Board of Dental Examiners or hereafter issued by said Board are subject to annual renewal and the exercise of any privilege granted by any license heretofore issued or hereafter issued by the North Carolina State Board of Dental Examiners is subject to the issuance on or before the first day of January of each year of a certificate of renewal of license.

On or before the first day of January of each year, each dentist engaged in the practice of dentistry in North Carolina shall make application to the North Carolina State Board of Dental Examiners and receive from said Board, subject to the further provisions of this section and of this Article, a certificate of renewal of said license.

The application shall show the serial number of the applicant's license, his full name, address and the county in which he has practiced during the preceding year, the date of the original issuance of license to said applicant and such other information as the said Board from time to time may prescribe, at least six months prior to January 1 of any year.

If the application for such renewal certificate, accompanied by the fee required by this Article, is not received by the Board before January 31 of each year, an additional fee shall be charged for renewal certificate. The maximum penalty fee for late renewal is set forth in G.S. 90-39. If such application, accompanied by the renewal fee, plus the additional fee, is not received by the Board before March 31 of each year, every person thereafter continuing to practice dentistry without having applied for a certificate of renewal shall be guilty of the unauthorized practice of dentistry and shall be subject to the penalties prescribed by G.S. 90-40. (1935, c. 66, s. 8; 1953, c. 564, s. 5; 1961, c. 446, s. 6; 1971, c. 755, s. 5; 1995 (Reg. Sess., 1996), c. 584, s. 3.)

§ 90-31.1. Continuing education courses required.

All dentists licensed under G.S. 90-30 shall be required to attend Board-approved courses of study in subjects relating to dentistry. The Board shall have authority to consider and approve courses, or providers of courses, to the end that those attending will gain (i) information on existing and new methods and procedures used by dentists, (ii) information leading to increased safety and competence in their dealings with patients and staff, and (iii) information on other matters, as they develop, that are of continuing importance to the practice of dentistry. The Board shall determine the number of hours of study within a particular period and the nature of course work required. The Board may provide exemptions or waivers from continuing education requirements where dentists are receiving alternate learning experiences or where they have limited practices. The Board shall by regulation define circumstances for exemptions or waivers for dentists who are involved in dental education or training pursuits where they gain experiences equivalent to formal continuing education courses, for those who have reached an advanced age and are semiretired or have otherwise voluntarily restricted their practices in volume and scope, and for such other situations as the Board in its discretion may determine meet the purposes of this section. (1993, c. 307, s. 1.)

§ 90-32. Contents of original license.

The original license granted by the North Carolina State Board of Dental Examiners shall bear a serial number, the full name of the applicant, the date of issuance and shall be signed by the president and the majority of the members of the said Board and attested by the seal of said Board and the secretary thereof. The certificate of renewal of license shall bear a serial number which need not be the serial number of the original license issued, the full name of the applicant and the date of issuance. (1935, c. 66, s. 8.)

§ 90-33. Displaying license and current certificate of renewal.

The license and the current certificate of renewal of license to practice dentistry issued, as herein provided, shall at all times be displayed in a conspicuous place in the office of the holder thereof and whenever requested the license and the current certificate of renewal shall be exhibited to or produced before the North Carolina State Board of Dental Examiners or to its authorized agents. (1935, c. 66, s. 8.)

§ 90-34. Refusal to grant renewal of license.

For nonpayment of fee or fees required by this Article, for failure to comply with continuing education requirements adopted by the Board under the authority of G.S. 90-31.1, or for violation of any of the terms or provisions of G.S. 90-41 concerning disciplinary actions, the North Carolina State Board of Dental Examiners may refuse to issue a certificate for renewal of license. As used in this section, the term “license” includes license, provisional license or intern permit. (1935, c. 66, s. 8; 1971, c. 755, s. 6; 1993, c. 307, s. 2.)

§ 90-35. Duplicate licenses.

When a person is a holder of a license to practice dentistry in North Carolina or the holder of a certificate of renewal of license, he may make application to the North Carolina State Board of Dental Examiners for the issuance of a copy or a duplicate thereof accompanied by a fee that shall not exceed the maximum fee for a duplicate license or certificate set forth in G.S. 90-39. Upon the filing of the application and the payment of the fee, the said Board shall issue a copy or duplicate. (1935, c. 66, s. 8; 1961, c. 446, s. 7; 1995 (Reg. Sess., 1996), c. 584, s. 4.)

§ 90-36. Licensing practitioners of other states.

(a) The North Carolina State Board of Dental Examiners may issue a license by credentials to an applicant who has been licensed to practice dentistry in any state or territory of the United States if the applicant produces satisfactory evidence to the Board that the applicant has the required education, training, and qualifications, is in good standing with the licensing jurisdiction, has passed satisfactory examinations of proficiency in the knowledge and practice of dentistry as determined by the Board, and meets all other requirements of this section and rules adopted by the Board. The Board may conduct examinations and interviews to test the qualifications of the applicant and may require additional information that would affect the applicant's ability to render competent dental care. The Board may, in its discretion, refuse to issue a license by credentials to an applicant who the Board determines is unfit to practice dentistry.

(b) The applicant for licensure by credentials shall be of good moral character and shall have graduated from and have a DDS or DMD degree from a program of dentistry in a school or college accredited by the Commission on Dental Accreditation of the American Dental Association and approved by the Board.

(c) The applicant must meet all of the following conditions:

(1) Has been actively practicing dentistry, as defined in G.S. 90-29(b)(1) through (b)(9), for a minimum of five years immediately preceding the date of application.

(2) Has not been the subject of final or pending disciplinary action in the military, in any state or territory in which the applicant is or has ever been licensed to practice dentistry, or in any state or territory in which the applicant has held any other professional license.

(3) Presents evidence that the applicant has no felony convictions and that the applicant has no other criminal convictions that would affect the applicant's ability to render competent dental care.

(4) Has not failed an examination conducted by the North Carolina State Board of Dental Examiners.

(d) The applicant for licensure by credentials shall submit an application to the North Carolina State Board of Dental Examiners, the form of which shall be determined by the Board, pay the fee required by G.S. 90-39, successfully complete examinations in Jurisprudence and Sterilization and Infection Control, and meet the criteria or requirements established by the Board.

(e) The holder of a license issued under this section shall establish a practice location and actively practice dentistry, as defined in G.S. 90-29(b) (1) through (b) (9), in North Carolina within one year from the date the license is issued. The license issued under this section shall be void upon a finding by the Board that the licensee fails to limit the licensee's practice to North Carolina or that the licensee no longer actively practices dentistry in North Carolina. (1935, c. 66, s. 9; 1971, c. 755, s. 7; 1981, c. 751, s. 6; 2002-37, s. 2.)

Cross References. — As to licensure by credentials, generally, see G.S. 90-224.1.

§ 90-37. Certificate issued to dentist moving out of State.

Any dentist duly licensed by the North Carolina State Board of Dental Examiners, desiring to move from North Carolina to another state, territory or foreign country, if a holder of a certificate of renewal of license from said Board, upon application to said Board and the payment to it of the fee in this Article provided, shall be issued a certificate showing his full name and address, the date of license originally issued to him, the date and number of his renewal of license, and whether any charges have been filed with the Board against him. The Board may provide forms for such certificate, requiring such additional information as it may determine proper. (1935, c. 66, s. 10.)

§ 90-37.1. Limited volunteer dental license.

(a) The North Carolina State Board of Dental Examiners may issue to an applicant a "Limited Volunteer Dental License" to practice dentistry only in nonprofit health care facilities serving low-income populations in the State. Holders of a limited volunteer dental license may volunteer their professional services, without compensation, only for the purpose of helping to meet the dental health needs of these persons served by these facilities. The Board may issue a limited license to an applicant under this section who:

(1) Has an out-of-state current or expired license, or an expired license in this State, or is authorized to treat veterans or personnel enlisted in the United States armed services; and

(2) Has actively practiced dentistry, as defined in G.S. 90-29(b)(1) through (b)(9), within the past five years.

(b) The limited license may be issued to an applicant who produces satisfactory evidence to the Board that the applicant has the required education, training, and qualifications; is in good standing with the licensing jurisdiction; has passed satisfactory examinations of proficiency in the knowledge and practice of dentistry as determined by the Board; and meets all other requirements of this section and rules adopted by the Board. The Board may conduct examinations and interviews to test the qualifications of the applicant and may require additional information that would affect the applicant's ability to render competent dental care. The Board may, in its discretion, refuse to issue a "limited volunteer dental license" to an applicant who the Board determines is unfit to practice dentistry.

(c) The applicant shall be of good moral character and shall have graduated from and have a DDS or DMD degree from a program of dentistry in a school or college accredited by the Commission on Dental Accreditation of the American Dental Association and approved by the Board.

(d) The applicant shall meet all of the following conditions:

(1) Show that the applicant has actively practiced dentistry, as defined in G.S. 90-29(b)(1) through (b)(9), for a minimum of five years.

(2) Show that the applicant has not been the subject of final or pending disciplinary action in any state in which the applicant has ever been licensed to practice dentistry or in any state in which the applicant has held any other professional license.

(3) Present evidence that the applicant has no felony convictions and that the applicant has no other criminal convictions that would affect the applicant's ability to render competent care.

(4) Present evidence that the applicant has no pending Veterans Administration or military disciplinary actions or any history of such disciplinary action.

(5) Show that the applicant has not failed an examination conducted by the North Carolina State Board of Dental Examiners.

(e) The applicant shall submit an application, the form of which shall be determined by the Board, pay the fee required under G.S. 90-39, and successfully complete examinations in Jurisprudence and Sterilization and Infection Control. The Board may charge and collect fees for license application and annual renewal as required under G.S. 90-39, except that credentialing fees applicable under G.S. 90-39(13) are waived for holders of a limited volunteer dental license.

(f) Holders of a limited volunteer dental license shall comply with the continuing dental education requirements adopted by the Board including CPR training.

(g) The holder of a limited license under this section who practices dentistry other than as authorized in this section shall be guilty of a Class 1 misdemeanor with each day's violation constituting a separate offense. Upon proof of practice other than as authorized in this section, the Board may suspend or revoke the limited license after notice to the licensee. For violations of the dental practice act or rules adopted under the act that are applicable to a limited license practice, the Board has the same authority to investigate and impose sanctions on limited license holders as it has for those holding an unlimited license.

(h) The Board shall maintain a nonexclusive list of nonprofit health care facilities serving the dental health needs of low-income populations in the State. Upon request, the Board shall consider adding other facilities to the list.

(i) The Board may adopt rules in accordance with Chapter 150B of the General Statutes to implement this section. (2002-37, s. 4.)

Cross References. — As to dental providers for problem access areas, see G.S. 130A-367.

§ 90-37.2. Temporary permits for volunteer dentists.

(a) The North Carolina State Board of Dental Examiners may issue to a person who is not licensed to practice dentistry in this State and who is a graduate of a Board-approved dental school, college, or institution a temporary volunteer permit authorizing such person to practice dentistry under the supervision or direction of a dentist duly licensed in this State. A temporary volunteer permit shall be issued only to those dentists who are licensed in another Board-approved state or jurisdiction, have never been subject to discipline, and have passed a patient-based clinical examination substantially similar to the clinical examination offered in this State. The issuance of a temporary volunteer permit is subject to the following conditions:

(1) A temporary volunteer permit shall be valid no more than one year from the date of issue; provided, however, that the Board may renew the permit for additional one-year periods.

(2) The holder of a temporary volunteer permit may practice only under the supervision or direction of one or more dentists duly licensed to practice in this State.

(3) The holder of a temporary volunteer permit may practice dentistry only: (i) as a volunteer in a hospital, sanatorium, temporary clinic, or like institution which is licensed or approved by the State of North Carolina and approved by the Board; (ii) as a volunteer for a nonprofit health care facility serving low-income populations and approved by the State Health Director or his designee or approved by the Board; or (iii) as a volunteer for the State of North Carolina or an agency or political subdivision thereof, or any other governmental entity within the State of North Carolina, when such service is approved by the Board.

(4) The holder of a temporary volunteer permit shall receive no fee or monetary compensation of any kind or nature for any dental service performed.

(5) The practice of dentistry by the holder of a temporary volunteer permit shall be strictly limited to the confines of and to the registered patients of the hospital, sanatorium, temporary clinic, or approved nonprofit health care facilities for which he is working or to the patients officially served by the governmental entity to which he is offering his volunteer services.

(6) The holder of a temporary volunteer permit shall be subject to discipline by the Board for those actions constituting the practice of dentistry by G.S. 90-29 occurring while practicing in this State.

(7) Any person seeking a temporary volunteer permit must file with the Board such proof as is required by the Board to determine if the applicant has a valid unrestricted dental license in another state or jurisdiction, has not been subject to discipline by any licensing board, has a proven record of clinical safety and is otherwise qualified to practice dentistry in this State.

(8) There shall be no fee associated with the issuance of a temporary volunteer permit for the practice of dentistry.

(b) The Board is authorized to make rules consistent with this section to regulate the practice of dentistry for those issued a temporary volunteer permit. (2007-346, s. 27.)

Editor's Note. — Session Laws 2007-346, s. 28, made this section effective October 1, 2007.

§ 90-38. Licensing former dentists who have moved back into State or resumed practice.

Any person who shall have been licensed by the North Carolina State Board of Dental Examiners to practice dentistry in this State who shall have retired from practice or who shall have moved from the State and shall have returned to the State, may, upon a satisfactory showing to said Board of his proficiency in the profession of dentistry and his good moral character during the period of his retirement, be granted by said Board a license to resume the practice of dentistry upon making application to the said Board in such form as it may require. The license to resume practice, after issuance thereof, shall be subject to all the provisions of this Article. (1935, c. 66, s. 11; 1953, c. 564, s. 2.)

CASE NOTES

This section is constitutional and valid as an exercise of the police power of the State for the good and welfare of the people. Allen v. Carr, 210 N.C. 513, 187 S.E. 809 (1936).

And its provisions bear alike upon all classes of persons referred to. Hence the requirement made by the Board that the plaintiff make to it a satisfactory showing of his proficiency in the profession of dentistry is no discrimination against the plaintiff. Allen v. Carr, 210 N.C. 513, 187 S.E. 809 (1936).

Mandamus will not lie to control the decision of the Board in the exercise of its discretionary power under this section, the extent of mandamus in such cases being limited to compelling the exercise of the discretionary power, but not controlling the decision reached in its exercise. Allen v. Carr, 210 N.C. 513, 187 S.E. 809 (1936).

Licensed Dentist Removing from State Must Take Second Examination upon Return. — A dentist licensed by the State Board of Dental Examiners, who thereafter moves from this State and practices his profession successively in other states, upon examination and license by them, and then returns to this State, must obtain a license to resume practice here by passing a second examination by the State Board of Dental Examiners, although such dentist has continuously practiced dentistry since he was first licensed by the State Board. Allen v. Carr, 210 N.C. 513, 187 S.E. 809 (1936).

§ 90-39. Fees.

In order to provide the means of carrying out and enforcing the provisions of this Article and the duties devolving upon the North Carolina State Board of Dental Examiners, it is authorized to charge and collect fees established by its rules not exceeding the following:

(1) Each application for general dentistry license $1,200

(2) Each general dentistry license renewal, which fee shall be annually fixed by the Board and not later than November 30 of each year it shall give written notice of the amount of the renewal fee to each

dentist licensed to practice in this State by mailing such notice to the last address of record with the Board of each such dentist	600.00
(2a) Penalty for late renewal of any license or permit	100.00
(3) Each provisional license	300.00
(4) Each intern permit or renewal thereof	500.00
(5) Each certificate of license to a resident dentist desiring to change to another state or territory	75.00
(6) Repealed by Session Laws 1995, (Reg. Sess., 1996), c. 584, s. 1.	
(7) Each license to resume the practice issued to a dentist who has retired from and returned to this State	500.00
(8) Each instructor's license or renewal thereof	500.00
(9) With each renewal of a dentistry license, an annual fee to help fund special peer review organizations for impaired dentists	100.00
(10) Each duplicate of any license, permit, or certificate issued by the Board	75.00
(11) Each office inspection for general anesthesia and parenteral sedation permits	750.00
(12) Each general anesthesia and parenteral sedation permit application or renewal of permit	100.00
(13) Each application for license by credentials	3,000.00
(14) Each application for limited volunteer dental license	200.00
(15) Each limited volunteer dental license annual renewal	50.00.

(1935, c. 66, s. 12; 1953, c. 564, s. 1; 1961, c. 446, s. 8; 1965, c. 163, s. 3; 1971, c. 755, s. 8; 1979, 2nd Sess., c. 1195, s. 12; 1987, c. 555, s. 1; 1993, c. 420, s. 1; 1995 (Reg. Sess., 1996), c. 584, s. 1; 2002-37, s. 5; 2003-348, s. 1; 2005-366, s. 2.)

§ 90-40. Unauthorized practice; penalty.

If any person shall practice or attempt to practice dentistry in this State without first having passed the examination and obtained a license from the North Carolina Board of Dental Examiners or having obtained a provisional license from said Board; or if he shall practice dentistry after March 31 of each year without applying for a certificate of renewal of license, as provided in G.S. 90-31; or shall practice or attempt to practice dentistry while his license is revoked, or suspended, or when a certificate of renewal of license has been refused; or shall violate any of the provisions of this Article for which no specific penalty has been provided; or shall practice or attempt to practice, dentistry in violation of the provisions of this Article; or shall practice dentistry under any name other than his own name, said person shall be guilty of a Class 1 misdemeanor. Each day's violation of this Article shall constitute a separate offense. (1935, c. 66, s. 13; 1953, c. 564, s. 6; 1957, c. 592, s. 4; 1965, c. 163, s. 6; 1969, c. 804, s. 2; 1993, c. 539, s. 619; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Conviction Held Proper. — The legislature has constitutional authority to regulate the practice of dentistry, and a conviction for violating former law of similar import was held proper. State v. Hicks, 143 N.C. 689, 57 S.E. 441 (1907).

Applied in Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs, 153 N.C. App. 527, 571 S.E.2d 52 (2002).

Cited in Grier v. Phillips, 230 N.C. 672, 55 S.E.2d 485 (1949); State v. Page, 32 N.C. App. 478, 232 S.E.2d 460 (1977).

§ 90-40.1. Enjoining unlawful acts.

(a) The practice of dentistry by any person who has not been duly licensed so as to practice or whose license has been suspended or revoked, or the doing, committing or continuing of any of the acts prohibited by this Article by any person or persons, whether licensed dentists or not, is hereby declared to be inimical to public health and welfare and to constitute a public nuisance. The Attorney General for the State of North Carolina, the district attorney of any of the superior courts, the North Carolina State Board of Dental Examiners in its own name, or any resident citizen may maintain an action in the name of the State of North Carolina to perpetually enjoin any person from so unlawfully practicing dentistry and from the doing, committing or continuing of such unlawful act. This proceeding shall be in addition to and not in lieu of criminal prosecutions or proceedings to revoke or suspend licenses as authorized by this Article.

(b) In an action brought under this section the final judgment, if in favor of the plaintiff, shall perpetually restrain the defendant or defendants from the commission or continuance of the act or acts complained of. A temporary injunction to restrain the commission or continuance thereof may be granted upon proof or by affidavit that the defendant or defendants have violated any of the laws or statutes applicable to unauthorized or unlawful practice of dentistry. The provisions of the statutes or rules relating generally to injunctions as provisional remedies in actions shall apply to such a temporary injunction and the proceedings thereunder.

(c) The venue for actions brought under this section shall be the superior court of any county in which such acts constituting unlicensed or unlawful practice of dentistry are alleged to have been committed or in which there appear reasonable grounds to believe that they will be committed or in the county where the defendants in such action reside.

(d) The plaintiff in such action shall be entitled to examination of the adverse party and witnesses before filing complaint and before trial in the same manner as provided by law for the examination of the parties. (1957, c. 592, s. 5; 1973, c. 47, s. 2.)

§ 90-41. Disciplinary action.

(a) The North Carolina State Board of Dental Examiners shall have the power and authority to (i) Refuse to issue a license to practice dentistry; (ii) Refuse to issue a certificate of renewal of a license to practice dentistry; (iii) Revoke or suspend a license to practice dentistry; and (iv) Invoke such other disciplinary measures, censure, or probative terms against a licensee as it deems fit and proper;

in any instance or instances in which the Board is satisfied that such applicant or licensee:

(1) Has engaged in any act or acts of fraud, deceit or misrepresentation in obtaining or attempting to obtain a license or the renewal thereof;
(2) Is a chronic or persistent user of intoxicants, drugs or narcotics to the extent that the same impairs his ability to practice dentistry;
(3) Has been convicted of any of the criminal provisions of this Article or has entered a plea of guilty or nolo contendere to any charge or charges arising therefrom;
(4) Has been convicted of or entered a plea of guilty or nolo contendere to any felony charge or to any misdemeanor charge involving moral turpitude;
(5) Has been convicted of or entered a plea of guilty or nolo contendere to any charge of violation of any state or federal narcotic or barbiturate law;
(6) Has engaged in any act or practice violative of any of the provisions of this Article or violative of any of the rules and regulations promulgated and adopted by the Board, or has aided, abetted or assisted any other person or entity in the violation of the same;

(7) Is mentally, emotionally, or physically unfit to practice dentistry or is afflicted with such a physical or mental disability as to be deemed dangerous to the health and welfare of his patients. An adjudication of mental incompetency in a court of competent jurisdiction or a determination thereof by other lawful means shall be conclusive proof of unfitness to practice dentistry unless or until such person shall have been subsequently lawfully declared to be mentally competent;

(8) Has conducted in-person solicitation of professional patronage or has employed or procured any person to conduct such solicitation by personal contact with potential patients, except to the extent that informal advice may be permitted by regulations issued by the Board of Dental Examiners;

(9) Has permitted the use of his name, diploma or license by another person either in the illegal practice of dentistry or in attempting to fraudulently obtain a license to practice dentistry;

(10) Has engaged in such immoral conduct as to discredit the dental profession;

(11) Has obtained or collected or attempted to obtain or collect any fee through fraud, misrepresentation, or deceit;

(12) Has been negligent in the practice of dentistry;

(13) Has employed a person not licensed in this State to do or perform any act or service, or has aided, abetted or assisted any such unlicensed person to do or perform any act or service which under this Article or under Article 16 of this Chapter, can lawfully be done or performed only by a dentist or a dental hygienist licensed in this State;

(14) Is incompetent in the practice of dentistry;

(15) Has practiced any fraud, deceit or misrepresentation upon the public or upon any individual in an effort to acquire or retain any patient or patients;

(16) Has made fraudulent or misleading statements pertaining to his skill, knowledge, or method of treatment or practice;

(17) Has committed any fraudulent or misleading acts in the practice of dentistry;

(18) Has, directly or indirectly, published or caused to be published or disseminated any advertisement for professional patronage or business which is untruthful, fraudulent, misleading, or in any way inconsistent with rules and regulations issued by the Board of Dental Examiners governing the time, place, or manner of such advertisements;

(19) Has, in the practice of dentistry, committed an act or acts constituting malpractice;

(20) Repealed by Session Laws 1981, c. 751, s. 7.

(21) Has permitted a dental hygienist or a dental assistant in his employ or under his supervision to do or perform any act or acts violative of this Article, or of Article 16 of this Chapter, or of the rules and regulations promulgated by the Board;

(22) Has wrongfully or fraudulently or falsely held himself out to be or represented himself to be qualified as a specialist in any branch of dentistry;

(23) Has persistently maintained, in the practice of dentistry, unsanitary offices, practices, or techniques;

(24) Is a menace to the public health by reason of having a serious communicable disease;

(25) Has distributed or caused to be distributed any intoxicant, drug or narcotic for any other than a lawful purpose; or

(26) Has engaged in any unprofessional conduct as the same may be, from time to time, defined by the rules and regulations of the Board.

(b) If any person engages in or attempts to engage in the practice of dentistry while his license is suspended, his license to practice dentistry in the State of North Carolina may be permanently revoked.

(c) The Board may, on its own motion, initiate the appropriate legal proceedings against any person, firm or corporation when it is made to appear to the Board that such person, firm or corporation has violated any of the provisions of this Article or of Article 16.

(d) The Board may appoint, employ or retain an investigator or investigators for the purpose of examining or inquiring into any practices committed in this State that might violate any of the provisions of this Article or of Article 16 or any of the rules and regulations promulgated by the Board.

(e) The Board may employ or retain legal counsel for such matters and purposes as may seem fit and proper to said Board.

(f) As used in this section the term "licensee" includes licensees, provisional licensees and holders of intern permits, and the term "license" includes license, provisional license, instructor's license, and intern permit.

(g) Records, papers, and other documents containing information collected or compiled by the Board, or its members or employees, as a result of investigations, inquiries, or interviews conducted in connection with a licensing or disciplinary matter, shall not be considered public records within the meaning of Chapter 132 of the General Statutes; provided, however, that any notice or statement of charges against any licensee, or any notice to any licensee of a hearing in any proceeding, shall be a public record within the meaning of Chapter 132 of the General Statutes, notwithstanding that it may contain information collected and compiled as a result of any investigation, inquiry, or interview; and provided, further, that if any record, paper, or other document containing information collected and compiled by the Board is received and admitted into evidence in any hearing before the Board, it shall then be a public record within the meaning of Chapter 132 of the General Statutes. (1935, c. 66, s. 14; 1957, c. 592, s. 7; 1965, c. 163, s. 4; 1967, c. 451, s. 1; 1971, c. 755, s. 9; 1979, 2nd Sess., c. 1195, ss. 7, 8; 1981, c. 751, s. 7; 1989, c. 442; 1997-456, s. 27; 2002-37, s. 9.)

Legal Periodicals. — For a note on advertising by health care professionals, see 2 Campbell L. Rev. 173 (1980).

For comment, "You Can't Always Get What You Want: A Look at North Carolina's Public Records Law," see 72 N.C.L. Rev. 1527 (1994).

CASE NOTES

Former Statute Constitutional. — See In re Hawkins, 17 N.C. App. 378, 194 S.E.2d 540, cert. denied and appeal dismissed, 283 N.C. 393, 196 S.E.2d 275, cert. denied, 414 U.S. 1001, 94 S. Ct. 355, 38 L. Ed. 2d 237 (1973), decided under this section as it existed prior to 1971 amendment.

Imposition of Sanctions Not Unconstitutional. — The imposition of sanctions against a dentist for violating the provision of subdivision (a)(13) against hiring dentists unlicensed in North Carolina did not violate N.C. Const., Art. 1, § 19 or federal due process. Armstrong v. North Carolina State Bd. of Dental Exmrs., 129 N.C. App. 153, 499 S.E.2d 462 (1998), cert. denied, 525 U.S. 1103, 119 S. Ct. 869, 142 L. Ed. 2d 770 (1999).

Standard of Practice. — The Dental Practice Act is silent as to the standard of practice by which a dentist's negligence or incompetence is to be measured. In considering the regulatory, licensing and disciplinary functions of the Board, a statewide standard must be applied. That is, prior to invoking disciplinary measures as authorized under subsection (a) of this section, the Board must first be satisfied that the care provided by the licensee was not in accordance with the standards of practice among members of the dentistry profession situated throughout this State at the time of the alleged violation. Dailey v. North Carolina State Bd. of Dental Exmrs., 309 N.C. 710, 309 S.E.2d 219 (1983).

The decision of whether an applicant or licensee has violated any of the factors enumerated in this section authorizing disciplinary action must be viewed in the context of a uniform statewide standard. Dailey v. North

Carolina State Bd. of Dental Exmrs., 309 N.C. 710, 309 S.E.2d 219 (1983).

In determining that an orthodontist's treatment of three patients constituted negligence in the practice of dentistry within the meaning of G.S. 90-41(a)(12), the Board was authorized, under Leahy v. North Carolina Bd. of Nursing, 346 N.C. 775, 488 S.E.2d 245 (1997), to determine the appropriate standard of care for the orthodontist's treatment of his patients without expert testimony from an orthodontist because (1) like all licensed dentists, orthodontists were subject to the regulatory and disciplinary authority of the Dental Board as it was statutorily composed under G.S. 90-29(a) and G.S. 90-41(a); (2) the express exclusion of the two members of the Board who were not licensed dentists, i.e., the dental hygienist and lay members, from participating in licensing issues under G.S. 90-22(b) strongly suggested that the General Assembly gave due consideration to the competence of the Board as composed to adjudicate disciplinary matters, and, thus, did not see fit to make any special provision for disciplinary actions involving orthontists; and (3) although Leahy overruled another case to the extent that it implied the standard of care in licensing board cases must be established by expert testimony, it did not empower a licensing board to base its findings or conclusions on facts outside the record and did not excuse an agency from its statutory obligation to find substantial evidence under G.S. 150B-51(b)(5), and thus, Leahy did not undermine a licensee's right to seek meaningful judicial review of the board's decision. Watkins v. N.C. State Bd. of Dental Exam'rs, 358 N.C. 190, 593 S.E.2d 764 (2004).

Standard of Care Under G.S. 90-21.12 Is Inapplicable. — While G.S. 90.21.12 establishes a standard of care below which a health care provider may be held civilly liable in damages, this section and G.S. 90-21.12 serve different purposes. Admittedly the violations for which a dentist may be subject to discipline include acts of "malpractice." However, this language was not intended to incorporate a standard applicable in actions for damages "for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of . . . dental . . . care." In fact, this section was first enacted in 1935, long before the 1975 enactment of G.S. 90-21.12. Therefore, the standard of health care enunciated under G.S. 90-21.12 is inapplicable to a professional licensing board disciplinary hearing. Dailey v. North Carolina State Bd. of Dental Exmrs., 309 N.C. 710, 309 S.E.2d 219 (1983).

Rescheduling Patients Not Negligent Practice. — Orthodontist's decision to reschedule a patient because the patient had not paid what was owed on the patient's account did not involve the practice of dentistry, and the North Carolina State Board of Dental Examiners erred by finding that the orthodontist was negligent in the practice of dentistry, in violation of G.S. 90-41(a)(12), and suspending the orthodontist's dental license on that basis. Watkins v. N.C. State Bd. of Dental Exam'rs, 157 N.C. App. 367, 579 S.E.2d 510, 2003 N.C. App. LEXIS 746 (2003).

Refusal to Treat as Negligent Practice of Dentistry. — Board of Dental Examiners was authorized to conclude that an orthodontist's refusal to treat a patient due to nonpayment was the "practice of dentistry" under G.S. 90-29(b) and substantial evidence supported its finding that the refusal to treat breached a duty to the patient and thus constituted negligence in the practice of dentistry under G.S. 90-41(a)(12). Watkins v. N.C. State Bd. of Dental Exam'rs, 358 N.C. 190, 593 S.E.2d 764 (2004).

Untimely Treatment and Tracking of Progress as Breach of Standard of Care. — Substantial evidence under G.S. 150B-2(8b) supported the Board of Dental Examiner's findings that (1) an orthodontist's treatment of a patient was untimely and that such untimeliness was a breach of the requisite standard of care for dentists under G.S. 90-41; and (2) the orthodontist's treatment of another patient was likewise negligent because the Board could reasonably have concluded that the standard of care required the use of photographs as a means to track the progress of orthodontic case. Watkins v. N.C. State Bd. of Dental Exam'rs, 358 N.C. 190, 593 S.E.2d 764 (2004).

Failure to Discover Oral Cancer. — Where expert opinion indicated that dentist should have observed oral cancer in patient and that dentist should have referred the patient for further diagnosis and treatment, substantial evidence supported the State Board of Dental Examiner's findings that the dentist was negligent and was liable for malpractice under subdivisions (a)(12) and (a)(19), respectively. Uicker v. North Carolina State Bd. of Dental Exmrs., 93 N.C. App. 295, 378 S.E.2d 45 (1989).

Dentist's administering of nitrous oxide sedation to a female patient while no one else was present in the office constituted negligence in the practice of dentistry. McCollough v. North Carolina State Bd. of Dental Exmrs., 111 N.C. App. 186, 431 S.E.2d 816, cert. denied, 335 N.C. 174, 436 S.E.2d 381 (1993).

Employment of Unlicensed Personnel. — Findings and conclusions concerning doctor's use and employment of unlicensed personnel to practice dentistry were supported by substantial evidence; each of the assistants involved took dental x-rays and placed and adjusted dentures in the patient's mouth, and since these activities are deemed to be the practice of dentistry, and each practiced dentistry without a license while under doctor's supervision, such practice was a violation of subdivisions (a)(6), (a)(13) and (a)(21). Uicker v. North Carolina State Bd. of Dental Exmrs., 93 N.C. 295, 378 S.E.2d 45 (1989).

Dentist Employed at State Mental Hospital. — As a licensed dentist employed at a state mental hospital, petitioner was bound to follow both the rules and regulations of the Department of Human Resources, which regulate employees at those institutions, and the rules and regulations of the Board of Dental Examiners, which regulates the practice of all dentists practicing in North Carolina. Woodlief v. North Carolina State Bd. of Dental Exmrs., 104 N.C. App. 52, 407 S.E.2d 596 (1991).

The Board is not a court and is not expected to know and observe the technicalities that trained attorneys and judges would demonstrate. North Carolina State Bd. of Dental Exmrs. v. Grady, 268 N.C. 541, 151 S.E.2d 25 (1966).

And Specific Findings of Fact Are Not Required. — Specific findings of fact, with minute details as to particulars, time and place entered in written form, are not required by this section. North Carolina State Bd. of Dental Exmrs. v. Grady, 268 N.C. 541, 151 S.E.2d 25 (1966).

Finding of Mens Rea Not Required. — This section did not require a finding as to a dentist's culpable mental state to sanction him for hiring a dentist unlicensed in North Carolina to practice in his office. Armstrong v. North Carolina State Bd. of Dental Exmrs., 129 N.C. App. 153, 499 S.E.2d 462 (1998), cert. denied, 525 U.S. 1103, 119 S. Ct. 869, 142 L. Ed. 2d 770 (1999).

On appeal to the superior court from order of the Board of Dental Examiners suspending the license of a dentist, the superior court should hear the accused in like manner as a consent reference, and the court should weigh the evidence and make its own independent determinations of the matters in dispute. North Carolina State Bd. of Dental Exmrs. v. Grady, 268 N.C. 541, 151 S.E.2d 25 (1966).

Board is not authorized to enter its final agency decision upon remand without the benefit of additional expert testimony that the care provided by the respondent was not in accordance with the standards of practice among members of the dentistry profession situated throughout the State at the time of the alleged violations. Dailey v. North Carolina State Bd. of Dental Exmrs., 309 N.C. 710, 309 S.E.2d 219 (1983).

As to advertising under former law, see In re Owen, 207 N.C. 445, 177 S.E. 403 (1934).

Applied in Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs, 153 N.C. App. 527, 571 S.E.2d 52 (2002).

Cited in Glover v. North Carolina, 301 F. Supp. 364 (E.D.N.C. 1969); State v. Page, 32 N.C. App. 478, 232 S.E.2d 460 (1977); Cameron v. North Carolina State Bd. of Dental Exmrs., 95 N.C. App. 332, 382 S.E.2d 864 (1989).

§ 90-41.1. Hearings.

(a) With the exception of applicants for license by comity and applicants for reinstatement after revocation, every licensee, provisional licensee, intern, or applicant for license, shall be afforded notice and opportunity to be heard before the North Carolina State Board of Dental Examiners shall take any action, the effect of which would be:

(1) To deny permission to take an examination for licensing for which application has been duly made; or
(2) To deny a license after examination for any cause other than failure to pass an examination; or
(3) To withhold the renewal of a license for any cause other than failure to pay a statutory renewal fee; or
(4) To suspend a license; or
(5) To revoke a license; or
(6) To revoke or suspend a provisional license or an intern permit; or
(7) To invoke any other disciplinary measures, censure, or probative terms against a licensee, a provisional licensee, or an intern,

such proceedings to be conducted in accordance with the provisions of Chapter 150B of the General Statutes of North Carolina.

(b) In lieu of or as a part of such hearing and subsequent proceedings, the Board is authorized and empowered to enter any consent order relative to the discipline, censure, or probation of a licensee, provisional licensee, an intern, or an applicant for a license, or relative to the revocation or suspension of a license, provisional license, or intern permit.

(c) Following the service of the notice of hearing as required by Chapter 150B of the General Statutes, the Board and the person upon whom such notice is served shall have the right to conduct adverse examinations, take depositions, and engage in such further discovery proceedings as are permitted by the laws of this State in civil matters. The Board is hereby authorized and empowered to issue such orders, commissions, notices, subpoenas, or other process as might be necessary or proper to effect the purposes of this subsection; provided, however, that no member of the Board shall be subject to examination hereunder. (1967, c. 451, s. 2; 1969, c. 804, s. 3; 1971, c. 755, s. 10; 1973, c. 1331, s. 3; 1987, c. 827, s. 1.)

§ 90-42. Restoration of revoked license.

Whenever any dentist has been deprived of his license, the North Carolina State Board of Dental Examiners, in its discretion, may restore said license upon due notice being given and hearing had, and satisfactory evidence produced of proper reformation of the licentiate, before restoration. (1935, c. 66, s. 14.)

§ 90-43. Compensation and expenses of Board.

Notwithstanding G.S. 93B-5(a), each member of the North Carolina State Board of Dental Examiners shall receive as compensation for his services in the performance of his duties under this Article a sum not exceeding one hundred dollars ($100.00) for each day actually engaged in the performance of the duties of his office, said per diem to be fixed by said Board, and all legitimate and necessary expenses incurred in attending meetings of the said Board.

The Board is authorized and empowered to expend from funds collected hereunder such additional sum or sums as it may determine necessary in the administration and enforcement of this Article, and employ such personnel as it may deem requisite to assist in carrying out the administrative functions required by this Article and by the Board. (1935, c. 66, s. 15; 1965, c. 163, s. 5; 1971, c. 755, s. 11; 1979, 2nd Sess., c. 1195, s. 9; 1989 (Reg. Sess., 1990), c. 892.)

§ 90-44. Annual report of Board.

Said Board shall, on or before the fifteenth day of February in each year, make an annual report as of the thirty-first day of December of the year preceding, of its proceedings, showing therein the examinations given, the fees received, the expenses incurred, the hearings conducted and the result thereof, which said report shall be filed with the Governor of the State of North Carolina. (1935, c. 66, s. 15.)

§ 90-45: Repealed by Session Laws 1967, c. 218, s. 4.

§ 90-46. Filling prescriptions.

Legally licensed druggists of this State may fill prescriptions of dentists duly licensed by the North Carolina State Board of Dental Examiners. (1935, c. 66, s. 17.)

§ 90-47: Repealed by Session Laws 1979, 2nd Sess., c. 1195, s. 13.

§ 90-48. Rules and regulations of Board; violation a misdemeanor.

The North Carolina State Board of Dental Examiners shall be and is hereby vested, as an agency of the State, with full power and authority to enact rules and regulations governing the practice of dentistry within the State, provided such rules and regulations are not inconsistent with the provisions of this Article. Such rules and regulations shall become effective 30 days after passage, and the same may be proven, as evidence, by the president and/or the secretary-treasurer of the Board, and/or by certified copy under the hand and official seal of the secretary-treasurer. A certified copy of any rule or regulation shall be receivable in all courts as prima facie evidence thereof if otherwise competent, and any person, firm, or corporation violating any such rule, regulation, or bylaw shall be guilty of a Class 2 misdemeanor, and each day that this section is violated shall be considered a separate offense.

The Board shall issue every two years to each licensed dentist a compilation or supplement of the Dental Practice Act and the Board rules and regulations, and upon written request therefor by such licensed dentist, a directory of dentists. (1935, c. 66, s. 19; 1957, c. 592, s. 6; 1971, c. 755, s. 12; 1993, c. 539, s. 620; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Applied in Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs, 153 N.C. App. 527, 571 S.E.2d 52 (2002).

Cited in Sharpe v. Worland, 137 N.C. App. 82, 527 S.E.2d 75 (2000).

§ 90-48.1. Free choice by patient guaranteed.

No agency of the State, county or municipality, nor any commission or clinic, nor any board administering relief, social security, health insurance or health service under the laws of the State of North Carolina shall deny to the recipients or beneficiaries of their aid or services the freedom to choose a duly licensed dentist as the provider of care or services which are within the scope of practice of the profession of dentistry as defined in this Chapter. (1965, c. 1169, s. 3.)

§ 90-48.2. Board agreements with special peer review organizations for impaired dentists.

(a) The State Board of Dental Examiners may, under rules adopted by the Board in compliance with Chapter 150B of the General Statutes, enter into agreements with special impaired dentist peer review organizations formed by the North Carolina Dental Society. The organizations shall be made up of Dental Society members designated by the Society, the Board, and the Dental School of the University of North Carolina. Peer review activities to be covered by such agreements shall include investigation, review and evaluation of records, reports, complaints, litigation, and other information about the practices and practice patterns of dentists licensed by the Board, as such matters may relate to impaired dentists. Special impaired dentist peer review organizations may include a statewide supervisory committee and various regional and local components or subgroups. The statewide supervisory committee shall consist of representatives from the North Carolina Dental Society, the UNC School of Dentistry, and the Board. When the statewide supervisory committee considers activities and programs that relate to impaired dental hygienists pursuant to G.S. 90-48.3, its membership shall be expanded to include two dental hygienists appointed upon the recommendation of the dental hygienist member of the Board.

(b) Agreements authorized under this section shall include provisions for the impaired dentist peer review organizations to receive relevant information from the Board and other sources, conduct any investigation, review, and evaluation in an expeditious manner, provide assurance of confidentiality of nonpublic information and of the peer review process, make reports of investigations and evaluations to the Board, and to do other related activities for operating and promoting a coordinated and effective peer review process. The agreements shall include provisions assuring basic due process for dentists that become involved.

(c) The impaired dentist peer review organizations that enter into agreements with the Board shall establish and maintain a program for impaired dentists licensed by the Board for the purpose of identifying, reviewing and evaluating the ability of those dentists to function as dentists, and to provide programs for treatment and rehabilitation. The Board may provide funds for the administration of these impaired dentist peer review programs. The Board shall adopt rules to apply to the operation of impaired dentist peer review programs, with provisions for: definitions of impairment; guidelines for program elements; procedures for receipt and use of information of suspected impairment; procedures for intervention and referral; arrangements for monitoring treatment, rehabilitation, posttreatment support and performance; reports of individual cases to the Board; periodic reporting of statistical information; and assurance of confidentiality of nonpublic information and of the peer review process.

(d) Upon investigation and review of a dentist licensed by the Board, or upon receipt of a complaint or other information, an impaired dentist peer review organization that enters into a peer review agreement with the Board shall report immediately to the Board detailed information about any dentist licensed by the Board, if:

(1) The dentist constitutes an imminent danger to the public or himself;
(2) The dentist refuses to cooperate with the program, refuses to submit to treatment, or is still impaired after treatment and exhibits professional incompetence; or
(3) It reasonably appears that there are other grounds for disciplinary action.

(e) Impaired dentist peer review organizations operating pursuant to this section shall have the same protections and responsibilities as traditional State and local dental society peer review committees under Article 2A of this Chapter. In addition, any confidential patient information and other nonpublic information acquired, created, or used in good faith by an impaired dentist peer review organization pursuant to this section shall remain confidential and shall not be subject to discovery or subpoena in a civil case. No person participating in good faith in an impaired dentist peer review program developed under this section shall be required in a civil case to disclose any information (including opinions, recommendations, or evaluations) acquired or developed solely in the course of participating in the program.

(f) Impaired dentist peer review activities conducted in good faith pursuant to any program developed under this section shall not be grounds for civil action under the laws of this State, and the activities are deemed to be State directed and sanctioned and shall constitute "State action" for the purposes of application of antitrust laws. (1993, c. 420, s. 2; 1999-382, s. 4.)

CASE NOTES

Cited in Sharpe v. Worland, 137 N.C. App. 82, 527 S.E.2d 75 (2000).

§ 90-48.3. Board authority to include impaired dental hygienists in programs developed for impaired dentists.

The Board may enter into agreements with special impaired dentist peer review organizations to include programs for impaired dental hygienists, and the provisions of G.S. 90-48.2 shall apply to any such agreements and programs. Special impaired dentist peer review organizations shall have the authority to appoint to the organizations, upon the recommendation of the dental hygienist member of the Board, one additional member who is a licensed dental hygienist and the member shall participate in activities and programs as they relate to impaired dental hygienists. Peer liaisons and volunteers participating in programs for impaired dental hygienists shall be dental hygienists. Dental hygienists who work with special impaired dentist peer review organizations in conducting programs for impaired dental hygienists shall have the same protections and responsibilities as members of traditional State and local dental society peer review committees under Article 2A of this Chapter and as provided in G.S. 90-48.2. The provisions of G.S. 90-48.2 regarding confidentiality shall also be applicable to all dental hygienist activities authorized under this section. (1999-382, s. 1.)

§§ 90-48.4 through 90-48.6: Reserved for future codification purposes.

Article 2A.

Dental Peer Review Protection Act.

§ 90-48.7. Title.

General Statutes 90-48.7 through G.S. 90-48.11 may be cited as the "Dental Peer Review Protection Act." (1979, 2nd Sess., c. 1192, s. 1.)

§ 90-48.8. Immunity of a member.

No member of a dental peer review committee of a State or local dental society shall be held liable in damages to any person for any action taken or recommendation made within the scope of the functions of that committee, except with regard to Medicare and Medicaid charges or payments if the committee member acts without malice and in reasonable belief that the action or recommendation was warranted by the facts known to him after reasonable effort to obtain the facts of the matter as to which the action was taken or recommendation was made. (1979, 2nd Sess., c. 1192, s. 1.)

CASE NOTES

Applied in Pangburn v. Saad, 73 N.C. App. 336, 326 S.E.2d 365 (1985).

§ 90-48.9. Immunity of witnesses before dental peer review committee.

Notwithstanding any other provision of law, no person providing information to any dental peer review committee or organization shall be held, by reason of having provided such information, to have violated any criminal law, or to be civilly liable under any law unless:

(1) The information is unrelated to the performance of the duty or function of the peer review committee or organization, or
(2) The information is false, and the person providing the information knew, or had good reason to believe that the information was false. (1979, 2nd Sess., c. 1192, s. 1.)

§ 90-48.10. Confidentiality of review organization's proceedings and records.

The proceedings and records of a dental review committee except those concerning the investigation and consideration of Medicare and Medicaid charges or payments, shall be held in confidence and shall not be subject to discovery or introduction into evidence in any civil action arising out of the matters which are the subject of evaluation and review by the committee; and no person who was in attendance at a meeting of the committee shall be permitted or required to testify in any civil action as to any evidence or other matters produced or presented during the proceedings of the committee or as to any findings, recommendations, evaluations, opinions, or other actions of the committee or any members thereof, except with regard to Medicare and Medicaid charges or payments: Provided, however, that information, documents or records otherwise available from original sources are not to be construed as immune from discovery or use in any civil action merely because they were presented during proceedings of a committee, nor should any person who testifies before a committee or who is a member of a committee be prevented from testifying as to matters within his knowledge, but the witness shall not be asked about his testimony before a committee or opinions formed by him as a result of the committee hearings, except with regard to Medicare and Medicaid charges or payments. (1979, 2nd Sess., c. 1192, s. 1.)

CASE NOTES

Cited in Sharpe v. Worland, 137 N.C. App. 82, 527 S.E.2d 75 (2000).

§ 90-48.11. No limitation on previous privileges and immunities.

Nothing in this G.S. 90-48.7 through G.S. 90-48.11 shall be deemed to annul, abridge, or limit in any manner any privileges or immunities heretofore existing under the laws of this State. (1979, 2nd Sess., c. 1192, s. 1.)

Article 3.

The Licensing of Mouth Hygienists to Teach and Practice Mouth Hygiene in Public Institutions.

§§ 90-49 through 90-52: Repealed by Session Laws 1945, c. 639, s. 14.

Cross References. — As to dental hygiene, see G.S. 90-221 through 90-233.1.

Article 4.

Pharmacy.

Part 1. Practice of Pharmacy.

§§ 90-53 through 90-75: Recodified as §§ 90-85.2 to 90-85.26, 90-85.32 to 90-85.40.

Editor's Note. — Part 1 of this Article was rewritten by Session Laws 1981 (Reg. Sess., 1982), c. 1188, effective July 1, 1982, and has been recodified, along with certain sections from Part 1A of this Article, as Article 4A, G.S. 90-85.2 through 90-85.40.

§ 90-76: Repealed by Session Laws 1979, c. 1017, s. 1.

Cross References. — For present provisions as to substitution of equivalent product for drug prescribed by brand name, see G.S. 90-85.28.

Part 1A. Drug Product Selection.

§§ 90-76.1 through 90-76.5: Recodified as G.S. 90-85.27 to 90-85.31 pursuant to Session Laws 1981 (Regular Session, 1982), c. 1188, s. 3.

§ 90-76.6: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1188, s. 4.

Part 2. Dealing in Specific Drugs Regulated.

§§ 90-77 through 90-80.1: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1188, s. 5.

§§ 90-81 through 90-85: Repealed by Session Laws 1955, c. 1330, s. 8.

§ 90-85.1: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1188, s. 5.

Article 4A.

North Carolina Pharmacy Practice Act.

§ 90-85.2. Legislative findings.

The General Assembly of North Carolina finds that mandatory licensure of all who engage in the practice of pharmacy is necessary to insure minimum standards of competency and to protect the public from those who might otherwise present a danger to the public health, safety and welfare. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

Editor's Note. — This Article is Part 1 of Article 4 of this Chapter as rewritten by Session Laws 1981 (Reg. Sess., 1982), c. 1188, effective July 1, 1982. G.S. 90-76.1 through 90-76.5 from Part 1A of Article 4 were transferred and renumbered by s. 3 of the same 1981 (Reg. Sess., 1982) act, and are incorporated in this Article and recodified as G.S. 90-85.27 through 90-85.31. Where appropriate, the historical citations to the sections in former Part 1 of Article 4 have been added to corresponding sections in this Article.

Session Laws 2005-276, s. 10.59B, provides: "Of the funds appropriated in this act to the Department of Health and Human Services, Division of Public Health, the sum of three hundred thousand dollars ($300,000) for the 2005-2006 fiscal year shall be used to develop a pilot program for the recruitment of minority students into pharmacy schools. The pilot program shall include all pharmacy schools willing to participate as well as community colleges with equipment and incentives for students that might be pharmacy school candidates. The Department shall report on the progress of the pilot program to the House of Representatives Appropriations Subcommittee on Health and Human Services, the Senate Appropriations Committee on Health and Human Services, and the Fiscal Research Division not later than March 1, 2006."

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

CASE NOTES

Authority of the Board. — Because the North Carolina Pharmacy Practice Act, G.S. 90-85.2 et seq. aims to insure minimum standards of competency and to protect the public, the State Board of Pharmacy had authority to discipline a pharmacy for the conduct of one of its licensed pharmacists. Sunscript Pharm. Corp. v. N.C. Bd. of Pharm., 147 N.C. App. 446, 555 S.E.2d 629, 2001 N.C. App. LEXIS 1172 (2001), cert. denied, 355 N.C. 292, 561 S.E.2d 506 (2002).

§ 90-85.3. Definitions.

(a) "Administer" means the direct application of a drug to the body of a patient by injection, inhalation, ingestion or other means.

(b) "Board" means the North Carolina Board of Pharmacy.

(b1) "Clinical pharmacist practitioner" means a licensed pharmacist who meets the guidelines and criteria for such title established by the joint subcommittee of the North Carolina Medical Board and the North Carolina Board of Pharmacy and is authorized to enter into drug therapy management agreements with physicians in accordance with the provisions of G.S. 90-18.4.

(c) "Compounding" means taking two or more ingredients and combining them into a dosage form of a drug, exclusive of compounding by a drug manufacturer, distributor, or packer.

(d) "Deliver" means the actual, constructive or attempted transfer of a drug, a device, or medical equipment from one person to another.

(e) "Device" means an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent or other similar or related article including any component part or accessory, whose label or labeling bears the statement "Caution: federal law requires dispensing by or on the order of a physician." The term does not include:

(1) Devices used in the normal course of treating patients by health care facilities and agencies licensed under Chapter 131E or Article 2 of Chapter 122C of the General Statutes;

(2) Devices used or provided in the treatment of patients by medical doctors, dentists, physical therapists, occupational therapists, speech pathologists, optometrists, chiropractors, podiatrists, and nurses li-

censed under Chapter 90 of the General Statutes, provided they do not dispense devices used to administer or dispense drugs.

(f) "Dispense" means preparing and packaging a prescription drug or device in a container and labeling the container with information required by State and federal law. Filling or refilling drug containers with prescription drugs for subsequent use by a patient is "dispensing". Providing quantities of unit dose prescription drugs for subsequent administration is "dispensing".

(g) "Drug" means:

(1) Any article recognized as a drug in the United States Pharmacopeia, or in any other drug compendium or any supplement thereto, or an article recognized as a drug by the United States Food and Drug Administration;

(2) Any article, other than food or devices, intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man or other animals;

(3) Any article, other than food or devices, intended to affect the structure or any function of the body of man or other animals; and

(4) Any article intended for use as a component of any articles specified in clause (1), (2) or (3) of this subsection.

(h) "Emancipated minor" means any person under the age of 18 who is or has been married or who is or has been a parent; or whose parents or guardians have surrendered their rights to the minor's services and earnings as well as their right to custody and control of the minor's person; or who has been emancipated by an appropriate court order.

(i) "Health care provider" means any licensed health care professional; any agent or employee of any health care institution, health care insurer, health care professional school; or a member of any allied health profession.

(j) "Label" means a display of written, printed or graphic matter upon the immediate or outside container of any drug.

(k) "Labeling" means preparing and affixing a label to any drug container, exclusive of labeling by a manufacturer, packer or distributor of a nonprescription drug or a commercially packaged prescription drug or device.

(*l*) "License" means a license to practice pharmacy including a renewal license issued by the Board.

(*l*1) "Medical equipment" means any of the following items that are intended for use by the consumer in the consumer's place of residence:

(1) A device.
(2) Ambulation assistance equipment.
(3) Mobility equipment.
(4) Rehabilitation seating.
(5) Oxygen and respiratory care equipment.
(6) Rehabilitation environmental control equipment.
(7) Diagnostic equipment.
(8) A bed prescribed by a physician to treat or alleviate a medical condition.

The term "medical equipment" does not include (i) medical equipment used or dispensed in the normal course of treating patients by or on behalf of home care agencies, hospitals, and nursing facilities licensed under Chapter 131E of the General Statutes or hospitals or agencies licensed under Article 2 of Chapter 122C of the General Statutes; (ii) medical equipment used or dispensed by professionals licensed under Chapters 90 or 93D of the General Statutes, provided the professional is practicing within the scope of that professional's practice act; (iii) upper and lower extremity prosthetics and related orthotics; or (iv) canes, crutches, walkers, and bathtub grab bars.

(*l*2) "Mobile pharmacy" means a pharmacy that meets all of the following conditions:

(1) Is either self-propelled or moveable by another vehicle that is self-propelled.
(2) Is operated by a nonprofit corporation.
(3) Dispenses prescription drugs at no charge or at a reduced charge to persons whose family income is less than two hundred percent (200%) of the federal poverty level and who do not receive reimbursement for the cost of the dispensed prescription drugs from Medicare, Medicaid, a private insurance company, or a governmental unit.

(m) "Permit" means a permit to operate a pharmacy, deliver medical equipment, or dispense devices, including a renewal license issued by the Board.

(n) "Person" means an individual, corporation, partnership, association, unit of government, or other legal entity.

(o) "Person in loco parentis" means the person who has assumed parental responsibilities for a child.

(p) "Pharmacist" means a person licensed under this Article to practice pharmacy.

(q) "Pharmacy" means any place where prescription drugs are dispensed or compounded.

(q1) "Pharmacy personnel" means pharmacists and pharmacy technicians.

(q2) "Pharmacy technician" means a person who may, under the supervision of a pharmacist, perform technical functions to assist the pharmacist in preparing and dispensing prescription medications.

(r) "Practice of pharmacy" means the responsibility for: interpreting and evaluating drug orders, including prescription orders; compounding, dispensing and labeling prescription drugs and devices; properly and safely storing drugs and devices; maintaining proper records; and controlling pharmacy goods and services. A pharmacist may advise and educate patients and health care providers concerning therapeutic values, content, uses and significant problems of drugs and devices; assess, record and report adverse drug and device reactions; take and record patient histories relating to drug and device therapy; monitor, record and report drug therapy and device usage; perform drug utilization reviews; and participate in drug and drug source selection and device and device source selection as provided in G.S. 90-85.27 through G.S. 90-85.31. A pharmacist who has received special training may be authorized and permitted to administer drugs pursuant to a specific prescription order in accordance with rules adopted by each of the Boards of Pharmacy, the Board of Nursing, and the North Carolina Medical Board. The rules shall be designed to ensure the safety and health of the patients for whom such drugs are administered. An approved clinical pharmacist practitioner may collaborate with physicians in determining the appropriate health care for a patient, subject to the provisions of G.S. 90-18.4.

(s) "Prescription drug" means a drug that under federal law is required, prior to being dispensed or delivered, to be labeled with the following statement:

"Caution: Federal law prohibits dispensing without prescription."

(t) "Prescription order" means a written or verbal order for a prescription drug, prescription device, or pharmaceutical service from a person authorized by law to prescribe such drug, device, or service. A prescription order includes an order entered in a chart or other medical record of a patient.

(u) "Unit dose medication system" means a system in which each dose of medication is individually packaged in a properly sealed and properly labeled container. (1981 (Reg. Sess., 1982), c. 1188, s. 1; 1983, c. 196, ss. 1-3; 1991, c. 578, s. 1; 1993 (Reg. Sess., 1994), c. 692, s. 2; 1995, c. 94, s. 24; 1999-246, s. 1; 1999-290, ss. 4, 5; 2001-375, s. 1; 2002-159, s. 37.)

§ 90-85.4. North Carolina Pharmaceutical Association.

The North Carolina Pharmaceutical Association, and the persons composing it, shall continue to be a body politic and corporate under the name and style of the North Carolina Pharmaceutical Association, and by that name have the right to sue and be sued, to plead and be impleaded, to purchase and hold real estate and grant the same, to have and to use a common seal, and to do any other things and perform any other acts as appertain to bodies corporate and politic not inconsistent with the Constitution and laws of the State. (1881, c. 355, s. 1; Code, s. 3135; Rev., s. 4471; C.S., s. 6650; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.5. Objective of Pharmaceutical Association.

The objective of the Association is to unite the pharmacists of this State for mutual aid, encouragement, and improvement; to encourage scientific research, develop pharmaceutical talent and to elevate the standard of professional thought. (1881, c. 355, s. 2; Code, s. 3136; Rev., s. 4472; C.S., s. 6651; 1981 (Reg. Sess., 1982), c. 1188, s. 1; 1991, c. 125, s. 1.)

§ 90-85.6. Board of Pharmacy; creation; membership; qualification of members.

(a) Creation. — The responsibility for enforcing the provisions of this Article and the laws pertaining to the distribution and use of drugs is vested in the Board. The Board shall adopt reasonable rules for the performance of its duties. The Board shall have all of the duties, powers and authorities specifically granted by and necessary for the enforcement of this Article, as well as any other duties, powers and authorities that may be granted from time to time by other appropriate statutes. The Board may establish a program for the purpose of aiding in the recovery and rehabilitation of pharmacists who have become addicted to controlled substances or alcohol, and the Board may use money collected as fees to fund such a program.

(b) Membership. — The Board shall consist of six members, one of whom shall be a representative of the public, and the remainder of whom shall be pharmacists.

(c) Qualifications. — The public member of the Board shall not be a health care provider or the spouse of a health care provider. He shall not be enrolled in a program to prepare him to be a health care provider. The public member of the Board shall be a resident of this State at the time of his appointment and while serving as a Board member. The pharmacist members of the Board shall be residents of this State at the time of their appointment and while serving as Board members. (1905, c. 108, ss. 5-7, 9; Rev., ss. 4473, 4475; 1907, c. 113, s. 1; C.S., ss. 6652, 6654; 1945, c. 572, s. 1; 1981, c. 717, s. 1; 1981 (Reg. Sess., 1982), c. 1188, s. 1; 1997-177, s. 1.)

CASE NOTES

Pharmacy Board Lacked Authority to Regulate Pharmacist Hours. — Pharmacy board's authority to regulate pharmacies did not extend to regulating pharmacist working hours as set out in its proposed rule; the North Carolina Department of Labor was the only entity with authority to regulate working hours of pharmacists in pharmacies, and such regulation was solely through the Wage and Hour Act, G.S. 95-25.1. N.C. Bd. of Pharm. v. Rules Review Comm'n, 174 N.C. App. 301, 620 S.E.2d 893, 2005 N.C. App. LEXIS 2362 (2005), rev'd, in part, remanded, 360 N.C. 638, 637 S.E.2d 515 (2006) (rev'd as to pharmacy board's authority to regulate hours).

§ 90-85.7. Board of Pharmacy; selection; vacancies; commission; term; per diem; removal.

(a) The Board of Pharmacy shall consist of six persons. Five of the members shall be licensed as pharmacists within this State and shall be elected and commissioned by the Governor as hereinafter provided. Pharmacist members shall be chosen in an election held as hereinafter provided in which every person licensed to practice pharmacy in North Carolina and residing in North Carolina shall be entitled to vote. Each pharmacist member of said Board shall be elected for a term of five years and until his successor shall be elected and shall qualify. Members chosen by election under this section shall be elected upon the expiration of the respective terms of the members of the present Board of Pharmacy. No pharmacist shall be nominated for membership on said Board, or shall be elected to membership on said Board, unless, at the time of such nomination, and at the time of such election, he is licensed to practice pharmacy in North Carolina. In case of death, resignation or removal from the State of any pharmacist member of said Board, the pharmacist members of the Board shall elect in his place a pharmacist who meets the criteria set forth in this section to fill the unexpired term.

One member of the Board shall be a person who is not a pharmacist and who represents the interest of the public at large. The Governor shall appoint this member.

All Board members serving on June 30, 1989, shall be eligible to complete their respective terms. No member appointed or elected to a term on or after July 1, 1989, shall serve more than two complete consecutive five-year terms. The Governor may remove any member appointed by him for good cause shown and may appoint persons to fill unexpired terms of members appointed by him.

It shall be the duty of a member of the Board of Pharmacy, within 10 days after receipt of notification of his appointment and commission, to appear before the clerk of the superior court of the county in which he resides and take and subscribe an oath to properly and faithfully discharge the duties of his office according to law.

(b) All nominations and elections of pharmacist members of the Board shall be conducted by the Board of Pharmacy, which is hereby constituted a Board of Pharmacy Elections. Every pharmacist with a current North Carolina license residing in this State shall be eligible to vote in all elections. The list of pharmacists shall constitute the registration list for elections. The Board of Pharmacy Elections is authorized to make rules and regulations relative to the conduct of these elections, provided such rules and regulations are not in conflict with the provisions of this section and provided that notice shall be given to all pharmacists residing in North Carolina. All such rules and regulations shall be adopted subject to the procedures of Chapter 150B of the General Statutes of North Carolina. From any decision of the Board of Pharmacy Elections relative to the conduct of such elections, appeal may be taken to the courts in the manner otherwise provided by Chapter 150B of the General Statutes.

(c) All rules, regulations, and bylaws of the North Carolina Board of Pharmacy so far as they are not inconsistent with the provisions of this Article, shall continue in effect.

(d) Notwithstanding G.S. 93B-5, Board members shall receive as compensation for their services per diem not to exceed one hundred dollars ($100.00) for each day during which they are engaged in the official business of the Board. (1905, c. 108, ss. 5-7; Rev., s. 4473; C.S., s. 6652; 1981, c. 717, s. 1; 1981 (Reg. Sess., 1982), c. 1188, s. 1; 1983, c. 196, s. 4; 1989, c. 118; 1989 (Reg. Sess., 1990), c. 825.)

§ 90-85.8. Organization.

The Board shall elect from its members a president, vice-president, and other officers as it deems necessary. The officers shall serve one-year terms and until their successors have been elected and qualified. (1905, c. 108, s. 8; Rev., s. 4474; C.S., s. 6653; 1923, c. 82; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.9. Meetings.

The Board shall meet at least twice annually for the purpose of administering examinations and conducting other business. Four Board members constitute a quorum. The Board shall keep a record of its proceedings, a register of all licensed persons, and a register of all persons to whom permits have been issued. The Board shall report, in writing, annually to the Governor and the presiding officer of each house of the General Assembly. (1905, c. 108, s. 8; Rev., s. 4474; C.S., s. 6653; 1923, c. 82; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.10. Employees; Executive Director.

The Board shall employ as Executive Director a pharmacist to serve as a full-time employee of the Board. The Executive Director shall serve as secretary and treasurer of the Board and shall perform administrative functions as authorized by the Board. The Board shall have the authority to employ other personnel as it may deem necessary to carry out the requirements of this Article. (1905, c. 108, s. 9; Rev., s. 4475; 1907, c. 113, s. 1; C.S., s. 6654; 1945, c. 572, s. 1; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.11. Compensation of employees.

The Board shall determine the compensation of its employees. Employees shall be reimbursed for all necessary expenses incurred in the performance of their official duties. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.11A. Acquisition of real property; equipment; liability insurance.

(a) The Board shall have the power to acquire, hold, rent, encumber, alienate, and otherwise deal with real property in the same manner as a private person or corporation, subject only to approval of the Governor and the Council of State. Collateral pledged by the Board for an encumbrance is limited to the assets, income, and revenues of the Board.

(b) The Board may purchase, rent, or lease equipment and supplies and purchase liability insurance or other insurance to cover the activities of the Board, its operations, or its employees. (2001-407, s. 1.)

§ 90-85.12. Executive Director to make investigations and prosecute.

(a) Upon receiving information concerning a violation of this Article that is a threat to the public safety, health, or welfare, the Executive Director shall promptly conduct an investigation, and if he finds evidence of the violation, he may file a complaint and prosecute the offender in a Board hearing. If the Executive Director receives information concerning a violation of this Article that does not pose a threat to the public safety, health, or welfare, the Executive Director may conduct an investigation, and if he finds evidence of the violation, he may file a complaint and prosecute the offender in a Board hearing.

(b) In all prosecutions of unlicensed persons for the violation of any of the provisions of this Article, a certificate signed under oath by the Executive Director shall be competent and admissible evidence in any court of this State that the person is not licensed, as required by law. (1905, c. 108, s. 11; Rev., s. 4477; C.S., s. 6656; 1923, c. 74, s. 1; 1981 (Reg. Sess., 1982), c. 1188, s. 1; 2005-402, s. 1.2.)

Editor's Note. — Session Laws 2005-402, s. 1.1, provides: "It is the goal of the General Assembly that the Board of Pharmacy will use the funds generated by this act to enable it to conduct investigations and inspections under this Article. The Board of Pharmacy shall annually expend at least one hundred thousand dollars ($100,000) of the funds generated by this act for a Pharmacy Recovery Network." Sections 2 through 4 of that act raised fees collectible by the Board of Pharmacy and increased the minimum requirements for continuing education.

§ 90-85.13. Approval of schools and colleges of pharmacy.

The Board shall approve schools and colleges of pharmacy upon a finding that students successfully completing the course of study offered by the school or college can reasonably be expected to practice pharmacy safely and properly. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.14. Practical experience program.

The Board shall issue regulations governing a practical experience program. These regulations shall assure that the person successfully completing the program will have gained practical experience that will enable him to safely and properly practice pharmacy. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.15. Application and examination for licensure as a pharmacist; prerequisites.

(a) Any person who desires to be licensed as a pharmacist shall file an application with the Executive Director on the form furnished by the Board, verified under oath, setting forth the applicant's name, age, the place at which and the time that he has spent in the study of pharmacy, and his experience in compounding and dispensing prescriptions under the supervision of a pharmacist. The applicant shall also appear at a time and place designated by the Board and submit to an examination as to his qualifications for being licensed. The applicant must demonstrate to the Board his physical and mental competency to practice pharmacy.

(b) On or after July 1, 1982, all applicants shall have received an undergraduate degree from a school of pharmacy approved by the Board. Applicants shall be required to have had up to one year of experience, approved by the Board, under the supervision of a pharmacist and shall pass the required examination offered by the Board. Upon completing these requirements and upon paying the required fee, the applicant shall be licensed.

(c) The Department of Justice may provide a criminal record check to the Board for a person who has applied for a license through the Board. The Board shall provide to the Department of Justice, along with the request, the fingerprints of the applicant, any additional information required by the Department of Justice, and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The Board shall keep all information pursuant to this subsection privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this subsection. (1905, c. 108, s. 13; Rev., ss. 4479, 4480; 1915, c. 165; C.S., s. 6658; 1921, c. 52; 1933, c. 206, ss. 1, 2; 1935, c. 181; 1937, c. 94; 1971, c. 481; 1981, c. 717, s. 4; 1981 (Reg. Sess., 1982), c. 1188, s. 1; 1983, c. 196, s. 5; 2002-147, s. 8.)

§ 90-85.15A. Pharmacy technicians.

(a) Registration. — A registration program for pharmacy technicians is established for the purposes of identifying those persons who are employed as pharmacy technicians. The Board must maintain a registry of pharmacy technicians that contains the name of each pharmacy technician, the name and location of the pharmacy in which the pharmacy technician works, the pharmacist-manager who employs the pharmacy technician, and the dates of that employment. The Board must register a pharmacy technician who pays the fee required under G.S. 90-85.24 and completes a required training program. A pharmacy technician must register with the Board within 30 days after the date the pharmacy technician completes a training program conducted by the pharmacy technician's pharmacist-manager. The registration must be renewed annually by paying a registration fee.

(b) Responsibilities of Pharmacist-Manager. — A pharmacist-manager may hire a person who has a high school diploma or equivalent or is currently enrolled in a program that awards a high school diploma or equivalent to work as a pharmacy technician. Pursuant to G.S. 90-85.21, a pharmacist-manager must notify the Board within 30 days of the date the pharmacy technician began employment. The pharmacist-manager must provide a training program for a pharmacy technician that includes pharmacy terminology, pharmacy calculations, dispensing systems and labeling requirements, pharmacy laws and regulations, record keeping and documentation, and the proper handling and storage of medications. The requirements of a training program may differ depending upon the type of employment. The training program must be provided and completed within 180 days of the date the pharmacy technician began employment unless the pharmacy technician is registered with the Board. If the pharmacy technician is registered with the Board, then the completion of the training program is optional at the discretion of the pharmacist-manager.

(c) Supervision. — A pharmacist may not supervise more than two pharmacy technicians unless the pharmacist-manager receives written approval from the Board. The Board may not allow a pharmacist to supervise more than two pharmacy technicians unless the additional pharmacy technicians have passed a nationally recognized pharmacy technician certification board exam, or its equivalent, that has been approved by the Board. The Board must respond to a request from a pharmacist-manager to allow a pharmacist to supervise more than two pharmacy technicians within 60 days of the date it received the request. The Board must respond to the request in one of three ways:

(1) Approval of the request.
(2) Approval of the request as amended by the Board.
(3) Disapproval of the request. A disapproval of a request must include a reasonable explanation of why the request was not approved.

(d) Disciplinary Action. — The Board may, in accordance with Chapter 150B of the General Statutes and rules adopted by the Board, issue a letter of reprimand or suspend, restrict, revoke, or refuse to grant or renew the registration of a pharmacy technician if the pharmacy technician has done one or more of the following:

(1) Made false representations or withheld material information in connection with registering as a pharmacy technician.
(2) Been found guilty of or plead guilty or nolo contendere to a felony involving the use or distribution of drugs.
(3) Indulged in the use of drugs to an extent that it renders the pharmacy technician unfit to assist a pharmacist in preparing and dispensing prescription medications.
(4) Developed a physical or mental disability that renders the pharmacy technician unfit to assist a pharmacist in preparing and dispensing prescription medications.
(5) Willfully violated any provision of this Article or rules adopted by the Board governing pharmacy technicians.

(e) Exemption. — This section does not apply to pharmacy students who are enrolled in a school of pharmacy approved by the Board under G.S. 90-85.13.

(f) Rule-Making Authority. — The Board may adopt rules necessary to implement this section. (2001-375, s. 2.)

Editor's Note. — Session Laws 2001-375, s. 9, provides: "A person employed as a pharmacy technician prior to January 1, 2002, may register with the Board of Pharmacy as a pharmacy technician without completing the pharmacy technician-training program required under G.S. 90-85.15A, as enacted by this act, if (i) the pharmacist-manager who employs the person certifies to the Board that the person has the training necessary to serve as a pharmacy technician and (ii) the person registers with the Board prior to July 1, 2002."

§ 90-85.16. Examination.

The license examination shall be given by the Board at least twice each year. The Board shall determine the subject matter of each examination and the place, time and date for administering the examination. The Board shall also determine which persons have passed the examination. The examination shall be designed to determine which applicants can reasonably be expected to safely and properly practice pharmacy. (1905, c. 108, s. 13; Rev., ss. 4479, 4480; 1915, c. 165; C.S., s. 6658; 1921, c. 52; 1933, c. 206, ss. 1, 2; 1935, c. 181; 1937, c. 94; 1971, c. 481; 1981, c. 717, s. 4; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.17. License renewal.

In accordance with Board regulations, each license to practice pharmacy shall expire on December 31 and shall be renewed annually by filing with the Board on or after December 1 an application for license renewal furnished by the Board, accompanied by the required fee. It shall be unlawful to practice pharmacy more than 60 days after the expiration date without renewing the license. All licensees shall give the Board notice of a change of mailing address or a change of place of employment within 30 days after the change. The Board may require licensees to obtain up to 30 hours of continuing education every two years from Board-approved providers as a condition of license renewal, with a minimum of 10 hours required per year. (1905, c. 108, ss. 18, 19, 27; Rev., ss. 3653, 4484; 1911, c. 48; C.S., s. 6662; 1921, c. 68, s. 2; 1947, c. 781; 1953, c. 1051; 1981 (Reg. Sess., 1982), c. 1188, s. 1; 2005-402, s. 4.)

Effect of Amendments. — Session Laws 2005-402, s. 4, effective January 1, 2008, in the last sentence, substituted "30 hours" for "10 hours," inserted "every two years" preceding "from Board-approved" and added "with a minimum of 10 hours required per year"; and made a minor punctuation change.

§ 90-85.18. Approval of continuing education programs.

The Board shall approve providers of continuing education programs upon finding that the provider is competent to and does offer an educational experience designed to enable those who successfully complete the program to more safely and properly practice pharmacy. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.19. Reinstatement.

Whenever a pharmacist who has not renewed his license for five or more years seeks to renew or reinstate his license, he must appear before the Board and submit evidence that he can safely and properly practice pharmacy. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.20. Licensure without examination.

(a) The Board may issue a license to practice pharmacy, without examination, to any person who is licensed as a pharmacist in another jurisdiction if the applicant shall present satisfactory evidence of possessing the same qualifications as are required of licensees in this State, that he was licensed by examination in such other jurisdiction, and that the standard of competence required by such other jurisdiction is substantially equivalent to that of this State at that time. The Board must be satisfied that a candidate for licensure has a satisfactory understanding of the laws governing the practice of pharmacy and distribution of drugs in this State.

(b) Repealed by Session Laws 1991, c. 125, s. 2. (1905, c. 108, s. 16; Rev., s. 4482; C.S., s. 6660; 1945, c. 572, s. 2; 1971, c. 468; 1977, c. 598; 1981, c. 717, ss. 6, 7; 1981 (Reg. Sess., 1982), c. 1188, s. 1; 1983, c. 196, ss. 6, 7; 1991, c. 125, s. 2.)

§ 90-85.21. Pharmacy permit.

(a) In accordance with Board regulations, each pharmacy in North Carolina shall annually register with the Board on a form provided by the Board. The application shall identify the pharmacist-manager of the pharmacy and all pharmacy personnel employed in the pharmacy. All pharmacist-managers shall notify the Board of any change in pharmacy personnel within 30 days of the change. In addition to identifying the pharmacist-manager, a pharmacy may identify a pharmacy permittee's designated agent that the Board shall notify of any investigation of the pharmacy or a pharmacist employed by the pharmacy. The notice shall include the specific reason for the investigation and be given prior to the initiation of any disciplinary proceedings.

(a1) A mobile pharmacy shall register annually with the Board in the manner prescribed in subsection (a) of this section, and the registration shall be renewed annually. A mobile pharmacy shall be considered a single pharmacy and shall not be required to pay a separate registration fee for each location but shall pay the annual registration fee prescribed in G.S. 90-85.24. A mobile pharmacy shall provide the Board with the address of every location from which prescription drugs will be dispensed by the mobile pharmacy.

(b) Each physician who dispenses prescription drugs, for a fee or other charge, shall annually register with the Board on the form provided by the

Board, and with the licensing board having jurisdiction over the physician. Such dispensing shall comply in all respects with the relevant laws and regulations that apply to pharmacists governing the distribution of drugs, including packaging, labeling, and record keeping. Authority and responsibility for disciplining physicians who fail to comply with the provisions of this subsection are vested in the licensing board having jurisdiction over the physician. The form provided by the Board under this subsection shall be as follows:

Application For Registration
With The Pharmacy Board
As A Dispensing Physician

1.	2.
Name and Address of Dispensing Physician	Affix Dispensing Label Here

3. Physician's North Carolina License Number ____________________

4. Are you currently practicing in a professional association registered with the North Carolina Medical Board?
__________ Yes __________ No. If yes, enter the name and registration number of the professional corporation:
____
____

5. I certify that the information is correct and complete.

________________ ________________
Signature Date

(1927, c. 28, s. 1; 1953, c. 183, s. 2; 1981 (Reg. Sess., 1982), c. 1188, s. 1; 1987, c. 687; 1995, c. 94, s. 25; 1999-246, s. 2; 2001-375, s. 3; 2005-427, s. 1.)

Effect of Amendments. — Session Laws 2005-427, s. 1., effective January 1, 2006, added the last two sentences in subsection (a).

CASE NOTES

Pharmacy Board Lacked Authority to Regulate Pharmacist Hours. — Pharmacy board's authority to regulate pharmacies did not extend to regulating pharmacist working hours as set out in its proposed rule; the North Carolina Department of Labor was the only entity with authority to regulate working hours of pharmacists in pharmacies, and such regulation was solely through the Wage and Hour Act, G.S. 95-25.1. N.C. Bd. of Pharm. v. Rules Review Comm'n, 174 N.C. App. 301, 620 S.E.2d 893, 2005 N.C. App. LEXIS 2362 (2005), rev'd, in part, remanded, 360 N.C. 638, 637 S.E.2d 515 (2006) (rev'd as to pharmacy board's authority to regulate hours).

§ 90-85.21A. Applicability to out-of-state operations.

(a) Any pharmacy operating outside the State which ships, mails, or delivers in any manner a dispensed legend drug into this State shall annually register with the Board on a form provided by the Board. In order to satisfy the registration requirements of this subsection, a pharmacy shall certify that the pharmacy employs a pharmacist who is responsible for dispensing, shipping, mailing, or delivering dispensed legend drugs into this State or in a state approved by the Board and has met requirements for licensure equivalent to the requirements for licensure in this State. In order for the pharmacy's certification of the pharmacists to be valid, a pharmacist shall agree in writing, on a form approved by the Board, to be subject to the jurisdiction of the Board, the provisions of this Article, and the rules adopted by the Board. If the Board revokes this certification, the pharmacy shall no longer have authority to dispense, ship, mail, or deliver in any manner a dispensed legend drug into this State.

(b) Any pharmacy subject to this section shall at all times maintain a valid unexpired license, permit, or registration necessary to conduct such pharmacy in compliance with the laws of the state in which such pharmacy is located. No pharmacy operating outside the State may ship, mail, or deliver in any manner a dispensed legend drug into this State unless such drug is lawfully dispensed by a licensed pharmacist in the state where the pharmacy is located.

(c) The Board shall be entitled to charge and collect not more than five hundred dollars ($500.00) for original registration of a pharmacy under this section, and for renewal thereof, not more than two hundred dollars ($200.00), and for reinstatement thereof, not more than two hundred dollars ($200.00).

(d) The Board may deny a nonresident pharmacy registration upon a determination that the pharmacy has a record of being formally disciplined in its home state for violations that relate to the compounding or dispensing of legend drugs and presents a threat to the public health and safety.

(e) Except as otherwise provided in this subsection, the Board may adopt rules to protect the public health and safety that are necessary to implement this section. Notwithstanding G.S. 90-85.6, the Board shall not adopt rules pertaining to the shipment, mailing, or other manner of delivery of dispensed legend drugs by pharmacies required to register under this section that are more restrictive than federal statutes or regulations governing the delivery of prescription medications by mail or common carrier. A pharmacy required to register under this section shall comply with rules adopted pursuant to this section.

(f) The Board may deny, revoke, or suspend a nonresident pharmacy registration for failure to comply with any requirement of this section. (1993, c. 455, s. 1; 1998-212, s. 12.3B(b); 2004-199, s. 25; 2005-402, s. 3.)

§ 90-85.21B. Unlawful practice of pharmacy.

It shall be unlawful for any person, firm, or corporation not licensed or registered under the provisions of this Article to:

(1) Use in a trade name, sign, letter, or advertisement any term, including "drug", "pharmacy", "prescription drugs", "prescription", "Rx", or "apothecary", that would imply that the person, firm, or corporation is licensed or registered to practice pharmacy in this State.

(2) Hold himself or herself out to others as a person, firm, or corporation licensed or registered to practice pharmacy in this State. (2003-284, s. 10.8D.)

§ 90-85.22. Device and medical equipment permits.

(a) Devices. — Each place, whether located in this State or out-of-state, where devices are dispensed or delivered to the user in this State shall register annually with the Board on a form provided by the Board and obtain a device permit. A business that has a current pharmacy permit does not have to register and obtain a device permit. Records of devices dispensed in pharmacies or other places shall be kept in accordance with rules adopted by the Board.

(b) Medical Equipment. — Each place, whether located in this State or out-of-state, that delivers medical equipment to the user of the equipment in this State shall register annually with the Board on a form provided by the Board and obtain a medical equipment permit. A business that has a current pharmacy permit or a current device permit does not have to register and obtain a medical equipment permit. Medical equipment shall be delivered only in accordance with requirements established by rules adopted by the Board.

(c) This section shall not apply to either of the following:

(1) A pharmaceutical manufacturer registered with the Food and Drug Administration.

(2) A wholly owned subsidiary of a pharmaceutical manufacturer registered with the Food and Drug Administration. (1981 (Reg. Sess., 1982), c. 1188, s. 1; 1993 (Reg. Sess., 1994), c. 692, s. 1; 2001-339, s. 1.)

§ 90-85.23. License and permit to be displayed.

Every pharmacist-manager's license, every permit, and every current renewal shall be conspicuously posted in the place of business owned by or employing the person to whom it is issued. The licenses and every last renewal of all other pharmacists employed in the pharmacy must be readily available for inspection by agents of the Board. Failure to display any license or permit and the most recent renewal shall be a violation of this Article and each day that the license or permit or renewal is not displayed shall be a separate and distinct offense. (1905, c. 108, ss. 18, 26; Rev., ss. 3651, 4485; C.S., s. 6663; 1921, c. 68, s. 3; 1953, c. 1051; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.24. Fees collectible by Board.

(a) The Board of Pharmacy shall be entitled to charge and collect not more than the following fees:

(1) For the examination of an applicant for license as a pharmacist, two hundred dollars ($200.00), plus the cost of the test material;

(2) For renewing the license as a pharmacist, one hundred thirty-five dollars ($135.00);

(3) For reinstatement of a license as a pharmacist, one hundred thirty-five dollars ($135.00);

(4) For annual registration of a pharmacy technician, thirty dollars ($30.00);

(5) For reinstatement of a registration of a pharmacy technician, thirty dollars ($30.00);

(6) For licenses without examination as provided in G.S. 90-85.20, original, six hundred dollars ($600.00);

(7) For original registration of a pharmacy, five hundred dollars ($500.00), and renewal thereof, two hundred dollars ($200.00);

(8) For reinstatement of the registration of a pharmacy, two hundred dollars ($200.00);

(9) For annual registration as a dispensing physician under G.S. 90-85.21(b), seventy-five dollars ($75.00);

(10) For reinstatement of registration as a dispensing physician, seventy-five dollars ($75.00);

(11) For annual registration as a dispensing physician assistant under G.S. 90-18.1, seventy-five dollars ($75.00);

(12) For reinstatement of registration as a dispensing physician assistant, seventy-five dollars ($75.00);

(13) For annual registration as a dispensing nurse practitioner under G.S. 90-18.2, seventy-five dollars ($75.00);
(14) For reinstatement of registration as a dispensing nurse practitioner, seventy-five dollars ($75.00);
(15) For registration of any change in pharmacist personnel as required under G.S. 90-85.21(a), thirty-five dollars ($35.00);
(16) For a duplicate of any license, permit, or registration issued by the Board, twenty-five dollars ($25.00);
(17) For original registration to dispense devices, deliver medical equipment, or both, five hundred dollars ($500.00);
(18) For renewal of registration to dispense devices, deliver medical equipment, or both, two hundred dollars ($200.00);
(19) For reinstatement of a registration to dispense devices, deliver medical equipment, or both, two hundred dollars ($200.00).

(b) All fees under this section shall be paid before any applicant may be admitted to examination or the applicant's name may be placed upon the register of pharmacists or before any license or permit, or any renewal or reinstatement thereof, may be issued by the Board. (1905, c. 108, s. 12; Rev., s. 4478; C.S., s. 6657; 1921, c. 57, s. 3; 1945, c. 572, s. 3; 1953, c. 183, s. 1; 1965, c. 676, s. 1; 1973, c. 1183; 1981, c. 72; c. 717, s. 3; 1981 (Reg. Sess., 1982), c. 1188, s. 2; 1983, c. 196, s. 8; 1987, c. 260; 1987 (Reg. Sess., 1988), c. 1039, s. 4; 1993 (Reg. Sess., 1994), c. 692, s. 3; 1997-231, s. 1; 2001-375, s. 4; 2005-402, s. 2.)

Editor's Note. — This section was formerly G.S. 90-60. It was recodified pursuant to Session Laws 1981 (Reg. Sess., 1982), c. 1188, s. 2, effective July 1, 1982.

Session Laws 2005-402, s. 1.1, provides: "It is the goal of the General Assembly that the Board of Pharmacy will use the funds generated by this act to enable it to conduct investigations and inspections under this Article. The Board of Pharmacy shall annually expend at least one hundred thousand dollars ($100,000) of the funds generated by this act for a Pharmacy Recovery Network." Sections 2 through 4 of that act raised fees collectible by the Board of Pharmacy and increased the minimum requirements for continuing education.

§ 90-85.25. Disasters and emergencies.

(a) In the event of an occurrence which the Governor of the State of North Carolina has declared a disaster or when the Governor has declared a state of emergency, or in the event of an occurrence for which a county or municipality has enacted an ordinance to deal with states of emergency under G.S. 14-288.12, 14-288.13, or 14-288.14, or to protect the public health, safety, or welfare of its citizens under G.S. 160A-174(a) or G.S. 153A-121(a), as applicable, the Board may waive the requirements of this Article in order to permit the provision of drugs, devices, and professional services to the public.

(b) The pharmacist in charge of a pharmacy shall report within 10 days to the Board any disaster, accident, theft, or emergency which may affect the strength, purity, or labeling of drugs and devices in the pharmacy. (1981 Reg. Sess., 1982), c. 1188, s. 1; 1998-212, s. 12.3B(a).)

§ 90-85.26. Prescription orders preserved.

(a) Every pharmacist-manager of a pharmacy shall maintain for at least three years the original of every prescription order and refill compounded or dispensed at the pharmacy except for prescription orders recorded in a patient's medical record. An automated data processing system may be used for the storage and retrieval of refill information for prescriptions pursuant to the regulations of the Board. A pharmacist-manager may comply with this section by capturing and maintaining an electronic image of a prescription order or refill. An electronic image of a prescription order or refill shall constitute the original prescription order, and a hard copy of the prescription order or refill is not required to be maintained. If a pharmacist-manager elects to maintain prescription orders by capturing electronic images of prescription orders or refills, the pharmacy's computer system must be capable of maintaining, printing, and providing in an electronic or paper format, upon a request by the Board, all of the information required by this Chapter or rules adopted pursuant to this Chapter within 48 hours of such a request.

(b) Every pharmacy permittee's designated agent shall maintain documentation of alleged medication errors and incidents described in G.S. 90-85.47(e)(1) for which the pharmacy permittee has knowledge. (1905, c. 108, s. 21; Rev., s. 4490; C.S., s. 6666; 1981 (Reg. Sess., 1982), c. 1188, s. 1; 2005-427, s. 2; 2007-248, s. 1.)

Effect of Amendments. — Session Laws 2005-427, s. 2, effective January 1, 2006, designated the former paragraph as subsection (a) and added subsection (b).

Session Laws 2007-248, s. 1, effective July 20, 2007, added the last three sentences in subsection (a).

§ 90-85.26A. Clinical pharmacist practitioners subcommittee.

The North Carolina Board of Pharmacy shall appoint and maintain a subcommittee of the Board consisting of four licensed pharmacists to work jointly with the subcommittee of the North Carolina Medical Board to develop rules to govern the provision of drug therapy management by clinical pharmacist practitioners and to determine reasonable fees to accompany an application for approval or renewal of such approval as provided in G.S. 90-6. The rules developed by this subcommittee shall govern the performance of acts by clinical pharmacist practitioners and shall become effective when they have been adopted by both Boards. (1999-290, s. 6.)

Editor's Note. — G.S. 90-6, as referred to above, was recodified as G.S. 90-8.1 and 90-8.2 by Session Laws 2007-346, s. 7, effective October 1, 2007.

§ 90-85.27. Definitions.

As used in G.S. 90-85.28 through G.S. 90-85.31:

(1) "Equivalent drug product" means a drug product which has the same established name, active ingredient, strength, quantity, and dosage form, and which is therapeutically equivalent to the drug product identified in the prescription;

(2) "Established name" has the meaning given in section 502(e)(3) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 352(e)(3);

(3) "Good manufacturing practice" has the meaning given it in Part 211 of Chapter 1 of Title 21 of the Code of Federal Regulations;

(4) "Manufacturer" means the actual manufacturer of the finished dosage form of the drug;

(4a) "Narrow therapeutic index drugs" means those pharmaceuticals having a narrowly defined range between risk and benefit. Such drugs have less than a twofold difference in the minimum toxic concentration and minimum effective concentration in the blood or are those drug product formulations that exhibit limited or erratic absorption, formulation-dependent bioavailability, and wide intrapatient pharmacokinetic variability that requires blood-level monitoring. Drugs identified as having narrow therapeutic indices shall be designated by the North Carolina Secretary of Health and Human Services upon the advice of the State Health Director, North Carolina Board of Pharmacy, and North Carolina Medical Board, as narrow therapeutic index drugs and shall be subject to the provisions of G.S. 90-85.28(b1). The North Carolina Board of Pharmacy shall submit the list of narrow therapeutic index drugs to the Codifier of Rules, in a timely fashion for publication in January of each year in the North Carolina Register.

(5) "Prescriber" means anyone authorized to prescribe drugs pursuant to the laws of this State. (1979, c. 1017, s. 1; 1981 (Reg. Sess., 1982), c. 1188, s. 3; 1983, c. 196, s. 9; 1997-76, s. 1; 1997-443, s. 11A.118(b).)

Editor's Note. — Session Laws 1983, c. 761, s. 60; 1983 (Reg. Sess., 1984), c. 1034, s. 62(h); 1985, c. 479, s. 86(g); 1987, c. 738, s. 67(g); 1989, c. 500, s. 70(g); 1991, c. 689, s. 93(f); 1991 (Reg. Sess., 1992), c. 900, s. 129; 1993, c. 321, s. 222(f); 1995, c. 324, s. 23.14(h); 1996, Second Extra Session, c. 18, s. 24; 1997-443, s. 11.11(h); 1999-237, s. 11.12(h); 2001-424, ss. 21.3(a) to (c), 21.19(h), as amended by 2002-126 s. 10.11(a); and Session Laws 2003-284, s. 10.19(h), contained provisions similar to those in Session Laws 2005-276, s. 10.11(a)(5).

This section was formerly G.S. 90-76.1. It was recodified pursuant to Session Laws 1981 (Reg. Sess., 1982), c. 1188, s. 3, effective July 1, 1982.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2006-66, s. 10.3(a), effective July 1, 2006, repealed Session Laws 2005-276, s. 10.11(a), pertaining to the dispensing of generic drugs.

Session Laws 2006-66, s. 10.3(e), provides: "Services and Payment Bases. — Funds appropriated for Medicaid services shall be expended in accordance with the following schedule of services and payment bases. All services and payments are subject to the language at the end of this subsection. Unless otherwise provided, services and payment bases will be as prescribed in the State Plan as established by the Department of Health and Human Services and may be changed with the approval of the Director of the Budget.

"(1) Hospital inpatient.

"(2) Hospital outpatient. — Eighty percent (80%) of allowable costs or a prospective reimbursement plan as established by the Department of Health and Human Services.

"(3) Nursing facilities. — Nursing facilities providing services to Medicaid recipients who also qualify for Medicare must be enrolled in the Medicare program as a condition of participation in the Medicaid program. State facilities are not subject to the requirement to enroll in the Medicare program. Residents of nursing facilities who are eligible for Medicare coverage of nursing facility services must be placed in a Medicare-certified bed. Medicaid shall cover facility services only after the appropriate services have been billed to Medicare. The Division of Medical Assistance shall allow nursing facility providers sufficient time from the effective date of this act to certify additional Medicare beds if necessary. In determining the date that the requirements of this subdivision become effective, the Division of Medical Assistance shall consider the regulations governing certification of Medicare beds and the length of time required for this process to be completed.

"(4) Physicians, certified nurse midwife services, nurse practitioners. — Fee schedules as development by the Department of Health and Human Services.

"(5) Community Alternative Program, EPSDT Screens. — Payments in accordance with rate schedule developed by the Department of Health and Human Services.

"(6) Home health and related services, durable medical equipment. — Payments according to reimbursement plans developed by the Department of Health and Human Services.

"(7) Hearing aids. — Wholesale cost plus dispensing fee to provider.

"(8) Rural health clinical services. — Provider-based, reasonable cost; non-provider-based, single-cost reimbursement rate per clinic visit.

"(9) Family planning. — Negotiated rate for local health departments. For other providers see specific services, e.g. hospitals, physicians.

"(10) Independent laboratory and X-ray services. — Uniform fee schedules as developed by the Department of Health and Human Services.

"(11) Ambulatory surgical centers.

"(12) Private duty nursing, clinic services, prepaid health plans.

"(13) Intermediate care facilities for the mentally retarded.

"(14) Chiropractors, podiatrists, optometrists, dentists.

"(15) Limitations on Dental Coverage. — Dental services shall be provided on a restricted basis in accordance with criteria adopted by the Department to implement this subsection.

"(16) Medicare Buy-In. — Social Security Administration premium.

"(17) Ambulance services. — Uniform fee schedules as developed by the Department of Health and Human Services. Public ambulance providers will be reimbursed at cost.

"(18) Optical supplies. — Payment for materials is made to a contractor in accordance with 42 C.F.R. § 431.54(d). Fees paid to dispensing providers are negotiated fees established by the State agency based on industry charges.

"(19) Medicare crossover claims. — The Department shall apply Medicaid medical policy to Medicare claims for dually eligible recipients. The Department shall pay an amount up to the actual coinsurance or deductible or both, in accordance with the State Plan, as approved by the Department of Health and Human Services.

"(20) Physical therapy, occupational therapy, and speech therapy. — Services limited to EPSDT-eligible children. Payments are to be made only to qualified providers at rates negotiated by the Department of Health and Human Services. Physical therapy, occupational therapy, and speech therapy services are subject to prior approval and utilization review.

"(21) Personal care services.

"(22) Case management services. — Reimbursement in accordance with the availability of funds to be transferred within the Department of Health and Human Services.

"(23) Hospice.

"(24) Medically necessary prosthetics or orthotics. — In order to be eligible for reimbursement, providers must be licensed or certified by the occupational licensing board or the certification authority having authority over the provider's license or certification. Medically necessary prosthetics and orthotics are subject to prior approval and utilization review.

"(25) Health insurance premiums.

"(26) Medical care/other remedial care. — Services not covered elsewhere in this section include related services in schools; health professional services provided outside the clinic setting to meet maternal and infant health goals; and services to meet federal EPSDT mandates.

"(27) Pregnancy-related services. — Covered services for pregnant women shall include nutritional counseling, psychosocial counseling, and predelivery and postpartum home visits by maternity care coordinators and public health nurses.

"(28) Drugs. — Reimbursements. Reimbursements shall be available for prescription drugs as allowed by federal regulations plus a professional services fee per month, excluding refills for the same drug or generic equivalent during the same month. Payments for drugs are subject to the provisions of this subdivision or in accordance with the State Plan adopted by the Department of Health and Human Services, consistent with federal reimbursement regulations. Payment of the professional services fee shall be made in accordance with the State Plan adopted by the Department of Health and Human Services, consistent with federal reimbursement regulations. The professional services fee shall be five dollars and sixty cents ($5.60) per prescription for generic drugs and four dollars ($4.00) per prescription for brand-name drugs. Adjustments to the professional services fee shall be established by the General Assembly. In addition to the professional services fee, the Department may pay an enhanced fee for pharmacy services.

"Limitations on quantity. — The Department of Health and Human Services may establish authorizations, limitations, and reviews for specific drugs, drug classes, brands, or quantities in order to manage effectively the Medicaid pharmacy program, except that the Department shall not impose limitations on brand-name medications for which there is a generic equivalent in cases where the prescriber has determined, at the time the drug is prescribed, that the brand-name drug is medically necessary and has written on the prescription order the phrase "medically necessary". In addition to the entities listed in subsection (a) of this section, the Department shall report to the Joint Legislative Commission on Governmental Operations on authorizations, limitations, and reviews established under this subparagraph, including limitations on monthly brand-name and generic prescriptions as well as restrictions on the total number of medications. The Department shall submit the report not later than May 1, 2006.

"Dispensing of generic drugs. — Notwithstanding G.S. 90-85.27 through G.S. 90-85.31, or any other law to the contrary, under the Medical Assistance Program (Title XIX of the Social Security Act), and except as otherwise provided in this subsection for atypical antipsychotic drugs and drugs listed in the narrow therapeutic index, a prescription order for a drug designated by a trade or brand name shall be considered to be an order for the drug by its established or generic name, except when the prescriber has determined, at the time the drug is prescribed, that the brand-name drug is medically necessary and has written on the prescription order the phrase "medically necessary". An initial prescription order for an atypical antipsychotic drug or a drug listed in the narrow therapeutic drug index that does not contain the phrase "medically necessary" shall be considered an order for the drug by its established or generic name, except that a pharmacy shall not substitute a generic or established name prescription drug for subsequent brand or trade name prescription orders of the same prescription drug without explicit oral or written approval of the prescriber given at the time the order is filled. Generic drugs shall be dispensed at a lower cost to the Medical Assistance Program rather than trade or brand-name drugs. As used in this subsection, "brand name" means the proprietary name the manufacturer places upon a drug product or on its container, label, or wrapping at the time of packaging; and "established name" has the same meaning as in section 502(e)(3) of the Federal Food, Drug, and Cosmetic Act as amended, 21 U.S.C. § 352(e)(3).

"Prior authorization. — The Department of Health and Human Services shall not impose prior authorization requirements or other restrictions under the State Medical Assistance Program on medications prescribed for Medicaid recipients for the treatment of: (i) mental illness, including, but not limited to, medications for schizophrenia, bipolar disorder, and major depressive disorder, or (ii) HIV/AIDS.

"(29) Other mental health services. — Unless otherwise covered by this section, coverage is limited to:

"a. Services as defined by the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services and approved by the Centers for Medicare and Medicaid Services (CMS) when provided in agencies meeting the requirements of the rules established by the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services and reimbursement is made in accordance with a State Plan developed by the Department of Health and Human Services not to exceed the upper limits established in federal regulations, and

"b. For children eligible for EPSDT services provided by:

"1. Licensed or certified psychologists, licensed clinical social workers, certified clinical nurse specialists in psychiatric mental health advanced practice, nurse practitioners certified as clinical nurse specialists in psychiatric mental health advanced practice, licensed psychological associates, licensed professional counselors, licensed marriage and family therapists, certified clinical addictions specialists, and certified clinical supervisors, when Medicaid-eligible children are referred by the Community Care of North Carolina primary care physician, a Medicaid-enrolled psychiatrist, or the area mental health program or local management entity, and

"2. Institutional providers of residential services as defined by the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services and approved by the Centers for Medicare and Medicaid Services (CMS) for children and Psychiatric Residential Treatment Facility services that meet federal and State requirements as defined by the Department.

"c. For Medicaid-eligible adults, services provided by licensed or certified psychologists, licensed clinical social workers, certified clinical nurse specialists in psychiatric mental health advanced practice, and nurse practitioners certified as clinical nurse specialists in psychiatric mental health advanced practice, licensed psychological associates, licensed professional counselors, licensed marriage and family therapists, licensed clinical addictions specialists, and licensed clinical supervisors, Medicaid-eligible adults may be self-referred.

"d. Payments made for services rendered in accordance with this subdivision shall be to qualified providers in accordance with approved policies and the State Plan. Nothing in sub-subdivision b. or c. of this subdivision shall be interpreted to modify the scope of practice of any service provider, practitioner, or licensee, nor to modify or attenuate any collaboration or supervision requirement related to the professional activities of any service provider, practitioner, or licensee. Nothing in sub-subdivision b. or c. of this subdivision shall be interpreted to require any private health insurer or health plan to make direct third-party reimbursements or payments to any service provider, practitioner, or licensee.

"e. The Department of Health and Human Services shall not enroll licensed psychological associates, licensed professional counselors, licensed marriage and family therapists, licensed clinical addiction specialists, and licensed clinical supervisors until all of the following conditions have been met:

"1. The fiscal impact of payments to these qualified providers has been projected;

"2. Funding for any projected requirements in excess of budgeted Division of Medical Assistance funding has been identified from within State funds appropriated to the Department of Health and Human Services, Division of Mental Health, Developmental Disabilities, and Substance Abuse Services to support area mental health programs or county programs, or identified from other sources; and

"3. Approval has been obtained from the Office of State Budget and Management to transfer these State or other source funds from the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services to the Division of Medical Assistance. Upon approval and implementation, the Department of Health and Human Services shall, on a quarterly basis, provide a status report to the Office of State Budget and Management and the Fiscal Research Division.

"Notwithstanding G.S. 150B-21.1(a), the Department of Health and Human Services may adopt temporary rules in accordance with Chapter 150B of the General Statutes further defining the qualifications of providers and referral procedures in order to implement this subdivision. Coverage policy for services defined by the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services under sub-subdivisions a. and b.2 of this subdivision shall be established by the Division of Medical Assistance."

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006 2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006 2007 fiscal year."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2007-323, s. 10.36(d), as amended by Session Laws 2007-345, ss. 1-3, provides: "(d) Services and Payment Bases. — The Department shall spend funds appropriated for Medicaid services in accordance with the following schedule of services and payment bases. All services and payments are subject to the language at the end of this subsection. Unless otherwise provided, services and payment bases will be as prescribed in the State Plan as established by the Department of Health and Human Services and may be changed with the approval of the Director of the Budget.

"(1) Hospital inpatient.

"(2) Hospital outpatient. — Eighty percent (80%) of allowable costs or a prospective reimbursement plan as established by the Department of Health and Human Services.

"(3) Nursing facilities. — Nursing facilities providing services to Medicaid recipients who also qualify for Medicare must be enrolled in the Medicare program as a condition of participation in the Medicaid program. State facilities are not subject to the requirement to enroll in the Medicare program. Residents of nursing facilities who are eligible for Medicare coverage of nursing facility services must be placed in a Medicare-certified bed. Medicaid shall cover facility services only after the appropriate services have been billed to Medicare.

"(4) Physicians, certified nurse midwife services, certified registered nurse anesthetists, nurse practitioners. — Fee schedules as developed by the Department of Health and Human Services.

"(5) Community Alternative Program, EPSDT Screens. — Payments in accordance with rate schedule developed by the Department of Health and Human Services.

"(6) Home health and related services, durable medical equipment. — Payments according to reimbursement plans developed by the Department of Health and Human Services.

"(7) Hearing aids. — Wholesale cost plus dispensing fee to provider.

"(8) Rural health clinical services. — Provider-based, reasonable cost; nonprovider-based, single-cost reimbursement rate per clinic visit.

"(9) Family planning. — Negotiated rate for local health departments. For other providers see specific services, e.g., hospitals, physicians.

"(10) Independent laboratory and X-ray services. — Uniform fee schedules as developed by the Department of Health and Human Services.

"(11) Ambulatory surgical centers.

"(12) Private duty nursing, clinic services, prepaid health plans.

"(13) Intermediate care facilities for the mentally retarded.

"(14) Chiropractors, podiatrists, optometrists, dentists.

"(15) Limitations on Dental Coverage. — Dental services shall be provided on a restricted basis in accordance with criteria adopted by the Department to implement this subsection.

"(16) Medicare Buy-In. — Social Security Administration premium.

"(17) Ambulance services. — Uniform fee schedules as developed by the Department of Health and Human Services. Public ambulance providers will be reimbursed at cost.

"(18) Optical supplies. — Payment for materials is made to a contractor in accordance with 42 C.F.R. § 431.54(d). Fees paid to dispensing providers are negotiated fees established by the State agency based on industry charges.

"(19) Medicare crossover claims. — The Department shall apply Medicaid medical policy to Medicare claims for dually eligible recipients. The Department shall pay an amount up to the actual coinsurance or deductible or both, in accordance with the State Plan, as approved by the Department of Health and Human Services. The Department may disregard application of this policy in cases where application of the policy would adversely affect patient care.

"(20) Physical therapy, occupational therapy, and speech therapy. — Services limited to EPSDT-eligible children. Payments are to be made only to qualified providers at rates negotiated by the Department of Health and Human Services. Physical therapy, occupational therapy, and speech therapy services are subject to prior approval and utilization review.

"(21) Personal care services. — Effective October 1, 2007, the Department of Health and Human Services shall impose prior authorization on all personal care services. Criteria for prior authorization shall be developed in consultation with the Physician Advisory Group of the North Carolina Medical Society and shall include a requirement that a determination and notification of approval or denial of personal care services shall be made within seven working days of receipt of the prior authorization request. The Department shall provide periodic data on recipients of personal care services to Community Care of North Carolina. Community Care of North Carolina shall assist the Department in assessing personal care services for medical necessity. The Department shall report on the implementation of prior authorization of all personal care services to the House of Representatives Appropriations Subcommittee on Health and Human Services, the Senate Appropriations Committee on Health and Human Services, and the Fiscal Research Division by May 1, 2008. The report on implementation of prior authorization shall address the following:

"a. Criteria for prior authorization developed in consultation with the North Carolina Physician Advisory Group.

"b. Policies and procedures for the prior authorization program.

"c. Use of the Uniform Screening Tool and the Integrated Assessment Tool for Medicaid Long Term Care Services in determining the need for personal care services.

"d. Cost of implementing a prior authorization system.

"e. Estimated costs savings from the implementation of a prior authorization system for personal care services.

"(22) Case management services. — Reimbursement in accordance with the availability of funds to be transferred within the Department of Health and Human Services.

"(23) Hospice.

"(24) Medically necessary prosthetics or orthotics. — In order to be eligible for reimbursement, providers must be licensed or certified by the occupational licensing board or the certification authority having authority over the provider's license or certification. Medically necessary prosthetics and orthotics are subject to prior approval and utilization review.

"(25) Health insurance premiums.

"(26) Medical care/other remedial care. — Services not covered elsewhere in this section include related services in schools; health professional services provided outside the clinic setting to meet maternal and infant health goals; and services to meet federal EPSDT mandates.

"(27) Pregnancy-related services. — Covered services for pregnant women shall include nutritional counseling, psychosocial counseling, and predelivery and postpartum home visits by maternity care coordinators and public health nurses.

"(28) Drugs. — Reimbursements. Reimbursements shall be available for prescription drugs as allowed by federal regulations plus a professional services fee per month, excluding refills for the same drug or generic equivalent during the same month. Payments for drugs are subject to the provisions of this subdivision or in accordance with the State Plan adopted by the Department of Health and Human Services, consistent with federal reimbursement regulations. Payment of the professional services fee shall be made in accordance with the State Plan adopted by the Department of Health and Human Services, consistent with federal reimbursement regulations. The professional services fee shall be five dollars and sixty cents ($5.60) per prescription for generic drugs and four dollars ($4.00) per prescription for brand-name drugs. Adjustments to the professional services fee shall be established by the General Assembly. In addition to the professional services fee, the Department may pay an enhanced fee for pharmacy services.

"Limitations on quantity. — The Department of Health and Human Services may establish authorizations, limitations, and reviews for specific drugs, drug classes, brands, or quantities in order to manage effectively the Medicaid pharmacy program, except that the Department shall not impose limitations on brand-name medications for which there is a generic equivalent in cases where the prescriber has determined, at the time the drug is prescribed, that the brand-name drug is medically necessary and has written on the prescription order the phrase 'medically necessary.'

"Dispensing of generic drugs. — Notwithstanding G.S. 90-85.27 through G.S. 90-85.31, or any other law to the contrary, under the Medical Assistance Program (Title XIX of the Social Security Act), and except as otherwise provided in this subsection for atypical antipsychotic drugs and drugs listed in the narrow therapeutic index, a prescription order for a drug designated by a trade or brand name shall be considered to be an order for the drug by its established or generic name, except when the prescriber has determined, at the time the drug is prescribed, that the brand-name drug is medically necessary and has written on the prescription order the phrase "medically necessary." An initial prescription order for an atypical antipsychotic drug or a drug listed in the narrow therapeutic drug index that does not contain the phrase "medically necessary" shall be considered an order for the drug by its established or generic name, except that a pharmacy shall not substitute a generic or established name prescription drug for subsequent brand or trade name prescription orders of the same prescription drug without explicit oral or written approval of the prescriber given at the time the order is filled. Generic drugs shall be dispensed at a lower cost to the Medical

Assistance Program rather than trade or brand-name drugs. As used in this subsection, "brand name" means the proprietary name the manufacturer places upon a drug product or on its container, label, or wrapping at the time of packaging; and "established name" has the same meaning as in section 502(e)(3) of the Federal Food, Drug, and Cosmetic Act as amended, 21 U.S.C. § 352(e)(3).

"Prior authorization. — The Department of Health and Human Services shall not impose prior authorization requirements or other restrictions under the State Medical Assistance Program on medications prescribed for Medicaid recipients for the treatment of (i) mental illness, including but not limited to, medications for schizophrenia, bipolar disorder, or major depressive disorder, or (ii) HIV/AIDS, except that the Department of Health and Human Services shall continually review utilization of medications under the State Medical Assistance Program prescribed for Medicaid recipients for the treatment of mental illness, including but not limited to, medications for schizophrenia, bipolar disorder, or major depressive disorder. For individuals 18 years of age and under who are prescribed three or more psychotropic medications, the Department shall implement clinical edits that target inefficient, ineffective, or potentially harmful prescribing patterns. When such patterns are identified, the Medical Director for the Division of Medical Assistance and the Chief of Clinical Policy for the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services shall require a peer-to-peer consultation with the target prescribers. Alternatives discussed during the peer-to-peer consultations shall be based upon:

"a. Evidence-based criteria available regarding efficacy or safety of the covered treatments; and

"b. Policy approval by a majority vote of the North Carolina Physicians Advisory Group (NCPAG).

"The target prescriber has final decision-making authority to determine which prescription drug to prescribe or refill.

"The Department shall report on the implementation of this subdivision not later than January 1, 2008, and quarterly thereafter to the Senate Appropriations Committee on Health and Human Services, the House of Representatives Appropriations Subcommittee on Health and Human Services, the Fiscal Research Division, and the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services.

"(29) Other mental health services. — Unless otherwise covered by this section, coverage is limited to:

"a. Services as defined by the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services and approved by the Centers for Medicare and Medicaid Services (CMS) when provided in agencies meeting the requirements of the rules established by the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services and reimbursement is made in accordance with a State Plan developed by the Department of Health and Human Services not to exceed the upper limits established in federal regulations, and

"b. For children eligible for EPSDT services provided by:

"1. Licensed or certified psychologists, licensed clinical social workers, certified clinical nurse specialists in psychiatric mental health advanced practice, nurse practitioners certified as clinical nurse specialists in psychiatric mental health advanced practice, licensed psychological associates, licensed professional counselors, licensed marriage and family therapists, licensed clinical addictions specialists, and certified clinical supervisors, when Medicaid-eligible children are referred by the Community Care of North Carolina primary care physician, a Medicaid-enrolled psychiatrist, or the area mental health program or local management entity, and

"2. Institutional providers of residential services as defined by the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services and approved by the Centers for Medicare and Medicaid Services (CMS) for children and Psychiatric Residential Treatment Facility services that meet federal and State requirements as defined by the Department.

"c. For Medicaid-eligible adults, services provided by licensed or certified psychologists, licensed clinical social workers, certified clinical nurse specialists in psychiatric mental health advanced practice, and nurse practitioners certified as clinical nurse specialists in psychiatric mental health advanced practice, licensed psychological associates, licensed professional counselors, licensed marriage and family therapists, licensed clinical addictions specialists, and certified clinical supervisors, Medicaid-eligible adults may be self-referred.

"d. Payments made for services rendered in accordance with this subdivision shall be to qualified providers in accordance with approved policies and the State Plan. Nothing in sub-subdivision b. or c. of this subdivision shall be interpreted to modify the scope of practice of any service provider, practitioner, or licensee, nor to modify or attenuate any collaboration or supervision requirement related to the professional activities of any service provider, practitioner, or licensee. Nothing in sub-subdivision b. or c. of this subdivision shall be interpreted to require any private health insurer or health plan to make direct third-party reimbursements or payments to any service provider, practitioner, or licensee.

"Notwithstanding G.S. 150B-21.1(a), the Department of Health and Human Services may adopt temporary rules in accordance with Chapter 150B of the General Statutes further defining the qualifications of providers and referral procedures in order to implement this subdivision. Coverage policy for services defined by the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services under sub-subdivisions a. and b.2. of this subdivision shall be established by the Division of Medical Assistance."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

§ 90-85.28. Selection by pharmacists permissible; prescriber may permit or prohibit selection; price limit on selected drugs.

(a) A pharmacist dispensing a prescription for a drug product prescribed by its brand name may select any equivalent drug product which meets the following standards:

(1) The manufacturer's name and the distributor's name, if different from the manufacturer's name, shall appear on the label of the stock package;

(2) It shall be manufactured in accordance with current good manufacturing practices;

(3) Effective January 1, 1982, all oral solid dosage forms shall have a logo, or other identification mark, or the product name to identify the manufacturer or distributor;

(4) The manufacturer shall have adequate provisions for drug recall; and

(5) The manufacturer shall have adequate provisions for return of outdated drugs, through his distributor or otherwise.

(b) The pharmacist shall not select an equivalent drug product if the prescriber instructs otherwise by one of the following methods:

(1) A prescription form shall be preprinted or stamped with two signature lines at the bottom of the form which read:

"____________________ ____________________

Product Selection Permitted Dispense as Written"

On this form, the prescriber shall communicate his instructions to the pharmacist by signing the appropriate line.

(2) In the event the preprinted or stamped prescription form specified in (b)(1) is not readily available, the prescriber may handwrite "Dispense as Written" or words or abbreviations of the same meaning on a prescription form.

(3) When ordering a prescription orally, the prescriber shall specify either that the prescribed drug product be dispensed as written or that product selection is permitted. The pharmacist shall note the instructions on the file copy of the prescription and retain the prescription form for the period prescribed by law.

(b1) A prescription for a narrow therapeutic index drug shall be refilled using only the same drug product by the same manufacturer that the pharmacist last dispensed under the prescription, unless the prescriber is notified by the pharmacist prior to the dispensing of another manufacturer's product, and the prescriber and the patient give documented consent to the dispensing of the other manufacturer's product. For purposes of this subsection, the term "refilled" shall include a new prescription written at the expiration of a prescription which continues the patient's therapy on a narrow therapeutic index drug.

(c) The pharmacist shall not select an equivalent drug product unless its price to the purchaser is less than the price of the prescribed drug product. (1979, c. 1017, s. 1; 1981 (Reg. Sess., 1982), c. 1188, s. 3; 1997-76, s. 2.)

Editor's Note. — This section was formerly G.S. 90-76.2. It was recodified pursuant to Session Laws 1981 (Reg. Sess., 1982), c. 1188, s. 3, effective July 1, 1982.

For provisions relating to the dispensing of generic drugs under the Medical Assistance Program, see the Editor's note under G.S. 90-85.27.

§ 90-85.29. Prescription label.

The prescription label of every drug product dispensed shall contain the brand name of any drug product dispensed, or in the absence of a brand name, the established name. The prescription drug label of every drug product dispensed shall:

(1) Contain the discard date when dispensed in a container other than the manufacturer's original container. The discard date shall be the earlier of one year from the date dispensed or the manufacturer's expiration date, whichever is earlier, and

(2) Not obscure the expiration date and storage statement when the product is dispensed in the manufacturer's original container.

As used in this section, "expiration date" means the expiration date printed on the original manufacturer's container, and "discard date" means the date after which the drug product dispensed in a container other than the original manufacturer's container shall not be used. Nothing in this section shall impose liability on the dispensing pharmacist or the prescriber for damages related to or caused by a drug product that loses its effectiveness prior to the expiration or disposal date displayed by the pharmacist or prescriber. (1979, c. 1017, s. 1; 1981 (Reg. Sess., 1982), c. 1188, s. 3; 1993, c. 529, s. 7.5.)

Editor's Note. — This section was formerly G.S. 90-76.3. It was recodified pursuant to Session Laws 1981 (Reg. Sess., 1982), c. 1188, s. 3, effective July 1, 1982.

For provisions relating to the dispensing of generic drugs under the Medical Assistance Program, see the Editor's note under G.S. 90-85.27.

§ 90-85.30. Prescription record.

The pharmacy file copy of every prescription shall include the brand or trade name, if any, or the established name and the manufacturer of the drug product dispensed. (1979, c. 1017, s. 1; 1981 (Reg. Sess., 1982), c. 1188, s. 3.)

Editor's Note. — This section was formerly G.S. 90-76.4. It was recodified pursuant to Session Laws 1981 (Reg. Sess., 1982), c. 1188, s. 3, effective July 1, 1982.

For provisions relating to the dispensing of generic drugs under the Medical Assistance Program, see the Editor's note under G.S. 90-85.27.

§ 90-85.31. Prescriber and pharmacist liability not extended.

The selection of an equivalent drug product pursuant to this Article shall impose no greater liability upon the pharmacist for selecting the dispensed drug product or upon the prescriber of the same than would be incurred by either for dispensing the drug product specified in the prescription. (1979, c. 1017, s. 1; 1981 (Reg. Sess., 1982), c. 1188, s. 3.)

Editor's Note. — This section was formerly G.S. 90-76.5. It was recodified pursuant to Session Laws 1981 (Reg. Sess., 1982), c. 1188, s. 3, effective July 1, 1982.

For provisions relating to the dispensing of generic drugs under the Medical Assistance Program, see the Editor's note under G.S. 90-85.27.

§ 90-85.32. Rules pertaining to filling, refilling, transfer, and mail or common-carrier delivery of prescription orders.

(a) Except as otherwise provided in this section, the Board may adopt rules governing the filling, refilling and transfer of prescription orders not inconsistent with other provisions of law regarding the distribution of drugs and devices. The rules shall assure the safe and secure distribution of drugs and devices. Prescriptions marked PRN shall not be refilled more than one year after the date issued by the prescriber unless otherwise specified.

(b) Notwithstanding G.S. 90-85.6, the Board shall not adopt rules pertaining to the shipment, mailing, or other manner of delivery of dispensed legend drugs that are more restrictive than federal statutes or regulations governing the delivery of prescription medications by mail or common carrier. (1981 (Reg. Sess., 1982), c. 1188, s. 1; 1998-212, s. 12.3B(c).)

CASE NOTES

Pharmacy Board Lacked Authority to Regulate Pharmacist Hours. — Pharmacy board's authority to regulate pharmacies did not extend to regulating pharmacist working hours as set out in its proposed rule; the North Carolina Department of Labor was the only entity with authority to regulate working hours of pharmacists in pharmacies, and such regulation was solely through the Wage and Hour Act, G.S. 95-25.1. N.C. Bd. of Pharm. v. Rules Review Comm'n, 174 N.C. App. 301, 620 S.E.2d 893, 2005 N.C. App. LEXIS 2362 (2005), rev'd, in part, remanded, 360 N.C. 638, 637 S.E.2d 515 (2006) (rev'd as to pharmacy board's authority to regulate hours).

§ 90-85.33. Unit dose medication systems.

The Board may adopt regulations governing pharmacists providing unit dose medication systems. The regulations shall ensure the safe and proper distribution of drugs in the patient's best health interests. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.34. Unique pharmacy practice.

Consistent with the provisions of this Article, the Board may regulate unique pharmacy practices including, but not limited to, nuclear pharmacy and clinical pharmacy, to ensure the best interests of patient health and safety. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.34A. Public health pharmacy practice.

(a) A registered nurse in a local health department clinic may dispense prescription drugs and devices, other than controlled substances as defined in G.S. 90-87, under the following conditions:

(1) The registered nurse has training acceptable to the Board in the labeling and packaging of prescription drugs and devices;

(2) Dispensing by the registered nurse shall occur only at a local health department clinic;

(3) Only prescription drugs and devices contained in a formulary recommended by the Department of Health and Human Services and approved by the Board shall be dispensed;

(4) The local health department clinic shall obtain a pharmacy permit in accordance with G.S. 90-85.21;
(5) Written procedures for the storage, packaging, labeling and delivery of prescription drugs and devices shall be approved by the Board; and
(6) The pharmacist-manager, or another pharmacist at his direction, shall review dispensing records at least weekly, provide consultation where appropriate, and be responsible to the Board for all dispensing activity at the local health department clinic.

(b) This section is applicable only to prescriptions issued on behalf of persons receiving local health department clinic services and issued by an individual authorized by law to prescribe drugs and devices.

(c) This section does not affect the practice of nurse practitioners pursuant to G.S. 90-18.2 or of physician assistants pursuant to G.S. 90-18.1. (1985, c. 359; 1989 (Reg. Sess., 1990), c. 1004, s. 2; c. 1075, s. 4; 1997-443, s. 11A.22.)

§ 90-85.35. Availability of patient records.

Pharmacists employed in health care facilities shall have access to patient records maintained by those facilities when necessary for the pharmacist to provide pharmaceutical services. The pharmacist shall make appropriate entries in patient records. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.36. Availability of pharmacy records.

(a) Except as provided in subsections (b) and (c) below, written prescription orders on file in a pharmacy or other place where prescriptions are dispensed are not public records and any person having custody of or access to the prescription orders may divulge the contents or provide a copy only to the following persons:

(1) An adult patient for whom the prescription was issued or a person who is legally appointed guardian of that person;
(2) An emancipated minor patient for whom the prescription order was issued or a person who is the legally appointed guardian of that patient;
(3) An unemancipated minor patient for whom the prescription order was issued when the minor's consent is sufficient to authorize treatment of the condition for which the prescription was issued;
(4) A parent or person in loco parentis of an unemancipated minor patient for whom the prescription order was issued when the minor's consent is not sufficient to authorize treatment for the condition for which the prescription is issued;
(5) The licensed practitioner who issued the prescription;
(6) The licensed practitioner who is treating the patient for whom the prescription was issued;
(7) A pharmacist who is providing pharmacy services to the patient for whom the prescription was issued;
(8) Anyone who presents a written authorization for the release of pharmacy information signed by the patient or his legal representative;
(9) Any person authorized by subpoena, court order or statute;
(10) Any firm, association, partnership, business trust, corporation or company charged by law or by contract with the responsibility of providing for or paying for medical care for the patient for whom the prescription order was issued;
(11) A member or designated employee of the Board;
(12) The executor, administrator or spouse of a deceased patient for whom the prescription order was issued;

(13) Researchers and surveyors who have approval from the Board. The Board shall issue this approval when it determines that there are adequate safeguards to protect the confidentiality of the information contained in the prescription orders and that the researchers or surveyors will not publicly disclose any information that identifies any person; or

(14) The person owning the pharmacy or his authorized agent.

(b) A pharmacist may disclose any information to any person only when he reasonably determines that the disclosure is necessary to protect the life or health of any person.

(c) Records required to be kept by G.S. 90-93(d) (Schedule V) are not public records and shall be disclosed at the pharmacist's discretion. (1905, c. 108, s. 21; Rev., s. 4490; C.S., s. 6666; 1981 (Reg. Sess., 1982), c. 1188, s. 1; 1991, c. 125, s. 3.)

§ 90-85.37. Embargo.

Notwithstanding any other provisions of law, whenever an authorized representative of the Board has reasonable cause to believe that any drug or device presents a danger to the public health, he shall affix to the drug or device a notice that the article is suspected of being dangerous to the public health and warning all persons not to remove or dispose of the article. Whenever an authorized representative of the Board has reasonable cause to believe that any drug or device presents a danger to the public health and that there are reasonable grounds to believe that it might be disposed of pending a judicial resolution of the matter, he shall seize the article and take it to a safe and secure place. When an article has been embargoed under this section, the Board shall, as soon as practical, file a petition in Orange County District Court for a condemnation order for such article. If the judge determines after hearing, that the article is not dangerous to the public health, the Board shall direct the immediate removal of the tag or other marking, and where appropriate, shall direct that the article be returned to its owner. If the judge finds the article is dangerous to the public health, he shall order its destruction at the owner's expense and under the Board's supervision. If the judge determines that the article is dangerous to the public health, he shall order the owner of the article to pay all court costs, reasonable attorney's fees, storage fees, and all other costs incident to the proceeding. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.38. Disciplinary authority.

(a) The Board may, in accordance with Chapter 150B of the General Statutes, issue a letter of reprimand or suspend, restrict, revoke, or refuse to grant or renew a license to practice pharmacy, or require licensees to successfully complete remedial education if the licensee has done any of the following:

(1) Made false representations or withheld material information in connection with securing a license or permit.

(2) Been found guilty of or plead guilty or nolo contendere to any felony in connection with the practice of pharmacy or the distribution of drugs.

(3) Indulged in the use of drugs to an extent that renders the pharmacist unfit to practice pharmacy.

(4) Made false representations in connection with the practice of pharmacy that endanger or are likely to endanger the health or safety of the public, or that defraud any person.

(5) Developed a physical or mental disability that renders the pharmacist unfit to practice pharmacy with reasonable skill, competence and safety to the public.

(6) Failed to comply with the laws governing the practice of pharmacy and the distribution of drugs.
(7) Failed to comply with any provision of this Article or rules adopted by the Board.
(8) Engaged in, or aided and abetted an individual to engage in, the practice of pharmacy without a license.
(9) Been negligent in the practice of pharmacy.

(b) The Board, in accordance with Chapter 150B of the General Statutes, may suspend, revoke, or refuse to grant or renew any permit for the same conduct as stated in subsection (a).

(c) Any license or permit obtained through false representation or withholding of material information shall be void and of no effect. (1905, c. 108, ss. 17, 25; Rev., s. 4483; C.S., s. 6661; 1967, c. 807; 1973, c. 138; 1981, c. 412, s. 4; c. 717, s. 8; c. 747, s. 66; 1981 (Reg. Sess., 1982), c. 1188, s. 1; 1987, c. 827, s. 1; 2001-375, s. 5.)

CASE NOTES

Discretion of Board. — Appellate court found that the superior court, which initially reviewed a decision of the Board of Pharmacy reprimanding a permitee pharmacy chain for negligent acts of its licensed pharmacists, had not erred in finding no arbitrary or capricious action by the Board in choosing a sanction; case law already made it clear that the chain could be vicariously responsible for the pharmacists' actions, and so any sanction listed as applicable to a pharmacist could also be applied against the chain. CVS Pharm., Inc. v. N.C. Bd. of Pharm., 162 N.C. App. 495, 591 S.E.2d 567 (2004).

§ 90-85.39. Injunctive authority.

The Board may apply to any court for an injunction to prevent violations of this Article or of any rules enacted pursuant to it. The court is empowered to grant the injunctions regardless of whether criminal prosecution or other action has been or may be instituted as a result of the violation. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.40. Violations.

(a) It shall be unlawful for any owner or manager of a pharmacy or other place to allow or cause anyone other than a pharmacist to dispense or compound any prescription drug unless that person is a pharmacy technician or a pharmacy student who is enrolled in a school of pharmacy approved by the Board and is working under the supervision of a pharmacist.

(b) Every person lawfully authorized to compound or dispense prescription drugs shall comply with all the laws and regulations governing the labeling and packaging of such drugs by pharmacists.

(c) It shall be unlawful for any person not licensed as a pharmacist to compound or dispense any prescription drug, unless that person is a pharmacy technician or a pharmacy student who is enrolled in a school of pharmacy approved by the Board and is working under the supervision of a pharmacist.

(d) It shall be unlawful for any person to manage any place of business where devices are dispensed or sold at retail without a permit as required by this Article.

(d1) It is unlawful for a person to own or manage a place of business from which medical equipment is delivered without a permit as required by this Article.

(e) It shall be unlawful for any person without legal authorization to dispose of an article that has been embargoed under this Article.

(f) It shall be unlawful to violate any provision of this Article or of any rules or regulations enacted pursuant to it.

(g) This Article shall not be construed to prohibit any person from performing an act that person is authorized to perform pursuant to North Carolina law. Health care providers who are authorized to prescribe drugs without supervision are authorized to dispense drugs without supervision.

(h) A violation of this Article shall be a Class 1 misdemeanor. (1905, c. 108, ss. 4, 23, 24; Rev., ss. 3649, 3650, 4487; C.S., ss. 6667, 6668, 6669; 1921, c. 68, ss. 6, 7; Ex. Sess. 1924, c. 116; 1953, c. 1051; 1957, c. 617; 1959, c. 1222; 1981 (Reg. Sess., 1982), c. 1188, s. 1; 1993, c. 539, s. 621; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 692, s. 4; 2001-375, ss. 6, 7.)

§ 90-85.41. Board agreements with special peer review organizations for impaired pharmacy personnel.

(a) The North Carolina Board of Pharmacy may, under rules adopted by the Board in compliance with Chapter 150B of the General Statutes, enter into agreements with special impaired pharmacy personnel peer review organizations. Peer review activities to be covered by such agreements shall include investigation, review and evaluation of records, reports, complaints, litigation, and other information about the practices and practice patterns of pharmacy personnel licensed or registered by the Board, as such matters may relate to impaired pharmacy personnel. Special impaired pharmacy personnel peer review organizations may include a statewide supervisory committee and various regional and local components or subgroups.

(b) Agreements authorized under this section shall include provisions for the impaired pharmacy personnel peer review organizations to receive relevant information from the Board and other sources, conduct any investigation, review, and evaluation in an expeditious manner, provide assurance of confidentiality of nonpublic information and of the peer review process, make reports of investigations and evaluations to the Board, and to do other related activities for operating and promoting a coordinated and effective peer review process. The agreements shall include provisions assuring basic due process for pharmacy personnel that become involved.

(c) The impaired pharmacy personnel peer review organizations that enter into agreements with the Board shall establish and maintain a program for impaired pharmacy personnel licensed or registered by the Board for the purpose of identifying, reviewing, and evaluating the ability of those pharmacists to function as pharmacists, and pharmacy technicians to function as pharmacy technicians, and to provide programs for treatment and rehabilitation. The Board may provide funds for the administration of these impaired pharmacy personnel peer review programs. The Board shall adopt rules to apply to the operation of impaired pharmacy personnel peer review programs, with provisions for: (i) definitions of impairment; (ii) guidelines for program elements; (iii) procedures for receipt and use of information of suspected impairment; (iv) procedures for intervention and referral; (v) arrangements for monitoring treatment, rehabilitation, posttreatment support, and performance; (vi) reports of individual cases to the Board; (vii) periodic reporting of statistical information; and (viii) assurance of confidentiality of nonpublic information and of the peer review process.

(d) Upon investigation and review of a pharmacist licensed by the Board, or a pharmacy technician registered with the Board, or upon receipt of a complaint or other information, an impaired pharmacy personnel peer review organization that enters into a peer review agreement with the Board shall report immediately to the Board detailed information about any pharmacist licensed or pharmacy technician registered by the Board, if:

(1) The pharmacist or pharmacy technician constitutes an imminent danger to the public or himself or herself.
(2) The pharmacist or pharmacy technician refuses to cooperate with the program, refuses to submit to treatment, or is still impaired after treatment and exhibits professional incompetence.
(3) It reasonably appears that there are other grounds for disciplinary action.

(e) Any confidential patient information and other nonpublic information acquired, created, or used in good faith by an impaired pharmacy personnel peer review organization pursuant to this section shall remain confidential and shall not be subject to discovery or subpoena in a civil case. No person participating in good faith in an impaired pharmacy personnel peer review program developed under this section shall be required in a civil case to disclose any information (including opinions, recommendations, or evaluations) acquired or developed solely in the course of participating in the program.

(f) Impaired pharmacy personnel peer review activities conducted in good faith pursuant to any program developed under this section shall not be grounds for civil action under the laws of this State, and the activities are deemed to be State directed and sanctioned and shall constitute "State action" for the purposes of application of antitrust laws. (1999-81, s. 1; 2001-375, s. 8.)

CASE NOTES

Cited in Sharpe v. Worland, 137 N.C. App. 82, 527 S.E.2d 75 (2000).

§§ 90-85.42 through 90-85.44: Reserved for future codification purposes.

Article 4B.

Pharmacy Quality Assurance Protection Act.

§ 90-85.45. Legislative intent.

It is the intent of the General Assembly to require pharmacy quality assurance programs to further contribute to and enhance the quality of health care and reduce medication errors in this State by facilitating a process for the continuous review of the practice of pharmacy. (2005-427, s. 3.)

Editor's Note. — Session Laws 2005-427, s. 4, provides that this Article is effective January 1, 2006, and shall supersede all administrative rules regulating the maintenance of alleged medication error or incident records in effect as of that date.

§ 90-85.46. Definitions.

The following definitions shall apply in this Article:
(1) Board. — The North Carolina Board of Pharmacy.
(2) Pharmacy quality assurance program. — A program pertaining to one of the following:
  a. A pharmacy association created under G.S. 90-85.4 or incorporated under Chapter 55A of the General Statutes that evaluates the quality of pharmacy services and alleged medication errors and

incidents and makes recommendations to improve the quality of pharmacy services.

b. A program established by a person or entity holding a valid pharmacy permit pursuant to G.S. 90-85.21 or G.S. 90-85.21A to evaluate the quality of pharmacy services and alleged medication errors and incidents and make recommendations to improve the quality of pharmacy services.

c. A quality assurance committee or medical or peer review committee established by a health care provider licensed under this Chapter or a health care facility licensed under Chapter 122C, 131D, or 131E of the General Statutes that includes evaluation of the quality of pharmacy services and alleged medication errors and incidents and makes recommendations to improve the quality of pharmacy services. (2005-427, s. 3; 2006-259, s. 16(a).)

Effect of Amendments. — Session Laws 2006-259, s. 16(a), effective August 23, 2006, substituted "G.S. 90-85.21A" for "G.S. 90-85.21(a)" in the middle of subdivision (2)(b).

§ 90-85.47. Pharmacy quality assurance program required; limited liability; discovery.

(a) Every person or entity holding a valid pharmacy permit pursuant to G.S. 90-85.21 or G.S. 90-85.21A shall establish or participate in a pharmacy quality assurance program as defined under G.S. 90-85.46(2), to evaluate the following:

(1) The quality of the practice of pharmacy.
(2) The cause of alleged medication errors and incidents.
(3) Pharmaceutical care outcomes.
(4) Possible improvements for the practice of pharmacy.
(5) Methods to reduce alleged medication errors and incidents.

(b) There shall be no monetary liability on the part of, or no cause of action for damages arising against, any member of a duly appointed pharmacy quality assurance program or any pharmacy or pharmacist furnishing information to a pharmacy quality assurance program or any person, including a person acting as a witness or incident reporter to or investigator for a pharmacy quality assurance program, for any act or proceeding undertaken or performed within the scope of the functions of the pharmacy quality assurance program.

(c) This section shall not be construed to confer immunity from liability on any professional association, pharmacy or pharmacist, or health care provider while performing services other than as a member of a pharmacy quality assurance program or upon any person, including a person acting as a witness or incident reporter to or investigator for a pharmacy quality assurance program, for any act or proceeding undertaken or performed outside the scope of the functions of the pharmacy quality assurance program. Except as provided in subsection (a) or (b) of this section, where a cause of action would arise against a pharmacy, pharmacist, or an individual health care provider, the cause of action shall remain in effect.

(d) The proceedings of a pharmacy quality assurance program, the records and materials it produces, and the materials it considers shall be confidential and not considered public records within the meaning of G.S. 132-1 or G.S. 58-2-100 and shall not be subject to discovery or introduction into evidence in any civil action, administrative hearing or Board investigation against a pharmacy, pharmacist, pharmacy technician, a pharmacist manager or a permittee or a hospital licensed under Chapter 122C or Chapter 131E of the General Statutes or that is owned or operated by the State, which civil action, administrative hearing or Board Investigation results from matters that are the subject of evaluation and review by the pharmacy quality assurance program. No person who was in attendance at a meeting of the pharmacy quality assurance program shall be required to testify in any civil action, administrative hearing or Board investigation as to any evidence or other matters produced or presented during the proceedings of the pharmacy quality assurance program or as to any findings, recommendations, evaluations, opinions, or other actions of the pharmacy quality assurance program or its members. However, information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the pharmacy quality assurance program. Documents otherwise available as public records within the meaning of G.S. 132-1 do not lose their status as public records merely because they were presented or considered during proceedings of the pharmacy quality assurance program. A member of the pharmacy quality assurance program may testify in a civil or administrative action but cannot be asked about the person's testimony before the pharmacy quality assurance program or any opinions formed as a result of the pharmacy quality assurance program. Nothing in this subsection shall preclude:

(1) A pharmacy, pharmacist, pharmacy technician, or other person or any agent or representative of a pharmacy, pharmacist, pharmacy technician or other person participating on a pharmacy quality assurance program may use otherwise privileged, confidential information for legitimate internal business or professional purposes of the pharmacy quality assurance program.

(2) A pharmacy, pharmacist, pharmacy technician, other person participating on the committee, or any person or organization named as a defendant in a civil action, a respondent in an administrative proceeding, or a pharmacy, pharmacist, or pharmacy technician subject to a Board investigation as a result of participation in the pharmacy quality assurance program may use otherwise privileged, confidential information in the pharmacy quality assurance program or person's own defense. A plaintiff in the civil action or the agency in the administrative proceeding may disclose records or determinations of or communications to the pharmacy quality assurance program in rebuttal to information given by the defendant, respondent, or pharmacist subject to Board investigation.

(e) Upon the Board providing written notice to the pharmacy permittee's designated agent under G.S. 90-85.21(a) and pharmacist of an investigation against the pharmacist, including the specific reason for the Board investigation, the pharmacy permittee's designated agent shall compile and provide documentation within 10 days of the receipt of the notice of any alleged medication error or incident committed by the pharmacist in the 12 months preceding the receipt of the notice, that the pharmacy permittee has knowledge of, when:

(1) The alleged medication error or incident resulted in any of the following:
   a. A visit to a physician or an emergency room attributed to the alleged medication incident or error.
   b. Hospitalization requiring an overnight stay or longer.
   c. A fatality.

(2) The Board has initiated a disciplinary proceeding against the pharmacist as a result of the investigation. Unless the documentation relates to an alleged medication error or incident that was specifically the cause of the investigation, the Board may review the documentation only after the Board has made findings of fact and conclusions of

law pursuant to G.S. 150B-42(a) and may use the documentation in determining the remedial action the pharmacist shall undergo as part of the disciplinary action imposed by the Board. The documentation shall be released only to the Board or its designated employees pursuant to this subsection and shall not otherwise be released except as required by law.

The documentation provided to the Board shall not include the proceedings and records of a pharmacy quality assurance program or information prepared by the pharmacy solely for consideration by or upon request of a pharmacy quality assurance program.

(f) Nothing in this section shall preclude the Board from obtaining information concerning a specific alleged medication error or incident that is the subject of a Board investigation resulting from a complaint to the Board. (2005-427, s. 3; 2006-259, s. 16(b).)

Effect of Amendments. — Session Laws 2006-259, s. 16(b), effective August 23, 2006, substituted "G.S. 90-85.21A" for "G.S. 90-85.21(a)" in the introductory paragraph of subsection (a).

ARTICLE 5.

North Carolina Controlled Substances Act.

§ 90-86. Title of Article.

This Article shall be known and may be cited as the "North Carolina Controlled Substances Act." (1971, c. 919, s. 1.)

Legal Periodicals. — For survey of 1976 criminal case law, see 55 N.C.L. Rev. 976 (1977).

For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For comment, "Admissibility of Biochemical Urinalysis Testing Results for the Purpose of Detecting Marijuana Use," see 20 Wake Forest L. Rev. 391 (1984).

For a survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2252 (1997).

CASE NOTES

Controlled Substances Act did not repeal prior law controlling narcotic drugs. State v. Overton, 60 N.C. App. 1, 298 S.E.2d 695 (1982), cert. denied and appeal dismissed, 307 N.C. 580, 299 S.E.2d 652 (1983).

Reference to Act in Indictment Prior to Effective Date. — The conspiracy to possess, sell, deliver, and manufacture heroin was equally a crime under the Controlled Substances Act and its predecessor, the Uniform Narcotic Drug Act, which remained in full force and effect as to offenses committed prior to January 1, 1972. Reference in indictments to the Controlled Substances Act did not invalidate the indictments, as reference in the indictment to the specific statute allegedly violated is immaterial. State v. Overton, 60 N.C. App. 1, 298 S.E.2d 695 (1982), cert. denied and appeal dismissed, 307 N.C. 580, 299 S.E.2d 652 (1983).

Indictment for Sale of Narcotics to Allege Name of Purchaser. — In a count charging the sale of narcotics, the indictment must allege the name of the purchaser. State v. Martindale, 15 N.C. App. 216, 189 S.E.2d 549 (1972).

Applied in State v. Turnbull, 16 N.C. App. 542, 192 S.E.2d 689 (1972); State v. McCuien, 17 N.C. App. 109, 193 S.E.2d 349 (1972); State v. Hart, 64 N.C. App. 699, 308 S.E.2d 474 (1983); State v. Boone, 310 N.C. 284, 311 S.E.2d 552 (1984).

Cited in State v. McIntyre, 281 N.C. 304, 188 S.E.2d 304 (1972); State v. Foye, 14 N.C. App. 200, 188 S.E.2d 67 (1972); State v. Wood, 17 N.C. App. 352, 194 S.E.2d 205 (1973); State v. Muncy, 79 N.C. App. 356, 339 S.E.2d 466 (1986); State v. Welch, 89 N.C. App. 135, 365 S.E.2d 190 (1988); Harrelson v. Soles, 94 N.C. App. 557, 380 S.E.2d 528 (1989); State v. Outlaw, 96 N.C. App. 192, 385 S.E.2d 165 (1989); State v. McRae, 110 N.C. App. 643, 430 S.E.2d 434 (1993); State v. Ballenger, 123 N.C. App.

179, 472 S.E.2d 572 (1996), aff'd, 345 N.C. 626, 481 S.E.2d 84, cert. denied, 522 U.S. 817, 118 S. Ct. 68, 139 L. Ed. 2d 29 (1997); State v. Harris, 361 N.C. 400, 646 S.E.2d 526, 2007 N.C. LEXIS 598 (2007).

§ 90-87. Definitions.

As used in this Article:

(1) "Administer" means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means to the body of a patient or research subject by:
  a. A practitioner (or, in his presence, by his authorized agent), or
  b. The patient or research subject at the direction and in the presence of the practitioner.

(2) "Agent" means an authorized person who acts on behalf of or at the direction of a manufacturer, distributor, or dispenser but does not include a common or contract carrier, public warehouseman, or employee thereof.

(3) "Bureau" means the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice or its successor agency.

(3a) "Commission" means the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services established under Part 4 of Article 3 of Chapter 143B of the General Statutes.

(4) "Control" means to add, remove, or change the placement of a drug, substance, or immediate precursor included in Schedules I through VI of this Article.

(5) "Controlled substance" means a drug, substance, or immediate precursor included in Schedules I through VI of this Article.

(5a) "Controlled substance analogue" means a substance (i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in Schedule I or II; (ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in Schedule I or II; or (iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in Schedule I or II; and does not include (i) a controlled substance; (ii) any substance for which there is an approved new drug application; (iii) with respect to a particular person any substance, if an exemption is in effect for investigational use, for that person, under § 355 of Title 21 of the United States Code to the extent conduct with respect to such substance is pursuant to such exemption; or (iv) any substance to the extent not intended for human consumption before such an exemption takes effect with respect to that substance. The designation of gamma butyrolactone or any other chemical as a listed chemical pursuant to subdivision 802(34) or 802(35) of Title 21 of the United States Code does not preclude a finding pursuant to this subdivision that the chemical is a controlled substance analogue.

(6) "Counterfeit controlled substance" means:
  a. A controlled substance which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number, or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than

the person or persons who in fact manufactured, distributed, or dispensed such substance and which thereby falsely purports, or is represented to be the product of, or to have been distributed by, such other manufacturer, distributor, or dispenser; or

b. Any substance which is by any means intentionally represented as a controlled substance. It is evidence that the substance has been intentionally misrepresented as a controlled substance if the following factors are established:

1. The substance was packaged or delivered in a manner normally used for the illegal delivery of controlled substances.
2. Money or other valuable property has been exchanged or requested for the substance, and the amount of that consideration was substantially in excess of the reasonable value of the substance.
3. The physical appearance of the tablets, capsules or other finished product containing the substance is substantially identical to a specified controlled substance.

(7) "Deliver" or "delivery" means the actual constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.

(8) "Dispense" means to deliver a controlled substance to an ultimate user or research subject by or pursuant to the lawful order of a practitioner, including the prescribing, administering, packaging, labeling, or compounding necessary to prepare the substance for that delivery.

(9) "Dispenser" means a practitioner who dispenses.

(10) "Distribute" means to deliver other than by administering or dispensing a controlled substance.

(11) "Distributor" means a person who distributes.

(12) "Drug" means a. substances recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; b. substances intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; c. substances (other than food) intended to affect the structure or any function of the body of man or other animals; and d. substances intended for use as a component of any article specified in a, b, or c of this subdivision; but does not include devices or their components, parts, or accessories.

(13) "Drug dependent person" means a person who is using a controlled substance and who is in a state of psychic or physical dependence, or both, arising from use of that controlled substance on a continuous basis. Drug dependence is characterized by behavioral and other responses which include a strong compulsion to take the substance on a continuous basis in order to experience its psychic effects, or to avoid the discomfort of its absence.

(14) "Immediate precursor" means a substance which the Commission has found to be and by regulation designates as being the principal compound commonly used or produced primarily for use, and which is an immediate chemical intermediary used or likely to be used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail, or limit such manufacture.

(14a) The term "isomer" means, except as used in G.S. 90-87(17)(d), G.S. 90-89(c), G.S. 90-90(1)d., and G.S. 90-95(h)(3), the optical isomer. As used in G.S. 90-89(c) the term "isomer" means the optical, position, or geometric isomer. As used in G.S. 90-87(17)(d), G.S. 90-90(1)d., and G.S. 90-95(h)(3) the term "isomer" means the optical isomer or diastereoisomer.

(15) "Manufacture" means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance by any means, whether directly or indirectly, artificially or naturally, or by extraction from substances of a natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis; and "manufacture" further includes any packaging or repackaging of the substance or labeling or relabeling of its container except that this term does not include the preparation or compounding of a controlled substance by an individual for his own use or the preparation, compounding, packaging, or labeling of a controlled substance:

   a. By a practitioner as an incident to his administering or dispensing of a controlled substance in the course of his professional practice, or

   b. By a practitioner, or by his authorized agent under his supervision, for the purpose of, or as an incident to research, teaching, or chemical analysis and not for sale.

(16) "Marijuana" means all parts of the plant of the genus Cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin, but shall not include the mature stalks of such plant, fiber produced from such stalks, oil, or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

(17) "Narcotic drug" means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

   a. Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate.

   b. Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in clause a, but not including the isoquinoline alkaloids of opium.

   c. Opium poppy and poppy straw.

   d. Cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof, or coca leaves and any salt, isomer, salts of isomers, compound, derivative or preparation of coca leaves, or any salt, isomer, salts of isomers, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocanized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine.

(18) "Opiate" means any substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability. It does not include, unless specifically designated as controlled under G.S. 90-88, the dextrorotatory isomer of 3-methoxy-n-methyl-morphinan and its salts (dextromethorphan). It does include its racemic and levorotatory forms.

(19) "Opium poppy" means the plant of the species Papaver somniferum L., except its seeds.

(20) "Person" means individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any other legal entity.

(21) "Poppy straw" means all parts, except the seeds, of the opium poppy, after mowing.

(22) "Practitioner" means:

a. A physician, dentist, optometrist, veterinarian, scientific investigator, or other person licensed, registered or otherwise permitted to distribute, dispense, conduct research with respect to or to administer a controlled substance so long as such activity is within the normal course of professional practice or research in this State.

b. A pharmacy, hospital or other institution licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to or to administer a controlled substance so long as such activity is within the normal course of professional practice or research in this State.

(23) "Prescription" means:

a. A written order or other order which is promptly reduced to writing for a controlled substance as defined in this Article, or for a preparation, combination, or mixture thereof, issued by a practitioner who is licensed in this State to administer or prescribe drugs in the course of his professional practice; or issued by a practitioner serving on active duty with the armed forces of the United States or the United States Veterans Administration who is licensed in this or another state or Puerto Rico, provided the order is written for the benefit of eligible beneficiaries of armed services medical care; a prescription does not include an order entered in a chart or other medical record of a patient by a practitioner for the administration of a drug; or

b. A drug or preparation, or combination, or mixture thereof furnished pursuant to a prescription order.

(24) "Production" includes the manufacture, planting, cultivation, growing, or harvesting of a controlled substance.

(25) "Registrant" means a person registered by the Commission to manufacture, distribute, or dispense any controlled substance as required by this Article.

(26) "State" means the State of North Carolina.

(27) "Ultimate user" means a person who lawfully possesses a controlled substance for his own use, or for the use of a member of his household, or for administration to an animal owned by him or by a member of his household. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 540, ss. 2-4; c. 1358, ss. 1, 15; 1977, c. 482, s. 6; 1981, c. 51, ss. 8, 9; c. 75, s. 1; c. 732; 1985, c. 491; 1987, c. 105, ss. 1, 2; 1991 (Reg. Sess., 1992), c. 1030, s. 21; 1997-456, s. 27; 2003-249, s. 2.)

Legal Periodicals. — For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

For article, "Asset Forfeiture and Third Party Rights: The Need for Further Law Reform," see 5 Duke L.J. 1254 (1989).

CASE NOTES

I. General Consideration.
II. "Deliver" or "Delivery."
III. "Manufacture."
IV. "Marijuana."
V. "Practitioner."
VI. "Prescription."

I. GENERAL CONSIDERATION.

Expert Witness. — Acceptance of an expert witness in the field of marijuana identification and admission of her opinion as to the nature of the material seized was not improper where the witness was a chemist with the State Bureau of Investigation, whose duties consisted of analysis of substances for the presence of controlled substances, including marijuana, where she had been so employed for almost two years, and had had special training in the analysis of controlled substances. State v. Jenkins, 74 N.C. App. 295, 328 S.E.2d 460 (1985).

Applied in State v. Piland, 58 N.C. App. 95, 293 S.E.2d 278 (1982); State v. Peoples, 65 N.C. App. 168, 308 S.E.2d 500 (1983); State v. Brown, 310 N.C. 563, 313 S.E.2d 585 (1984); State v. Perry, 69 N.C. App. 477, 317 S.E.2d 428 (1984); State v. Johnson, 78 N.C. App. 68, 337 S.E.2d 81 (1985); State v. Williams, 164 N.C. App. 638, 596 S.E.2d 313 (2004).

Cited in State v. Phillips, 15 N.C. App. 597, 190 S.E.2d 433 (1972); State v. Aiken, 286 N.C. 202, 209 S.E.2d 763 (1974); State v. Newton, 21 N.C. App. 384, 204 S.E.2d 724 (1974); State v. Bell, 33 N.C. App. 607, 235 S.E.2d 886 (1977); State v. Shufford, 34 N.C. App. 115, 237 S.E.2d 481 (1977); State v. Childers, 41 N.C. App. 729, 255 S.E.2d 654 (1979); State v. Roseboro, 55 N.C. App. 205, 284 S.E.2d 725 (1981); State v. Ellers, 56 N.C. App. 683, 289 S.E.2d 924 (1982); State v. Simmons, 66 N.C. App. 402, 311 S.E.2d 357 (1984); State v. Moore, 95 N.C. App. 718, 384 S.E.2d 67 (1989); State v. Thorpe, 326 N.C. 451, 390 S.E.2d 311 (1990); State v. Jones, 97 N.C. App. 189, 388 S.E.2d 213 (1990); State v. Holmes, 109 N.C. App. 615, 428 S.E.2d 277 (1993); State v. Oakes, 113 N.C. App. 332, 438 S.E.2d 477 (1994).

II. "DELIVER" OR "DELIVERY."

"Delivery" Means "Transfer." — In a prosecution for felonious sale and delivery of marijuana and felonious possession of marijuana with intent to sell, trial judge's charge to the jury placing the burden on the State to prove that defendant "transferred" the marijuana was not prejudicial error, since "delivery" means "transfer" under this section. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

In the context of controlled substance statutes, "deliver" means the actual, constructive, or attempted transfer from one person to another of a controlled substance. It is the intent of the defendant that is the gravaman of the offense. State v. Creason, 313 N.C. 122, 326 S.E.2d 24 (1985).

"Deliver" means actual, constructive, or attempted transfer from one person to another of a controlled substance. State v. Thrift, 78 N.C. App. 199, 336 S.E.2d 861 (1985), cert. denied and appeal dismissed, 316 N.C. 557, 344 S.E.2d 15 (1986).

In Exchange For Work. — Exchanging methamphetamine, a controlled substance under G.S. 90-87(5), G.S. 90-90(3), for work was a sale of a controlled substance. State v. Yelton, 175 N.C. App. 349, 623 S.E.2d 594, 2006 N.C. App. LEXIS 44 (2006).

Evidence Sufficient. — Where the evidence showed that defendant gave drugs to two persons when officers arrived at a residence to search for a fugitive, there was sufficient evidence to support a finding of delivery; therefore, a motion to dismiss was properly denied since the credibility of the witnesses was within the province of the jury. State v. Price, — N.C. App. —, 611 S.E.2d 891 (2005).

Evidence of Constructive Delivery Held Sufficient. — Evidence that defendant allowed agent to pick up a bag of cocaine from scales and place it under bed "for security purposes," from where the agent later retrieved it, was sufficient evidence of constructive delivery to go to the jury for its evaluation and determination as to whether defendant knowingly delivered 400 grams or more of a mixture containing cocaine. State v. Thrift, 78 N.C. App. 199, 336 S.E.2d 861 (1985), cert. denied and appeal dismissed, 316 N.C. 557, 344 S.E.2d 15 (1986).

Evidence that defendant agreed to sell marijuana to an informant, drove around the agreed scene of the marijuana's delivery to inspect the scene, and left the delivery scene before a person working for him arrived to deliver the marijuana was sufficient to show constructive delivery of the marijuana. State v. Lorenzo, 147 N.C. App. 728, 556 S.E.2d 625 (2001).

Remuneration Need Not Be Shown. — To prove delivery, the State is not required to prove that defendant received remuneration for the transfer. State v. Thrift, 78 N.C. App. 199, 336 S.E.2d 861 (1985), cert. denied and appeal dismissed, 316 N.C. 557, 344 S.E.2d 15 (1986).

III. "MANUFACTURE."

"Processing" is to subject the controlled substance to a particular method, system, technique of preparation or treatment to bring about a desired result. State v. Muncy, 79 N.C. App. 356, 339 S.E.2d 466, cert. denied, 316 N.C. 736, 345 S.E.2d 396 (1986).

When Intent to Distribute Is Necessary Element. — Intent to distribute is not a necessary element of the offense of manufacturing a controlled substance unless the manufacturing activity is preparation or compounding. State v. Muncy, 79 N.C. App. 356, 339 S.E.2d 466, cert. denied, 316 N.C. 736, 345 S.E.2d 396 (1986).

In those cases where production, propagation, conversion or processing of a controlled substance is involved, the intent of the defendant, either to distribute or consume personally, will be irrelevant and does not form an element of the offense. State v. Muncy, 79 N.C. App. 356, 339 S.E.2d 466, cert. denied, 316 N.C. 736, 345 S.E.2d 396 (1986).

The intent to distribute was not necessary for a violation of subdivision (15) of this section, where defendant was indicted for the cutting of cocaine (dilution of a controlled substance). State v. Muncy, 79 N.C. App. 356, 339 S.E.2d 466, cert. denied, 316 N.C. 736, 345 S.E.2d 396 (1986).

The plain meaning of the exception in subdivision (15) which excepts "preparation or compounding of a controlled substance by an individual for his own use" is to avoid making an individual liable for the felony of manufacturing controlled substance in the situation where, being already in possession of a controlled substance, he makes it ready for use (i.e., rolling marijuana into cigarettes for smoking) or combines it with other ingredients for use (i.e., making the so-called "Alice B. Toklas" brownies containing marijuana). State v. Childers, 41 N.C. App. 729, 255 S.E.2d 654, cert. denied, 298 N.C. 302, 259 S.E.2d 916 (1979).

Evidence Sufficient to Show Manufacture of Marijuana. — Evidence was sufficient to withstand a motion for judgment as of nonsuit on a charge of manufacture of marijuana where stripped stalks of marijuana were found growing behind a television antenna connected to the defendant's residence and marijuana plants were found growing in flower pots on a table in the defendant's yard 32 feet from his residence. State v. Wiggins, 33 N.C. App. 291, 235 S.E.2d 265, cert. denied, 293 N.C. 592, 241 S.E.2d 513 (1977).

Evidence held to place defendant in such "close juxtaposition" to six patches of marijuana growing in the environs of his mobile home as to justify a jury finding that defendant was engaged in its manufacture. State v. Jenkins, 74 N.C. App. 295, 328 S.E.2d 460 (1985).

Evidence of scales and plastic bags with marijuana found in defendants' residence was sufficient evidence for the issue of manufacturing to be submitted to a jury; moreover, a co-defendant testified that one defendant used the scale and vacuum sealer found in the kitchen to weigh and package marijuana for distribution. State v. Harrington, 171 N.C. App. 17, 614 S.E.2d 337, 2005 N.C. App. LEXIS 1189 (2005), cert. denied, sub nom. State v. Rattis, 360 N.C. 70, 623 S.E.2d 36 (2005).

Evidence from a co-defendant that defendant had access to a garage at their residence where one to two thousand dime bags were found, that defendant had access to the kitchen where a scale and vacuum sealer were found, and that defendant used bags found in the garage to distribute marijuana, when coupled with evidence that the police found, among other things, a set of scales and plastic bags containing marijuana residue in defendants bedroom, was sufficient to submit to the jury the issue of whether defendant was trafficking in marijuana by manufacture. State v. Harrington, 171 N.C. App. 17, 614 S.E.2d 337, 2005 N.C. App. LEXIS 1189 (2005), cert. denied, sub nom. State v. Rattis, 360 N.C. 70, 623 S.E.2d 36 (2005).

Sufficient evidence supported defendant's conviction for manufacturing marijuana by packaging it, as: (1) when arrested, defendant had in defendant's pants pocket a plastic bag containing marijuana that was the same, or similar to, the plastic bags found in an apartment; (2) an accomplice testified that defendant resided in the apartment with the accomplice; and (3) the accomplice testified that the accomplice had seen defendant near a blue bowl, plastic bags, and scales, and that defendant had been bagging up marijuana. State v. Brown, — N.C. App. —, 641 S.E.2d 850, 2007 N.C. App. LEXIS 574 (2007).

Evidence Sufficient to Show Manufacture of Heroin. — Evidence held ample to give rise to a reasonable inference that defendant manufactured heroin by packing controlled substance. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

Evidence showing the presence of a bag containing 17 grams of diluted cocaine, a smaller bag containing over three grams of cocaine of a greater purity, tools of a type which the State's evidence showed were commonly used in repackaging and selling cocaine, a bag of inositol, and over a hundred small plastic bags was sufficient to sustain defendant's conviction for manufacturing cocaine. State v. Rich, 87 N.C. App. 380, 361 S.E.2d 321 (1987).

Evidence Sufficient to Show Manufacture of Methamphetamine. — Motion to dismiss the charge of possession with intent to manufacture, sell, and deliver methamphetamine was properly denied where defendant testified to knowingly assisting her husband in manufacturing methamphetamine by ordering chemistry ware for him; her testimony that 2.9 grams of methamphetamine found at her residence was for personal use was contradicted by expert testimony that indicated the items found were consistent with materials used in manufacturing methamphetamine and packaging controlled substances and that plastic bags such as those found at defendant's residence could be used to package controlled substances into smaller amounts for sale. State v. Alderson, 173 N.C. App. 344, 618 S.E.2d 844, 2005 N.C. App. LEXIS 2033 (2005).

Where an array of items all used as means to package and distribute cocaine were found on a table, from the plastic baggies to the tinfoil, from the cellophane tape to the wire ties, a rational trier of fact had sufficient evidence to convict one of manufacturing cocaine. State v. Brown, 64 N.C. App. 637, 308 S.E.2d 346 (1983), aff'd, 310 N.C. 563, 313 S.E.2d 585 (1984).

IV. "MARIJUANA."

The exception in subdivision (16) relating to sterilized seeds implies an affirmative act by which presumptively vital seeds are rendered sterile, rather than the naturally occurring sterile seeds resulting from a lack of fertilization by pollination. State v. Childers, 41 N.C. App. 729, 255 S.E.2d 654, cert. denied, 298 N.C. 302, 259 S.E.2d 916 (1979).

State Entitled to Assume Marijuana Seeds Are Vital. — Where the defendant does not make any showing as to the fertility of marijuana seeds, and offers no proof that they were in any different state from that in which they naturally occurred, the State is entitled to assume that the seeds are vital and to proceed upon that assumption until the contrary is shown by defendant's evidence. State v. Childers, 41 N.C. App. 729, 255 S.E.2d 654, cert. denied, 298 N.C. 302, 259 S.E.2d 916 (1979).

Burden of Showing Matter Seized Not Within Definition. — The burden would be upon the defendants to show that stalks were mature or that any other part of the matter or material seized did not qualify as "marijuana" as defined by subdivision (16) of this section. State v. Anderson, 57 N.C. App. 602, 292 S.E.2d 163, cert. denied, 306 N.C. 559, 294 S.E.2d 372 (1982).

Failure of Defendant to Show Material Was Not "Marijuana". — Trial court did not err in permitting case in which 12,410 pounds of marijuana plants, including stalks, and plastic pipes, was seized, where defendant failed to show that enough of the material seized did not qualify as marijuana. State v. Grainger, 78 N.C. App. 123, 337 S.E.2d 77 (1985), cert. denied, 316 N.C. 198, 341 S.E.2d 572 (1986).

When marijuana seized from defendant was weighed one day after it was seized, and found to weigh more than the statutory minimum required for a charge of trafficking in marijuana, this weight could properly include moisture naturally present within the plant because such moisture was not specifically listed in G.S. 90-87(16) as an exclusion from such weight, so, even though the marijuana weighed less than the statutory minimum when it was weighed over one month after being seized, this did not, as a matter of law, require dismissal of the trafficking charge, and it was reversible error for the trial court to apply a requirement that the marijuana's weight, for purposes of the trafficking charge, was determined when it was "usable or suitable for consumption." State v. Gonzales, 164 N.C. App. 512, 596 S.E.2d 297 (2004), aff'd, 359 N.C. 420, 611 S.E.2d 832 (2005).

V. "PRACTITIONER."

The term "within the normal course of professional practice" in subdivision (22)a is not vague. It gives every practitioner fair notice of the standard he must follow if his conduct is to come within the exception of the statute. That is all the Constitution requires. State v. Best, 31 N.C. App. 250, 229 S.E.2d 581 (1976), rev'd on other grounds, 292 N.C. 294, 233 S.E.2d 544 (1977).

VI. "PRESCRIPTION."

The clause "who is licensed ... to ... prescribe drugs in the course of his professional practice" in subdivision (23)a is an adjective clause modifying the preceding noun "practitioner." It describes the one issuing the prescription. It does not change the definition of practitioner as given in subdivision (22)a. State v. Best, 31 N.C. App. 250, 229 S.E.2d 581 (1976), rev'd on other grounds, 292 N.C. 294, 233 S.E.2d 544 (1977).

Thus a practitioner who is licensed to issue a prescription in the course of "his" professional practice may not do so unless that "activity is within the normal course of professional practice." State v. Best, 31 N.C. App. 250, 229 S.E.2d 581 (1976), rev'd on other grounds, 292 N.C. 294, 233 S.E.2d 544 (1977).

§ 90-88. Authority to control.

(a) The Commission may add, delete, or reschedule substances within Schedules I through VI of this Article on the petition of any interested party, or its own motion. In every case the Commission shall give notice of and hold a public hearing pursuant to Chapter 150B of the General Statutes prior to adding, deleting or rescheduling a controlled substance within Schedules I through VI of this Article, except as provided in subsection (d) of this section. A petition by the Commission, the North Carolina Department of Justice, or the North Carolina Board of Pharmacy to add, delete, or reschedule a controlled substance within Schedules I through VI of this Article shall be placed on the agenda, for consideration, at the next regularly scheduled meeting of the Commission, as a matter of right.

(a1) In making a determination regarding a substance, the Commission shall consider the following:

(1) The actual or relative potential for abuse;
(2) The scientific evidence of its pharmacological effect, if known;
(3) The state of current scientific knowledge regarding the substance;
(4) The history and current pattern of abuse;
(5) The scope, duration, and significance of abuse;
(6) The risk to the public health;
(7) The potential of the substance to produce psychic or physiological dependence liability; and
(8) Whether the substance is an immediate precursor of a substance already controlled under this Article.

(b) After considering the required factors, the Commission shall make findings with respect thereto and shall issue an order adding, deleting or rescheduling the substance within Schedules I through VI of this Article.

(c) If the Commission designates a substance as an immediate precursor, substances which are precursors of the controlled precursor shall not be subject to control solely because they are precursors of the controlled precursor.

(d) If any substance is designated, rescheduled or deleted as a controlled substance under federal law, the Commission shall similarly control or cease control of, the substance under this Article unless the Commission objects to such inclusion. The Commission, at its next regularly scheduled meeting that takes place 30 days after publication in the Federal Register of a final order scheduling a substance, shall determine either to adopt a rule to similarly control the substance under this Article or to object to such action. No rule-making notice or hearing as specified by Chapter 150B of the General Statutes is required if the Commission makes a decision to similarly control a substance. However, if the Commission makes a decision to object to adoption of the federal action, it shall initiate rule-making procedures pursuant to Chapter 150B of the General Statutes within 180 days of its decision to object.

(e) The Commission shall exclude any nonnarcotic substance from the provisions of this Article if such substance may, under the federal Food, Drug and Cosmetic Act, lawfully be sold over-the-counter without prescription.

(f) Authority to control under this Article does not include distilled spirits, wine, malt beverages, or tobacco.

(g) The Commission shall similarly exempt from the provisions of this Article any chemical agents and diagnostic reagents not intended for administration to humans or other animals, containing controlled substances which either (i) contain additional adulterant or denaturing agents so that the resulting mixture has no significant abuse potential, or (ii) are packaged in such a form or concentration that the particular form as packaged has no significant abuse potential, where such substance was exempted by the Federal Bureau of Narcotics and Dangerous Drugs.

(h) Repealed by Session Laws 1987, c. 413, s. 4.

(i) The North Carolina Department of Health and Human Services shall maintain a list of all preparations, compounds, or mixtures which are excluded, exempted and excepted from control under any schedule of this Article by the United States Drug Enforcement Administration and/or the Commission. This list and any changes to this list shall be mailed to the North Carolina Board of Pharmacy, the State Bureau of Investigation and each district attorney of this State. (1971, c. 919, s. 1; 1973, c. 476, s. 128; cc. 524, 541; c. 1358, ss. 2, 3, 15; 1977, c. 667, s. 3; 1981, c. 51, s. 9; 1987, c. 413, ss. 1-4; 1989, c. 770, s. 16; 1997-443, s. 11A.118(a); 2000-189, s. 4; 2001-487, s. 22.)

Cross References. — As to the creation and organization of the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services, see G.S. 143B-147 et seq.

CASE NOTES

This section is constitutional. State v. Lisk, 21 N.C. App. 474, 204 S.E.2d 868, cert. denied, 285 N.C. 666, 207 S.E.2d 759 (1974).

This section does not delegate the authority to define crimes; rather, it is a delegation of authority to find facts or determine the existence or nonexistence of a factual situation or condition on which the operation of a law is made to depend. State v. Lisk, 21 N.C. App. 474, 204 S.E.2d 868, cert. denied, 285 N.C. 666, 207 S.E.2d 759 (1974).

Guidelines Are Adequate. — An examination of this section reveals that the legislature has imposed guidelines upon the rescheduling of controlled substances that are more than adequate. State v. Lisk, 21 N.C. App. 474, 204 S.E.2d 868, cert. denied, 285 N.C. 666, 207 S.E.2d 759 (1974).

Applied in McLawhorn v. North Carolina, 484 F.2d 1 (4th Cir. 1973); State v. Wooten, 20 N.C. App. 499, 201 S.E.2d 696 (1974); State v. Baxter, 21 N.C. App. 81, 203 S.E.2d 93 (1974); State v. Newton, 21 N.C. App. 384, 204 S.E.2d 724 (1974).

Cited in State v. Crews, 286 N.C. 41, 209 S.E.2d 462 (1974); State v. Aikens, 22 N.C. App. 310, 206 S.E.2d 348 (1974); State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976); State v. Best, 292 N.C. 294, 233 S.E.2d 544 (1977); State v. Anderson, 57 N.C. App. 602, 292 S.E.2d 163 (1982).

§ 90-89. Schedule I controlled substances.

This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that a substance comes within this schedule, the Commission shall find: a high potential for abuse, no currently accepted medical use in the United States, or a lack of accepted safety for use in treatment under medical supervision. The following controlled substances are included in this schedule:

(1) Any of the following opiates, including the isomers, esters, ethers, salts and salts of isomers, esters, and ethers, unless specifically excepted, or listed in another schedule, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:
  a. Acetyl-alpha-methylfentanyl (N[1-(1-methyl-2-phenethyl)-4-piperidinyl]-N-phenylacet amide).
  b. Acetylmethadol.
  c. Repealed by Session Laws 1987, c. 412, s. 2.
  d. Alpha-methylthiofentanyl (N-[1-methyl-2-(2-thienyl)ethyl-4-piperidinyl]-N-phen ylprop anamide).
  e. Allylprodine.
  f. Alphacetylmethadol.
  g. Alphameprodine.
  h. Alphamethadol.
  i. Alpha-methylfentanyl (N-(1-(alpha-methyl-beta-phenyl) ethyl-4-piperidyl) propionalilide; 1(1-methyl-2-phenyl-ethyl)-4-(N-propanilido) piperidine).
  j. Benzethidine.
  k. Betacetylmethadol.
  l. Beta-hydroxfentanyl (N-[1-(2-hydroxy-2-phenethyl)-4-piperidinyl]-N-phenylpropanamid e).
  m. Beta-hydroxy-3-methylfentanyl (N-[1-(2-hydroxy-2-phenethyl)-3-methyl-4-piperidinyl]-N-pheny lpropanamide).
  n. Betameprodine.
  o. Betamethadol.

p. Betaprodine.
q. Clonitazene.
r. Dextromoramide.
s. Diampromide.
t. Diethylthiambutene.
u. Difenoxin.
v. Dimenoxadol.
w. Dimepheptanol.
x. Dimethylthiambutene.
y. Dioxaphetyl butyrate.
z. Dipipanone.
aa. Ethylmethylthiambutene.
bb. Etonitazene.
cc. Etoxeridine.
dd. Furethidine.
ee. Hydroxypethidine.
ff. Ketobemidone.
gg. Levomoramide.
hh. Levophenacylmorphan.
ii. 1-methyl-4-phenyl-4-propionoxypiperidine (MPPP).
jj. 3-Methylfentanyl (N-[3-methyl-1-(2-Phenylethyl)-4-Pi- peridyl]-N-Phenylpropanamide).
kk. 3-Methylthiofentanyl (N-[(3-methyl-1-(2-thienyl)ethyl-4-piperidinyl]-N-phenylpropa namide).
ll. Morpheridine.
mm. Noracymethadol.
nn. Norlevorphanol.
oo. Normethadone.
pp. Norpipanone.
qq. Para-fluorofentanyl (N-(4-fluorophenyl)-N-[1-(2-phen-ethyl)-4-piperidinyl]-pr opanamide.
rr. Phenadoxone.
ss. Phenampromide.
tt. 1-(2-phenethyl)-4-phenyl-4-acetoxypiperidine (PEPAP).
uu. Phenomorphan.
vv. Phenoperidine.
ww. Piritramide.
xx. Proheptazine.
yy. Properidine.
zz. Propiram.
aaa. Racemoramide.
bbb. Thiofentanyl (N-phenyl-N-[1-(2-thienyl)ethyl-4-piperidinyl]-propanamide.
ccc. Tilidine.
ddd. Trimeperidine.

(2) Any of the following opium derivatives, including their salts, isomers, and salts of isomers, unless specifically excepted, or listed in another schedule, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

a. Acetorphine.
b. Acetyldihydrocodeine.
c. Benzylmorphine.
d. Codeine methylbromide.
e. Codeine-N-Oxide.
f. Cyprenorphine.
g. Desomorphine.

h. Dihydromorphine.
i. Etorphine (except hydrochloride salt).
j. Heroin.
k. Hydromorphinol.
l. Methyldesorphine.
m. Methyldihydromorphine.
n. Morphine methylbromide.
o. Morphine methylsulfonate.
p. Morphine-N-Oxide.
q. Myrophine.
r. Nicocodeine.
s. Nicomorphine.
t. Normorphine.
u. Pholcodine.
v. Thebacon.
w. Drotebanol.

(3) Any material, compound, mixture, or preparation which contains any quantity of the following hallucinogenic substances, including their salts, isomers, and salts of isomers, unless specifically excepted, or listed in another schedule, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

a. 3, 4-methylenedioxyamphetamine.
b. 5-methoxy-3, 4-methylenedioxyamphetamine.
c. 3, 4-Methylenedioxymethamphetamine (MDMA).
d. 3,4-methylenedioxy-N-ethylamphetamine (also known as N-ethyl-alpha-methyl-3,4-(methylenedioxy)phenethylamine, N-ethyl MDA, MDE, and MDEA).
e. N-hydroxy-3,4-methylenedioxyamphetamine (also known as N-hydroxy-alpha-methyl-3,4-(methylenedioxy)phenethylamine, and N-hydroxy MDA).
f. 3, 4, 5-trimethoxyamphetamine.
g. Alpha-ethyltryptamine. Some trade or other names: etryptamine, Monase, alpha-ethyl-1H-indole-3- ethanamine, 3-(2-aminobutyl) indole, alpha-ET, and AET.
h. Bufotenine.
i. Diethyltryptamine.
j. Dimethyltryptamine.
k. 4-methyl-2, 5-dimethoxyamphetamine.
l. Ibogaine.
m. Lysergic acid diethylamide.
n. Mescaline.
o. Peyote, meaning all parts of the plant presently classified botanically as Lophophora Williamsii Lemaire, whether growing or not; the seeds thereof; any extract from any part of such plant; and every compound, manufacture, salt, derivative, mixture or preparation of such plant, its seed or extracts.
p. N-ethyl-3-piperidyl benzilate.
q. N-methyl-3-piperidyl benzilate.
r. Psilocybin.
s. Psilocin.
t. 2, 5-dimethoxyamphetamine.
u. 2, 5-dimethoxy-4-ethylamphetamine. Some trade or other names: DOET.
v. 4-bromo-2, 5-dimethoxyamphetamine.
w. 4-methoxyamphetamine.

x. Ethylamine analog of phencyclidine. Some trade or other names: N-ethyl-1-phenylcyclohexylamine, (1-phenylcyclohexyl) ethylamine, N-(1-phenylcyclohexyl) ethylamine, cyclohexamine, PCE.

y. Pyrrolidine analog of phencyclidine. Some trade or other names: 1-(1-phenylcyclohexyl)-pyrrolidine, PCPy, PHP.

z. Thiophene analog of phencyclidine. Some trade or other names: 1-[1-(2-thienyl)-cyclohexyl]-piperidine, 2-thienyl analog of phencyclidine, TPCP, TCP.

aa. 1-[1-(2-thienyl)cyclohexyl]pyrrolidine; Some other names: TCPy.

bb. Parahexyl.

cc. 4-Bromo-2, 5-Dimethoxyphenethylamine.

(4) Any material compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation, unless specifically excepted or unless listed in another schedule:

a. Mecloqualone.

b. Methaqualone.

c. Gamma hydroxybutyric acid; Some other names: GHB, gamma-hydroxybutyrate, 4-hydroxybutyrate, 4-hydroxybutanoic acid; sodium oxybate; sodium oxybutyrate.

(5) Stimulants. — Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation that contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers, and salts of isomers:

a. Aminorex. Some trade or other names: aminoxaphen; 2-amino-5-phenyl-2-oxazoline; or 4,5-dihydro-5- phenly-2-oxazolamine.

b. Cathinone. Some trade or other names: 2-amino-1-phenyl-1-propanone, alpha-aminopropiophenone, 2-aminopropiophenone, and norephedrone.

c. Fenethylline.

d. Methcathinone. Some trade or other names: 2-(methylamino)-propiophenone, alpha-(methylamino)propiophenone, 2-(methylamino)-1- phenylpropan-1-one, alpha-N-methylaminopropiophenone, monomethylproprion, ephedrone, N-methylcathinone, methylcathinone, AL- 464, AL-422, AL-463, and UR1432.

e. (+/-)cis-4-methylaminorex [(+/-)cis-4,5-dihydro-4- methyl-5-phenyl-2-oxazolamine] (also known as 2-amino-4-methyl-5-phenyl-2-oxazoline).

f. N,N-dimethylamphetamine. Some other names: N,N,alpha-trimethylbenzeneethaneamine; N,N,alpha-trimethylphenethylamine.

g. N-ethylamphetamine. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 844; c. 1358, ss. 4, 5, 15; 1975, c. 443, s. 1; c. 790; 1977, c. 667, s. 3; c. 891, s. 1; 1979, c. 434, s. 1; 1981, c. 51, s. 9; 1983, c. 695, s. 1; 1985, c. 172, ss. 1-3; 1987, c. 412, ss. 1-5; 1989 (Reg. Sess., 1990), c. 1040, s. 1; 1993, c. 319, ss. 1, 2; 1995, c. 186, ss. 1-3; c. 509, s. 135.1(c); 1997-456, ss. 12, 27; 1999-165, s. 1; 2000-140, s. 92.2(a).)

Legal Periodicals. — For a survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2252 (1997).

CASE NOTES

Evidence. — Testimony by a special agent that "Two of the three substances that I purchased were MDA" did not constitute substantial evidence that the drug possessed and sold by defendant was in fact 3, 4-methylenedioxyamphetamine as charged in the bills of indictment. State v. Board, 296 N.C. 652, 252 S.E.2d 803 (1979).

Indictment failed where substance alleged was not listed in G.S. 90-89. — Indictment alleging that defendant unlawfully, willfully and feloniously did possess Methylenedioxyamphetamine, a controlled substance included in Schedule I of North Carolina Controlled Substances Act failed because no such substance appeared in G.S. 90-89. State v. Ledwell, 171 N.C. App. 328, 614 S.E.2d 412, 2005 N.C. App. LEXIS 1259 (2005).

Applied in State v. Hardy, 31 N.C. App. 67, 228 S.E.2d 487 (1976).

Cited in State v. Aiken, 286 N.C. 202, 209 S.E.2d 763 (1974); State v. Hart, 33 N.C. App. 235, 234 S.E.2d 430 (1977); State v. Board, 37 N.C. App. 581, 246 S.E.2d 581 (1978); State v. Mendez, 42 N.C. App. 141, 256 S.E.2d 405 (1979); State v. Pulliam, 78 N.C. App. 129, 336 S.E.2d 649 (1985); State v. Holmes, 109 N.C. App. 615, 428 S.E.2d 277 (1993); Lynn v. West, 134 F.3d 582, 1998 U.S. App. LEXIS 403 (4th Cir.), cert. denied, 525 U.S. 813, 119 S. Ct. 47, 142 L. Ed. 2d 36 (1998) (But see Milligan v. State, 135 N.C. App. 781, 522 S.E.2d 330 (1999)).

§ 90-89.1. Treatment of controlled substance analogues.

A controlled substance analogue shall, to the extent intended for human consumption, be treated for the purposes of any State law as a controlled substance in Schedule I. (2003-249, s. 1.)

§ 90-90. Schedule II controlled substances.

This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that a substance comes within this schedule, the Commission shall find: a high potential for abuse; currently accepted medical use in the United States, or currently accepted medical use with severe restrictions; and the abuse of the substance may lead to severe psychic or physical dependence. The following controlled substances are included in this schedule:

(1) Any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, unless specifically excepted or unless listed in another schedule:
  a. Opium and opiate, and any salt, compound, derivative, or preparation of opium and opiate, excluding apomorphine, nalbuphine, dextrorphan, naloxone, naltrexone and nalmefene, and their respective salts, but including the following:
    1. Raw opium.
    2. Opium extracts.
    3. Opium fluid extracts.
    4. Powdered opium.
    5. Granulated opium.
    6. Tincture of opium.
    7. Codeine.
    8. Ethylmorphine.
    9. Etorphine hydrochloride.
    10. Hydrocodone.
    11. Hydromorphone.
    12. Metopon.
    13. Morphine.

14. Oxycodone.
15. Oxymorphone.
16. Thebaine.
17. Dihydroetorphine.

b. Any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in paragraph 1 of this subdivision, except that these substances shall not include the isoquinoline alkaloids of opium.

c. Opium poppy and poppy straw.

d. Cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof, or coca leaves and any salt, isomer, salts of isomers, compound, derivative, or preparation of coca leaves, or any salt, isomer, salts of isomers, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocanized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine.

e. Concentrate of poppy straw (the crude extract of poppy straw in either liquid, solid or powder form which contains the phenanthrine alkaloids of the opium poppy).

(2) Any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation unless specifically exempted or listed in other schedules:

a. Alfentanil.
b. Alphaprodine.
c. Anileridine.
d. Bezitramide.
e. Carfentanil.
f. Dihydrocodeine.
g. Diphenoxylate.
h. Fentanyl.
i. Isomethadone.
j. Levo-alphacetylmethadol. Some trade or other names: levo-alpha-acetylmethadol, levomethadyl acetate, or LAAM.
k. Levomethorphan.
l. Levorphanol.
m. Metazocine.
n. Methadone.
o. Methadone — Intermediate, 4-cyano-2-dimethylamino-4, 4- diphenyl butane.
p. Moramide — Intermediate, 2-methyl-3-morpholino-1, 1-diphenylpropane-carboxylic acid.
q. Pethidine.
r. Pethidine — Intermediate — A, 4-cyano-1-methyl-4-phenylpiperidine.
s. Pethidine — Intermediate — B, ethyl-4-phenylpiperidine-4-carboxylate.
t. Pethidine — Intermediate — C, 1-methyl-4-phenylpiperidine-4-carboxylic acid.
u. Phenazocine.
v. Piminodine.
w. Racemethorphan.
x. Racemorphan.
y. Remifentanil.
z. Sufentanil.

(3) Any material, compound, mixture, or preparation which contains any quantity of the following substances having a potential for abuse associated with a stimulant effect on the central nervous system unless specifically exempted or listed in another schedule:
  a. Amphetamine, its salts, optical isomers, and salts of its optical isomers.
  b. Phenmetrazine and its salts.
  c. Methamphetamine, including its salts, isomers, and salts of isomers.
  d. Methylphenidate.
  e. Phenylacetone. Some trade or other names: Phenyl-2-propanone; P2P; benzyl methyl ketone; methyl benzyl ketone.

(4) Any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation, unless specifically exempted by the Commission or listed in another schedule:
  a. Amobarbital
  b. Glutethimide
  c. Repealed by Session Laws 1983, c. 695, s. 2.
  d. Pentobarbital
  e. Phencyclidine
  f. Phencyclidine immediate precursors:
    1. 1-Phenylcyclohexylamine
    2. 1-Piperidinocyclohexanecarbonitrile (PCC)
  g. Secobarbital.

(5) Any material, compound, mixture, or preparation which contains any quantity of the following hallucinogenic substances, including their salts, isomers, and salts of isomers, unless specifically excepted, or listed in another schedule, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:
  a. Repealed by Session Laws 2001-233, s. 2(a), effective June 21, 2001.
  b. Nabilone [Another name for nabilone: (+/-)-trans-3-(1,1-dimethylheptyl)-6,6a,7,8,10,10a-hexahyd ro-1-hydroxy-6,6-dimethyl-9H-dibenzo[b,d]pyran-9-one]. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 540, s. 6; c. 1358, ss. 6, 15; 1975, c. 443, s. 2; 1977, c. 667, s. 3; c. 891, s. 2; 1979, c. 434, s. 2; 1981, c. 51, s. 9; 1983, c. 695, s. 2; 1985, c. 172, ss. 4, 5; 1987, c. 105, s. 3; c. 412, ss. 5A-7; 1989 (Reg. Sess., 1990), c. 1040, s. 2; 1993, c. 319, ss. 3, 4; 1995, c. 186, s. 4; 1997-385, s. 1; 1997-456, s. 27; 1999-165, s. 2; 2001-233, ss. 1, 2(a).)

Cross References. — As to provisions pertaining to punishment of offenders for murder by the unlawful distribution of certain substances, see G.S. 14-17.

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 417.

CASE NOTES

Desoxyn. — Desoxyn is a trade name used by Abbott Laboratories, North Chicago, Illinois, for methamphetamine hydrochloride. State v. Newton, 21 N.C. App. 384, 204 S.E.2d 724 (1974).

Desoxyn is a controlled substance. In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

Butacaps, or Butasol capsules, are Butabarbital, a controlled substance, apparently somewhat less dangerous than Didrex and Desoxyn. In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

Methamphetamine. — Exchanging methamphetamine, a controlled substance under G.S. 90-87(5), 90-90(3), for work was a sale of a controlled substance. State v. Yelton, 175 N.C. App. 349, 623 S.E.2d 594, 2006 N.C. App. LEXIS 44 (2006).

Legislature's use of the word "mixture" in G.S. 90-95(h)(4) establishes that the total weight of dosage units of Dilaudid is a sufficient basis to charge a suspect with trafficking. State v. Jones, 85 N.C. App. 56, 354 S.E.2d 251, cert. denied, 320 N.C. 173, 358 S.E.2d 61, cert. denied, 484 U.S. 969, 108 S. Ct. 465, 98 L. Ed. 2d 404 (1987).

Typographical Error in Affidavit. — Although affidavit in support of search warrant made a single reference to the "the Schedule II controlled substance marijuana" instead of cocaine, the trial court determined this was a typographical error and the warrant was still valid. State v. Ledbetter, 120 N.C. App. 117, 461 S.E.2d 341 (1995).

Applied in State v. Proctor, 58 N.C. App. 631, 294 S.E.2d 240 (1982); State v. Jones, 161 N.C. App. 60, 588 S.E.2d 5, cert. granted, 357 N.C. 660, 589 S.E.2d 882 (2003); State v. Jones, 358 N.C. 473, 598 S.E.2d 125 (2004).

Cited in State v. Crews, 286 N.C. 41, 209 S.E.2d 462 (1974); State v. McNeil, 47 N.C. App. 30, 266 S.E.2d 824 (1980); State v. Moore, 102 N.C. App. 434, 402 S.E.2d 435 (1991); State v. Holmes, 109 N.C. App. 615, 428 S.E.2d 277 (1993); Creel v. Town of Dover, 126 N.C. App. 547, 486 S.E.2d 478 (1997); State v. Boston, 165 N.C. App. 214, 598 S.E.2d 163 (2004).

§ 90-91. Schedule III controlled substances.

This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that a substance comes within this schedule, the Commission shall find: a potential for abuse less than the substances listed in Schedules I and II; currently accepted medical use in the United States; and abuse may lead to moderate or low physical dependence or high pyschological dependence. The following controlled substances are included in this schedule:

(a) Repealed by Session Laws 1973, c. 540, s. 5.

(b) Any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system unless specifically exempted or listed in another schedule:

1. Any substance which contains any quantity of a derivative of barbituric acid, or any salt of a derivative of barbituric acid.
2. Chlorhexadol.
3. Repealed by Session Laws 1993, c. 319, s. 5.
4. Lysergic acid.
5. Lysergic acid amide.
6. Methyprylon.
7. Sulfondiethylmethane.
8. Sulfonethylmethane.
9. Sulfonmethane.

9a. Tiletamine and zolazepam or any salt thereof. Some trade or other names for tiletamine-zolazepam combination product: Telazol. Some trade or other names for tiletamine: 2-(ethylamino)-2-(2-thienyl)-cyclohexanone. Some trade or other names for zolazepam: 4-(2-fluorophenyl)-6,8-dihydro-1,3,8-trimethylpyrazolo-[3,4-e][1,4]-diazepin-7(1H)-one. flupyrazapon.

10. Any compound, mixture or preparation containing
    (i) Amobarbital.
    (ii) Secobarbital.
    (iii) Pentobarbital.
    or any salt thereof and one or more active ingredients which are not included in any other schedule.
11. Any suppository dosage form containing
    (i) Amobarbital.
    (ii) Secobarbital.

(iii) Pentobarbital.

or any salt of any of these drugs and approved by the federal Food and Drug Administration for marketing as a suppository.

12. Ketamine.

(c) Nalorphine.

(d) Any material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, or any salts thereof unless specifically exempted or listed in another schedule:

1. Not more than 1.80 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit with an equal or greater quantity of an isoquinoline alkaloid of opium.
2. Not more than 1.80 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.
3. Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit with a four-fold or greater quantity of an isoquinoline alkaloid of opium.
4. Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.
5. Not more than 1.80 grams of dihydrocodeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.
6. Not more than 300 milligrams of ethylmorphine per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.
7. Not more than 500 milligrams of opium per 100 milliliters or per 100 grams, or not more than 25 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.
8. Not more than 50 milligrams of morphine per 100 milliliters or per 100 grams with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(e) Any compound, mixture or preparation containing limited quantities of the following narcotic drugs, which shall include one or more active, nonnarcotic, medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation, valuable medicinal qualities other than those possessed by the narcotic drug alone:

1. Paregoric, U.S.P.; provided, that no person shall purchase or receive by any means whatsoever more than one fluid ounce of paregoric within a consecutive 24-hour period, except on prescription issued by a duly licensed physician.

(f) Paregoric, U.S.P., may be dispensed at retail as permitted by federal law or administrative regulation without a prescription only by a registered pharmacist and no other person, agency or employee may dispense paregoric, U.S.P., even if under the direct supervision of a pharmacist.

(g) Notwithstanding the provisions of G.S. 90-91(f), after the pharmacist has fulfilled his professional responsibilities and legal responsibilities required of him in this Article, the actual cash transaction, credit transaction, or delivery of paregoric, U.S.P., may be completed by a nonpharmacist. A pharmacist may refuse to dispense a paregoric, U.S.P., substance until he is satisfied that the product is being obtained for medicinal purposes only.

(h) Paregoric, U.S.P., may only be sold at retail without a prescription to a person at least 18 years of age. A pharmacist must require every retail purchaser of a paregoric, U.S.P., substance to furnish suitable identification, including proof of age when appropriate, in order to purchase paregoric, U.S.P.

The name and address obtained from such identification shall be entered in the record of disposition to consumers.

(i) The Commission may by regulation except any compound, mixture, or preparation containing any stimulant or depressant substance listed in paragraphs (a)1 and (a)2 of this schedule from the application of all or any part of this Article if the compound, mixture, or preparation contains one or more active medicinal ingredients not having a stimulant or depressant effect on the central nervous system; and if the ingredients are included therein in such combinations, quantity, proportion, or concentration that vitiate the potential for abuse of the substances which have a stimulant or depressant effect on the central nervous system.

(j) Any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers, and salts of said isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation, unless specifically excluded or listed in some other schedule.

1. Benzphetamine.
2. Chlorphentermine.
3. Clortermine.
4. Repealed by Session Laws 1987, c. 412, s. 10.
5. Phendimetrazine.

(k) Anabolic steroids. The term “anabolic steroid” means any drug or hormonal substance, chemically and pharmacologically related to testosterone (other than estrogens, progestins, and corticosteroids) that promotes muscle growth, including, but not limited to, the following:

1. Methandrostenolone,
2. Stanozolol,
3. Ethylestrenol,
4. Nandrolone phenpropionate,
5. Nandrolone deconoate,
6. Testosterone propionate,
7. Chorionic gonadotropin,
8. Boldenone,
9. Chlorotestosterone (4-chlorotestosterone),
10. Clostebol,
11. Dehydrochlormethyltestosterone,
12. Dibydrostestosterone (4-dihydrotestosterone),
13. Drostanolone,
14. Fluoxymesterone,
15. Formebulone (formebolone),
16. Mesterolene,
17. Methandienone,
18. Methandranone,
19. Methandriol,
20. Methenolene,
21. Methyltestosterone,
22. Mibolerone,
23. Nandrolene,
24. Norethandrolene,
25. Oxandrolone,
26. Oxymesterone,
27. Oxymetholone,
28. Stanolone,
29. Testolactone,
30. Testosterone,

31. Trenbolone, and
32. Any salt, ester, or isomer of a drug or substance described or listed in this subsection, if that salt, ester, or isomer promotes muscle growth. Except such term does not include an anabolic steroid which is expressly intended for administration through implants to cattle or other nonhuman species and which has been approved by the Secretary of Health and Human Services for such administration. If any person prescribes, dispenses, or distributes such steroid for human use, such person shall be considered to have prescribed, dispensed, or distributed an anabolic steroid within the meaning of this subsection.

(*l*) Repealed by Session Laws 2001-233, s. 3(a), effective June 21, 2001.

(m) Any drug product containing gamma hydroxybutyric acid, including its salts, isomers, and salts of isomers, for which an application is approved under section 505 of the Federal Food, Drug, and Cosmetic Act.

(n) Dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a U.S. Food and Drug Administration approved drug product. [Some other names: (6aR-trans), -6a,7,8,10a-tetrahydro-6,6,9-trimethyl-3-pentyl-6H-dibenzo [b,d]pyran-1-o1 or (-)-delta-9-(trans)-tetrahydrocannabinol]. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 540, s. 5; c. 1358, ss. 7, 15; 1975, c. 442; 1977, c. 667, s. 3; 1979, c. 434, s. 3; 1981, c. 51, s. 9; 1987, c. 412, ss. 8-10; 1987 (Reg. Sess., 1988), c. 1055; 1991, c. 413, s. 1; 1993, c. 319, s. 5; 1999-370, s. 3; 2000-140, s. 92.2(b); 2001-233, ss. 2(b), 3(a), 3(b).)

Editor's Note. — Subsection (e) of this section contains a subdivision 1, but no subdivision 2.

Legal Periodicals. — For "Legislative Survey: Criminal Law," see 22 Campbell L. Rev. 253 (2000).

CASE NOTES

Methamphetamine. — Before the second 1973 amendment, this section classed methamphetamine as a controlled substance. State v. Newton, 21 N.C. App. 384, 204 S.E.2d 724 (1974).

Applied in State v. Guy, 13 N.C. App. 637, 186 S.E.2d 663 (1972); State v. Newton, 21 N.C. App. 384, 204 S.E.2d 724 (1974).

Cited in State v. Crews, 286 N.C. 41, 209 S.E.2d 462 (1974).

§ 90-92. Schedule IV controlled substances.

(a) This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that a substance comes within this schedule, the Commission shall find: a low potential for abuse relative to the substances listed in Schedule III of this Article; currently accepted medical use in the United States; and limited physical or pyschological dependence relative to the substances listed in Schedule III of this Article. The following controlled substances are included in this schedule:

(1) Depressants. — Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:
  a. Alprazolam.
  b. Barbital.
  c. Bromazepam.
  d. Camazepam.
  e. Chloral betaine.
  f. Chloral hydrate.

g. Chlordiazepoxide.
h. Clobazam.
i. Clonazepam.
j. Clorazepate.
k. Clotiazepam.
l. Cloxazolam.
m. Delorazepam.
n. Diazepam.
o. Estazolam.
p. Ethchlorvynol.
q. Ethinamate.
r. Ethyl loflazepate.
s. Fludiazepam.
t. Flunitrazepam.
u. Flurazepam.
v. Repealed by Session Laws 2000, c. 140, s. 92.2(c), effective December 1, 2000.
w. Halazepam.
x. Haloxazolam.
y. Ketazolam.
z. Loprazolam.
aa. Lorazepam.
bb. Lormetazepam.
cc. Mebutamate.
dd. Medazepam.
ee. Meprobamate.
ff. Methohexital.
gg. Methylphenobarbital (mephobarbital).
hh. Midazolam.
ii. Nimetazepam.
jj. Nitrazepam.
kk. Nordiazepam.
ll. Oxazepam.
mm. Oxazolam.
nn. Paraldehyde.
oo. Petrichloral.
pp. Phenobarbital.
qq. Pinazepam.
rr. Prazepam.
ss. Quazepam.
tt. Temazepam.
uu. Tetrazepam.
vv. Triazolam.
ww. Zolpidem.
xx. Zaleplon.

(2) Any material, compound, mixture, or preparation which contains any of the following substances, including its salts, or isomers and salts of such isomers, whenever the existence of such salts, isomers, and salts of isomers is possible:
a. Fenfluramine.
b. Pentazocine.

(3) Stimulants. — Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers (whether optical, position, or geometric), and salts of such isomers

whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:
 a. Diethylpropion.
 b. Mazindol.
 c. Pemoline (including organometallic complexes and chelates thereof).
 d. Phentermine.
 e. Cathine.
 f. Fencamfamin.
 g. Fenproporex.
 h. Mefenorex.
 i. Sibutramine.
 j. Modafinil.

(4) Other Substances. — Unless specifically excepted or unless listed in another schedule, any material, compound, mixture or preparation which contains any quantity of the following substances, including its salts:
 a. Dextropropoxyphene (Alpha-(plus)-4-dimethylamino-1, 2-diphenyl-3-methyl-2-propionoxybutane).
 b. Pipradrol.
 c. SPA ((-)-1-dimethylamino-1, 2-diphenylethane).
 d. Butorphanol.

(5) Narcotic Drugs. — Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, or any salts thereof:
 a. Not more than 1 milligram of difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit.
 b. Buprenorphine.

(b) The Commission may by regulation except any compound, mixture, or preparation containing any stimulant or depressant substance listed in this schedule from the application of all or any part of this Article if the compound, mixture, or preparation contains one or more active, nonnarcotic, medicinal ingredients not having a stimulant or depressant effect on the central nervous system; provided, that such admixtures shall be included therein in such combinations, quantity, proportion, or concentration as to vitiate the potential for abuse of the substances which do have a stimulant or depressant effect on the central nervous system. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 1358, ss. 8, 15; c. 1446, s. 5; 1975, cc. 401, 819; 1977, c. 667, s. 3; c. 891, s. 3; 1979, c. 434, ss. 4-6; 1981, c. 51, s. 9; 1985, c. 172, ss. 6-8; c. 439, s. 1; 1987, c. 412, ss. 11, 12; 1993, c. 319, s. 6; 1995, c. 509, s. 38; 1997-456, s. 27; 1997-501, s. 1; 1999-165, s. 3; 2000-140, s. 92.2(c); 2001-233, s. 4.)

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 417.

CASE NOTES

Applied in State v. King, 44 N.C. App. 31, 259 S.E.2d 919 (1979); Little v. North Carolina State Bd. of Dental Exmrs., 64 N.C. App. 67, 306 S.E.2d 534 (1983).

§ 90-93. Schedule V controlled substances.

(a) This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that a substance comes within this schedule, the

Commission shall find: a low potential for abuse relative to the substances listed in Schedule IV of this Article; currently accepted medical use in the United States; and limited physical or psychological dependence relative to the substances listed in Schedule IV of this Article. The following controlled substances are included in this schedule:

(1) Any compound, mixture or preparation containing any of the following limited quantities of narcotic drugs or salts thereof, which shall include one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the narcotic alone:
  a. Not more than 200 milligrams of codeine or any of its salts per 100 milliliters or per 100 grams.
  b. Not more than 100 milligrams of dihydrocodeine or any of its salts per 100 milliliters or per 100 grams.
  c. Not more than 100 milligrams of ethylmorphine or any of its salts per 100 milliliters or per 100 grams.
  d. Not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit.
  e. Not more than 100 milligrams of opium per 100 milliliters or per 100 grams.
  f. Not more than 0.5 milligram of difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit.
(2) Repealed by Session Laws 1985, c. 172, s. 9.
(3) Stimulants. — Unless specifically exempted or excluded or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers and salts of isomers:
  a. Repealed by Session Laws 1993, c. 319, s. 7.
  b. Pyrovalerone.

(b) A Schedule V substance may be sold at retail without a prescription only by a registered pharmacist and no other person, agent or employee may sell a Schedule V substance even if under the direct supervision of a pharmacist.

(c) Notwithstanding the provisions of G.S. 90-93(b), after the pharmacist has fulfilled the responsibilities required of him in this Article, the actual cash transaction, credit transaction, or delivery of a Schedule V substance, may be completed by a nonpharmacist. A pharmacist may refuse to sell a Schedule V substance until he is satisfied that the product is being obtained for medicinal purposes only.

(d) A Schedule V substance may be sold at retail without a prescription only to a person at least 18 years of age. The pharmacist must require every retail purchaser of a Schedule V substance to furnish suitable identification, including proof of age when appropriate, in order to purchase a Schedule V substance. The name and address obtained from such identification shall be entered in the record of disposition to consumers. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 1358, ss. 9, 15; 1977, c. 667, s. 3; 1979, c. 434, ss. 7, 8; 1981, c. 51, s. 9; 1985, c. 172, s. 9; 1989 (Reg. Sess., 1990), c. 1040, s. 3; 1993, c. 319, s. 7; 1997-456, s. 27.)

Cross References. — As to disclosure of the records required to be kept under subsection (d) of this section, see G.S. 90-85.36.

§ 90-94. Schedule VI controlled substances.

This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that such substance comes within this schedule, the Commission shall find: no currently accepted medical use in the United States, or a relatively low potential for abuse in terms of risk to public health and potential to produce psychic or physiological dependence liability based upon present medical knowledge, or a need for further and continuing study to develop scientific evidence of its pharmacological effects.

The following controlled substances are included in this schedule:

(1) Marijuana.

(2) Tetrahydrocannabinols. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 1358, s. 15; 1977, c. 667, s. 3; 1981, c. 51, s. 9; 1997-456, s. 27.)

Legal Periodicals. — For survey of 1976 criminal case law, see 55 N.C.L. Rev. 976 (1977).

For survey of 1982 criminal law, see 61 N.C.L. Rev. 1060 (1983).

CASE NOTES

Neither Possession Nor Possession with Intent to Sell Included in the Other. — To prove the offense of possession of over one ounce of marijuana, the State must show possession and that the amount possessed was greater than one ounce. To prove the offense of possession with intent to sell or deliver marijuana, the State must show possession of any amount of marijuana and that the person possessing the substance intended to sell or deliver it. Thus, the two crimes each contain one element that is not necessary for proof of the other crime. One is not a lesser included offense of the other. State v. Gooch, 58 N.C. App. 582, 294 S.E.2d 13, rev'd on other grounds, 307 N.C. 253, 297 S.E.2d 599 (1982).

Findings Not Required as to Marijuana. — The requirement that the Drug Authority (now Drug Commission) make findings as to whether a substance comes within this section applies only to drugs the Authority (now Commission) may wish to add, delete or reschedule, and not to substances, such as marijuana, which have already been included by the General Assembly. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

In a prosecution for felonious sale and delivery of marijuana and felonious possession of marijuana with intent to sell, it is not necessary for the State to show that the Drug Authority (now Drug Commission) has made a finding that marijuana is a controlled substance, since it has been listed as such under this section. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

Applied in State v. McIntyre, 13 N.C. App. 479, 186 S.E.2d 207 (1972); State v. McKinney, 288 N.C. 113, 215 S.E.2d 578 (1975).

Cited in State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972); State v. Shufford, 34 N.C. App. 115, 237 S.E.2d 481 (1977); State v. Best, 292 N.C. 294, 233 S.E.2d 544 (1977); State v. McGill, 296 N.C. 564, 251 S.E.2d 616 (1979); State v. Board, 296 N.C. 652, 252 S.E.2d 803 (1979); State v. Lombardo, 306 N.C. 594, 295 S.E.2d 399 (1982); State v. Reddick, 55 N.C. App. 646, 286 S.E.2d 654 (1982); State v. Jenkins, 74 N.C. App. 295, 328 S.E.2d 460 (1985); State v. Damon, 78 N.C. App. 421, 337 S.E.2d 170 (1985); State v. Thomas, 81 N.C. App. 200, 343 S.E.2d 588 (1986); State v. Pavone, 104 N.C. App. 442, 410 S.E.2d 1 (1991); State v. Ledbetter, 120 N.C. App. 117, 461 S.E.2d 341 (1995).

§ 90-95. Violations; penalties.

(a) Except as authorized by this Article, it is unlawful for any person:

(1) To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance;

(2) To create, sell or deliver, or possess with intent to sell or deliver, a counterfeit controlled substance;

(3) To possess a controlled substance.

(b) Except as provided in subsections (h) and (i) of this section, any person who violates G.S. 90-95(a)(1) with respect to:

(1) A controlled substance classified in Schedule I or II shall be punished as a Class H felon, except as follows: (i) the sale of a controlled substance classified in Schedule I or II shall be punished as a Class G felony, and (ii) the manufacture of methamphetamine shall be punished as provided by subdivision (1a) of this subsection.

(1a) The manufacture of methamphetamine shall be punished as a Class C felony unless the offense was one of the following: packaging or repackaging methamphetamine, or labeling or relabeling the methamphetamine container. The offense of packaging or repackaging methamphetamine, or labeling or relabeling the methamphetamine container shall be punished as a Class H felony.

(2) A controlled substance classified in Schedule III, IV, V, or VI shall be punished as a Class I felon, except that the sale of a controlled substance classified in Schedule III, IV, V, or VI shall be punished as a Class H felon. The transfer of less than 5 grams of marijuana for no remuneration shall not constitute a delivery in violation of G.S. 90-95(a)(1).

(c) Any person who violates G.S. 90-95(a)(2) shall be punished as a Class I felon.

(d) Except as provided in subsections (h) and (i) of this section, any person who violates G.S. 90-95(a)(3) with respect to:

(1) A controlled substance classified in Schedule I shall be punished as a Class I felon;

(2) A controlled substance classified in Schedule II, III, or IV shall be guilty of a Class 1 misdemeanor. If the controlled substance exceeds four tablets, capsules, or other dosage units or equivalent quantity of hydromorphone or if the quantity of the controlled substance, or combination of the controlled substances, exceeds one hundred tablets, capsules or other dosage units, or equivalent quantity, the violation shall be punishable as a Class I felony. If the controlled substance is methamphetamine, amphetamine, phencyclidine, or cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof, or coca leaves and any salt, isomer, salts of isomers, compound, derivative, or preparation of coca leaves, or any salt, isomer, salts of isomers, compound, derivative or preparation thereof which is chemically equivalent or identical with any of these substances (except decocanized coca leaves or any extraction of coca leaves which does not contain cocaine or ecgonine), the violation shall be punishable as a Class I felony.

(3) A controlled substance classified in Schedule V shall be guilty of a Class 2 misdemeanor;

(4) A controlled substance classified in Schedule VI shall be guilty of a Class 3 misdemeanor, but any sentence of imprisonment imposed must be suspended and the judge may not require at the time of sentencing that the defendant serve a period of imprisonment as a special condition of probation. If the quantity of the controlled substance exceeds one-half of an ounce (avoirdupois) of marijuana or one-twentieth of an ounce (avoirdupois) of the extracted resin of marijuana, commonly known as hashish, the violation shall be punishable as a Class 1 misdemeanor. If the quantity of the controlled substance exceeds one and one-half ounces (avoirdupois) of marijuana or three-twentieths of an ounce (avoirdupois) of the extracted resin of marijuana, commonly known as hashish, or if the controlled substance consists of any quantity of synthetic tetrahydrocannabinols or tetrahydrocannabinols isolated from the resin of marijuana, the violation shall be punishable as a Class I felony.

(d1)(1) Except as authorized by this Article, it is unlawful for any person to:
   a. Possess an immediate precursor chemical with intent to manufacture a controlled substance; or
   b. Possess or distribute an immediate precursor chemical knowing, or having reasonable cause to believe, that the immediate precursor chemical will be used to manufacture a controlled substance.

Any person who violates this subsection shall be punished as a Class H felon, unless the immediate precursor is one that can be used to manufacture methamphetamine.

(2) Except as authorized by this Article, it is unlawful for any person to:
   a. Possess an immediate precursor chemical with intent to manufacture methamphetamine; or
   b. Possess or distribute an immediate precursor chemical knowing, or having reasonable cause to believe, that the immediate precursor chemical will be used to manufacture methamphetamine.

Any person who violates this subdivision shall be punished as a Class F felon.

(d2) The immediate precursor chemicals to which subsection (d1) and (d1a) of this section applies are those immediate precursor chemicals designated by the Commission pursuant to its authority under G.S. 90-88, and the following (until otherwise specified by the Commission):

(1) Acetic anhydride.
(2) Acetone.
(3) Anhydrous ammonia.
(4) Anthranilic acid.
(5) Benzyl chloride.
(6) Benzyl cyanide.
(7) 2-Butanone (Methyl Ethyl Ketone).
(8) Chloroephedrine.
(9) Chloropseudoephedrine.
(10) D-lysergic acid.
(11) Ephedrine.
(12) Ergonovine maleate.
(13) Ergotamine tartrate.
(14) Ethyl ether.
(15) Ethyl Malonate.
(16) Ethylamine.
(17) Gamma-butyrolactone.
(18) Hydrochloric Acid.
(19) Iodine.
(20) Isosafrole.
(21) Lithium.
(22) Malonic acid.
(23) Methylamine.
(24) Methyl Isobutyl Ketone.
(25) N-acetylanthranilic acid.
(26) N-ethylephedrine.
(27) N-ethylepseudoephedrine.
(28) N-methylephedrine.
(29) N-methylpseudoephedrine.
(30) Norpseudoephedrine.
(31) Phenyl-2-propane.
(32) Phenylacetic acid.
(33) Phenylpropanolamine.
(34) Piperidine.
(35) Piperonal.

(36) Propionic anhydride.
(37) Pseudoephedrine.
(38) Pyrrolidine.
(39) Red phosphorous.
(40) Safrole.
(41) Sodium.
(42) Sulfuric Acid.
(43) Tetrachloroethylene.
(44) Thionylchloride.
(45) Toluene.

(e) The prescribed punishment and degree of any offense under this Article shall be subject to the following conditions, but the punishment for an offense may be increased only by the maximum authorized under any one of the applicable conditions:

(1), (2) Repealed by Session Laws 1979, c. 760, s. 5.

(3) If any person commits a Class 1 misdemeanor under this Article and if he has previously been convicted for one or more offenses under any law of North Carolina or any law of the United States or any other state, which offenses are punishable under any provision of this Article, he shall be punished as a Class I felon. The prior conviction used to raise the current offense to a Class I felony shall not be used to calculate the prior record level.

(4) If any person commits a Class 2 misdemeanor, and if he has previously been convicted for one or more offenses under any law of North Carolina or any law of the United States or any other state, which offenses are punishable under any provision of this Article, he shall be guilty of a Class 1 misdemeanor. The prior conviction used to raise the current offense to a Class 1 misdemeanor shall not be used to calculate the prior conviction level.

(5) Any person 18 years of age or over who violates G.S. 90-95(a)(1) by selling or delivering a controlled substance to a person under 16 years of age but more than 13 years of age or a pregnant female shall be punished as a Class D felon. Any person 18 years of age or over who violates G.S. 90-95(a)(1) by selling or delivering a controlled substance to a person who is 13 years of age or younger shall be punished as a Class C felon. Mistake of age is not a defense to a prosecution under this section. It shall not be a defense that the defendant did not know that the recipient was pregnant.

(6) For the purpose of increasing punishment under G.S. 90-95(e)(3) and (e)(4), previous convictions for offenses shall be counted by the number of separate trials at which final convictions were obtained and not by the number of charges at a single trial.

(7) If any person commits an offense under this Article for which the prescribed punishment requires that any sentence of imprisonment be suspended, and if he has previously been convicted for one or more offenses under any law of North Carolina or any law of the United States or any other state, which offenses are punishable under any provision of this Article, he shall be guilty of a Class 2 misdemeanor.

(8) Any person 21 years of age or older who commits an offense under G.S. 90-95(a)(1) on property used for a child care center, or for an elementary or secondary school or within 1,000 feet of the boundary of real property used for a child care center, or for an elementary or secondary school shall be punished as a Class E felon. For purposes of this subdivision, the transfer of less than five grams of marijuana for no remuneration shall not constitute a delivery in violation of G.S. 90-95(a)(1). For purposes of this subdivision, a child care center is as

defined in G.S. 110-86(3)a., and that is licensed by the Secretary of the Department of Health and Human Services.

(9) Any person who violates G.S. 90-95(a)(3) on the premises of a penal institution or local confinement facility shall be guilty of a Class H felony.

(10) Any person 21 years of age or older who commits an offense under G.S. 90-95(a)(1) on property that is a public park or within 1,000 feet of the boundary of real property that is a public park shall be punished as a Class E felon. For purposes of this subdivision, the transfer of less than five grams of marijuana for no remuneration shall not constitute a delivery in violation of G.S. 90-95(a)(1).

(f) Any person convicted of an offense or offenses under this Article who is sentenced to an active term of imprisonment that is less than the maximum active term that could have been imposed may, in addition, be sentenced to a term of special probation. Except as indicated in this subsection, the administration of special probation shall be the same as probation. The conditions of special probation shall be fixed in the same manner as probation, and the conditions may include requirements for rehabilitation treatment. Special probation shall follow the active sentence. No term of special probation shall exceed five years. Special probation may be revoked in the same manner as probation; upon revocation, the original term of imprisonment may be increased by no more than the difference between the active term of imprisonment actually served and the maximum active term that could have been imposed at trial for the offense or offenses for which the person was convicted, and the resulting term of imprisonment need not be diminished by the time spent on special probation.

(g) Whenever matter is submitted to the North Carolina State Bureau of Investigation Laboratory, the Charlotte, North Carolina, Police Department Laboratory or to the Toxicology Laboratory, Reynolds Health Center, Winston-Salem for chemical analysis to determine if the matter is or contains a controlled substance, the report of that analysis certified to upon a form approved by the Attorney General by the person performing the analysis shall be admissible without further authentication in all proceedings in the district court and superior court divisions of the General Court of Justice as evidence of the identity, nature, and quantity of the matter analyzed. Provided, however, that a report is admissible in a criminal proceeding in the superior court division or in an adjudicatory hearing in juvenile court in the district court division only if:

(1) The State notifies the defendant at least 15 days before trial of its intention to introduce the report into evidence under this subsection and provides a copy of the report to the defendant, and

(2) The defendant fails to notify the State at least five days before trial that the defendant objects to the introduction of the report into evidence.

Nothing in this subsection precludes the right of any party to call any witness or to introduce any evidence supporting or contradicting the evidence contained in the report.

(g1) Procedure for establishing chain of custody without calling unnecessary witnesses. —

(1) For the purpose of establishing the chain of physical custody or control of evidence consisting of or containing a substance tested or analyzed to determine whether it is a controlled substance, a statement signed by each successive person in the chain of custody that the person delivered it to the other person indicated on or about the date stated is prima facie evidence that the person had custody and made the delivery as stated, without the necessity of a personal appearance in court by the person signing the statement.

(2) The statement shall contain a sufficient description of the material or its container so as to distinguish it as the particular item in question and shall state that the material was delivered in essentially the same condition as received. The statement may be placed on the same document as the report provided for in subsection (g) of this section.

(3) The provisions of this subsection may be utilized by the State only if:
  a. The State notifies the defendant at least 15 days before trial of its intention to introduce the statement into evidence under this subsection and provides the defendant with a copy of the statement, and
  b. The defendant fails to notify the State at least five days before trial that the defendant objects to the introduction of the statement into evidence.

(4) Nothing in this subsection precludes the right of any party to call any witness or to introduce any evidence supporting or contradicting the evidence contained in the statement.

(h) Notwithstanding any other provision of law, the following provisions apply except as otherwise provided in this Article.

(1) Any person who sells, manufactures, delivers, transports, or possesses in excess of 10 pounds (avoirdupois) of marijuana shall be guilty of a felony which felony shall be known as "trafficking in marijuana" and if the quantity of such substance involved:
  a. Is in excess of 10 pounds, but less than 50 pounds, such person shall be punished as a Class H felon and shall be sentenced to a minimum term of 25 months and a maximum term of 30 months in the State's prison and shall be fined not less than five thousand dollars ($5,000);
  b. Is 50 pounds or more, but less than 2,000 pounds, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);
  c. Is 2,000 pounds or more, but less than 10,000 pounds, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);
  d. Is 10,000 pounds or more, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(2) Any person who sells, manufactures, delivers, transports, or possesses 1,000 tablets, capsules or other dosage units, or the equivalent quantity, or more of methaqualone, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in methaqualone" and if the quantity of such substance or mixture involved:
  a. Is 1,000 or more dosage units, or equivalent quantity, but less than 5,000 dosage units, or equivalent quantity, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);
  b. Is 5,000 or more dosage units, or equivalent quantity, but less than 10,000 dosage units, or equivalent quantity, such person shall be

punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 10,000 or more dosage units, or equivalent quantity, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(3) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof, or any coca leaves and any salt, isomer, salts of isomers, compound, derivative, or preparation of coca leaves, and any salt, isomer, salts of isomers, compound, derivative or preparation thereof which is chemically equivalent or identical with any of these substances (except decocainized coca leaves or any extraction of coca leaves which does not contain cocaine) or any mixture containing such substances, shall be guilty of a felony, which felony shall be known as "trafficking in cocaine" and if the quantity of such substance or mixture involved:

a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 200 grams or more, but less than 400 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 400 grams or more, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months in the State's prison and shall be fined at least two hundred fifty thousand dollars ($250,000).

(3a) Repealed by Session Laws 1999-370, s. 1, effective December 1, 1999.

(3b) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of methamphetamine or amphetamine shall be guilty of a felony which felony shall be known as "trafficking in methamphetamine or amphetamine" and if the quantity of such substance or mixture involved:

a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 200 grams or more, but less than 400 grams, such person shall be punished as a Class E felon and shall be sentenced to a minimum term of 90 months and a maximum term of 117 months in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 400 grams or more, such person shall be punished as a Class C felon and shall be sentenced to a minimum term of 225 months and a maximum term of 279 months in the State's prison and shall be fined at least two hundred fifty thousand dollars ($250,000).

(4) Any person who sells, manufactures, delivers, transports, or possesses four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate (except apomorphine, nalbuphine, analoxone and naltrexone and their respective salts), including heroin, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in opium or heroin" and if the quantity of such controlled substance or mixture involved:

a. Is four grams or more, but less than 14 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 14 grams or more, but less than 28 grams, such person shall be punished as a Class E felon and shall be sentenced to a minimum term of 90 months and a maximum term of 117 months in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 28 grams or more, such person shall be punished as a Class C felon and shall be sentenced to a minimum term of 225 months and a maximum term of 279 months in the State's prison and shall be fined not less than five hundred thousand dollars ($500,000).

(4a) Any person who sells, manufactures, delivers, transports, or possesses 100 tablets, capsules, or other dosage units, or the equivalent quantity, or more, of Lysergic Acid Diethylamide, or any mixture containing such substance, shall be guilty of a felony, which felony shall be known as "trafficking in Lysergic Acid Diethylamide". If the quantity of such substance or mixture involved:

a. Is 100 or more dosage units, or equivalent quantity, but less than 500 dosage units, or equivalent quantity, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 500 or more dosage units, or equivalent quantity, but less than 1,000 dosage units, or equivalent quantity, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 1,000 or more dosage units, or equivalent quantity, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(4b) Any person who sells, manufactures, delivers, transports, or possesses 100 or more tablets, capsules, or other dosage units, or 28 grams or more of 3,4-methylenedioxyamphetamine (MDA), including its salts, isomers, and salts of isomers, or 3,4-methylenedioxymethamphetamine (MDMA), including its salts, isomers, and salts of isomers, or any mixture containing such substances, shall be guilty of a felony, which felony shall be known as "trafficking in MDA/MDMA." If the quantity of the substance or mixture involved:

a. Is 100 or more tablets, capsules, or other dosage units, but less than 500 tablets, capsules, or other dosage units, or 28 grams or more, but less than 200 grams, the person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 500 or more tablets, capsules, or other dosage units, but less than 1,000 tablets, capsules, or other dosage units, or 200 grams or more, but less than 400 grams, the person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 1,000 or more tablets, capsules, or other dosage units, or 400 grams or more, the person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months in the State's prison and shall be fined not less than two hundred fifty thousand dollars ($250,000).

(5) Except as provided in this subdivision, a person being sentenced under this subsection may not receive a suspended sentence or be placed on probation. The sentencing judge may reduce the fine, or impose a prison term less than the applicable minimum prison term provided by this subsection, or suspend the prison term imposed and place a person on probation when such person has, to the best of his knowledge, provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals if the sentencing judge enters in the record a finding that the person to be sentenced has rendered such substantial assistance.

(6) Sentences imposed pursuant to this subsection shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder.

(i) The penalties provided in subsection (h) of this section shall also apply to any person who is convicted of conspiracy to commit any of the offenses described in subsection (h) of this section. (1971, c. 919, s. 1; 1973, c. 654, s. 1; c. 1078; c. 1358, s. 10; 1975, c. 360, s. 2; 1977, c. 862, ss. 1, 2; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1251, ss. 4-7; 1983, c. 18; c. 294, s. 6; c. 414; 1985, c. 569, s. 1; c. 675, ss. 1, 2; 1987, c. 90; c. 105, ss. 4, 5; c. 640, ss. 1, 2; c. 783, s. 4; 1989, c. 641; c. 672; c. 690; c. 770, s. 68; 1989 (Reg. Sess., 1990), c. 1024, s. 17; c. 1039, s. 5; c. 1081, s. 2; 1991, c. 484, s. 1; 1993, c. 538, s. 30; c. 539, s. 1358.1; 1994, Ex. Sess., c. 11, s. 1; c. 14, ss. 46, 47; c. 24, s. 14(b); 1996, 2nd Ex. Sess., c. 18, s. 20.13(c); 1997-304, ss. 1, 2; 1997-443, s. 19.25(b), (u), (ii); 1998-212, s. 17.16(e); 1999-165, s. 4; 1999-370, s. 1; 2000-140, s. 92.2(d); 2001-307, s. 1; 2001-332, s. 1; 2004-178, ss. 3, 4, 5, 6; 2007-375, s. 1.)

Cross References. — As to furnishing controlled substances to inmates of charitable, mental or penal institutions, see G.S. 14-258.1.

Editor's Note. — G.S. 90-95(d1)(2) was recodified as G.S. 90-95(d1)(1)b. at the direction of the Revisor of Statutes. G.S. 90-95(d1a) was recodified as G.S. 90-95(d1)(2) at the direction of the Revisor of Statutes.

Session Laws 2004-178, s. 10, provides: "Sections 1 through 6 of this act and Section 8 of this act become effective December 1, 2004, and apply to offenses committed on or after that date. Prosecutions for offenses occurring before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions. Section 7 of this act becomes effective January 1, 2005. The remainder of this act is effective when it becomes law, at which time the Commission for Health Services [now the Commission for Public Health] may adopt rules under Section 7 of this act."

Effect of Amendments. — Session Laws 2007-375, s. 1, effective December 1, 2007, and applicable to offenses committed on or after that date, substituted "1,000 feet" for "300 feet" in subdivision (e)(8) and (10); in subdivision (e)(10), deleted "playground in a" preceding "public park" twice in the first sentence and deleted the former last sentence which defined "playground."

Legal Periodicals. — For note on punishment of physicians under the Controlled Substances Act, see 56 N.C.L. Rev. 154 (1978).

For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

For survey of 1982 criminal law, see 61 N.C.L. Rev. 1060 (1983).

For note, "My Own (Not So) Private Garbage: the North Carolina Supreme Court Gives the Green Light to Warrantless Police Searches of Trash Placed Behind Your House in State v. Hauser," see 31 Wake Forest L. Rev. 1141 (1996).

For a survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2252 (1997).

For "Legislative Survey: Criminal Law," see 22 Campbell L. Rev. 253 (2000).

CASE NOTES

I. General Consideration.
II. Manufacture.
III. Sale or Delivery.
IV. Possession.
  A. In General.
  B. Possession with Intent to Sell or Deliver.
V. Trafficking.
VI. Evidentiary Chain of Custody.

I. GENERAL CONSIDERATION.

Section Is Constitutional. — This section, relating to the possession and distribution of controlled substances, is constitutional. State v. McDougald, 18 N.C. App. 407, 197 S.E.2d 11, cert. denied, 283 N.C. 756, 198 S.E.2d 726 (1973), decided under this section as it stood before the 1973 revision.

The mandatory minimum sentence and fine provision of subdivision (h)(4) of this section does not violate equal protection rights and the separation of powers clause of the North Carolina Constitution in that it places impermissible legislative restraints on the judiciary and, in effect, also places sentencing powers in the hands of the prosecutor, who is a member of the executive branch. It is well-established that the legislature has exclusive power to prescribe the punishment for crimes. The function of the court in the punishment of crimes is to determine whether an accused is guilty or innocent and, if guilty, to pronounce the penalty prescribed by the legislature. State v. Willis, 61 N.C. App. 23, 300 S.E.2d 420, modified and aff'd, 309 N.C. 451, 306 S.E.2d 779 (1983).

Subdivisions (h)(4), (h)(5) and (h)(6) of this section are not violative of the United States or North Carolina Constitutions. State v. Willis, 61 N.C. App. 23, 300 S.E.2d 420, modified and aff'd, 309 N.C. 451, 306 S.E.2d 779 (1983); State v. Porter, 65 N.C. App. 13, 308 S.E.2d 767 (1983), cert. denied and appeal dismissed, 310 N.C. 155, 311 S.E.2d 295, cert. denied, 466 U.S. 973, 104 S. Ct. 2348, 80 L. Ed. 2d 821 (1984).

Subdivision (h)(4) of this section is not unconstitutional under N.C. Const., Art. I, § 6, the separation of power clauses, or under N.C. Const., Art. I, § 19, the law of the land provision. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

The imposition of harsher penalties for the possession of a mixture of controlled substances with a larger mixture of lawful materials has a rational relation to a valid State objective, that is, the deterrence of large scale distribution of drugs. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

The language of subdivision (a)(1) creates three offenses: (1) manufacture of a controlled substance, (2) transfer of a controlled substance by sale or delivery, and (3) possession with intent to manufacture, sell or deliver a controlled substance. The Supreme Court of North Carolina disapproved the contrary language in State v. Clark, 71 N.C. App. 55, 322 S.E.2d 176 (1984), which interpreted the statutes as creating six separate offenses. State v. Moore, 327 N.C. 378, 395 S.E.2d 124 (1990).

Arresting for Possession of Marijuana But Not Alcoholic Beverages Is Constitutional. — The practice of arresting persons present at an arena who have marijuana in their possession and not arresting persons found at the arena who have alcoholic beverages in their possession is not unconstitutional and does not violate either the due process or equal protection clauses of U.S. Const., Amend. XIV. Wheaton v. Hagan, 435 F. Supp. 1134 (M.D.N.C. 1977).

Construction with Federal Law. — The defendant's conviction of possessing between twenty-eight and two hundred grams of cocaine in violation of subsection (h)(3) was not a "serious drug offense" as defined in 18 U.S.C.S. § 924(e)(2)(A)(ii) and, therefore, could not be used to subject him to the mandatory fifteen year minimum sentence outlined by that section. United States v. Brandon, 247 F.3d 186, 2001 U.S. App. LEXIS 6618 (4th Cir. 2001).

Defendant's Convictions Under This Section Properly Used to Establish Habitual Felon Status. — G.S. 90-95(d)(2) classified cocaine possession as a felony, and defendant's two cocaine possession convictions were therefore properly used to establish his habitual felon status. State v. Miller, 168 N.C. App. 572, 608 S.E.2d 565, 2005 N.C. App. LEXIS 345 (2005).

Double Jeopardy. — Defendant was not subjected to double jeopardy when he was convicted and separately sentenced to both felonious possession and felonious transportation of the same package of heroin, since felonious transportation involves acts not necessarily a part of, nor a requisite to, felonious possession. State v. Harrington, 283 N.C. 527, 196 S.E.2d 742, cert. denied, 414 U.S. 1011, 94 S. Ct. 375, 38 L. Ed. 2d 249 (1973), decided prior to the 1973 revision of this section.

Manufacturing or possession under subsection (a) of this section does not require proof of any additional facts beyond those required under subdivision (h)(1) of this section; therefore, convictions under both statutes violate protection against double jeopardy. State v. Sanderson, 60 N.C. App. 604, 300 S.E.2d 9, cert. denied, 308 N.C. 679, 304 S.E.2d 759 (1983).

The principles of double jeopardy bar defendant's conviction and punishment for possession of more than one gram of cocaine and possession of cocaine with intent to sell or deliver. The appropriate procedure was to instruct the jury to first consider the offense of possession with intent to sell and deliver, and then, if and only if they found defendant not guilty of that offense, to consider the possession charge. State v. Rich, 87 N.C. App. 380, 361 S.E.2d 321 (1987).

Convictions for the separate offenses of transporting and possessing a controlled substance are consistent with the intent of the legislature and do not violate the constitutional prohibition against double jeopardy. State v. Bogle, 90 N.C. App. 277, 368 S.E.2d 424, rev'd on other grounds, 324 N.C. 190, 376 S.E.2d 745 (1988); State v. Jones, 96 N.C. App. 389, 386 S.E.2d 217 (1989), appeal dismissed and cert. denied, 326 N.C. 366, 389 S.E.2d 809 (1990).

Defendant's consecutive sentences for trafficking by sale and trafficking by delivery do not violate double jeopardy as they are separate offenses. State v. Holmes, 120 N.C. App. 54, 460 S.E.2d 915 (1995).

Double Jeopardy Violated Where Four Conspiracies Were Actually Single Conspiracy. — Where defendant was convicted of conspiracy to possess cocaine, conspiracy to deliver cocaine, conspiracy to sell cocaine and conspiracy to transport cocaine, since the four separate conspiracies for which defendant was charged were, in fact, only a single conspiracy, his conviction for more than that single conspiracy violated his right to be free from double jeopardy. State v. Kamtsiklis, 94 N.C. App. 250, 380 S.E.2d 400, appeal dismissed and cert. denied, 325 N.C. 711, 388 S.E.2d 466 (1989).

Double Jeopardy Not Violated for Conviction for Failure to Pay Excise Tax. — Convictions for trafficking in cocaine by possession and for failure to pay excise tax on the controlled substance did not constitute double jeopardy, nor did the punishments imposed upon those convictions violate the prohibition against multiple punishments for the same offense, where the state sought to collect the drug excise tax from defendant in the same prosecution, and where neither of the crimes in question was a lesser included offense of the other. State v. Morgan, 118 N.C. App. 461, 455 S.E.2d 490 (1995).

Misdemeanors Punishable as Felonies Could Not Be Basis for Habitual Felony Changes. — Where defendant's prior convictions for possession of cocaine were defined by G.S. 90-95(d)(2) as misdemeanors punishable as felonies, they could not support the charges of possession of a firearm by a felon and being a habitual felon under G.S. 14-415.1 and G.S. 14-7.1. State v. Sneed, 161 N.C. App. 331, 588 S.E.2d 74, 2003 N.C. App. LEXIS 2050 (2003).

Quantity Not Element of Subdivision (a)(1). — While the quantity of drugs seized is evidence of the intent to sell, it is not an element of subdivision (a)(1) of this section. State v. Hyatt, 98 N.C. App. 214, 390 S.E.2d 355 (1990).

Nowhere in subdivision (a)(1) is an element specifying the amount of the controlled substance for which a defendant may be charged and convicted. State v. Hyatt, 98 N.C. App. 214, 390 S.E.2d 355 (1990).

The premise upon which the North Carolina Controlled Substances Act rests is that the substances so controlled are detrimental to the public; with that in mind the legislature established presumptive sentences for the different crimes involving marijuana. State v. Coffey, 65 N.C. App. 751, 310 S.E.2d 123 (1984).

Purpose. — One of the purposes of the Controlled Substances Act is to deter dealers in illicit drugs. State v. Horton, 75 N.C. App. 632, 331 S.E.2d 215, cert. denied, 314 N.C. 672, 335 S.E.2d 497 (1985).

Intent of the legislature in adopting subdivision (a)(1) was two-fold: (1) to prevent the manufacture of controlled substances, and (2) to prevent the transfer of controlled substances from one person to another. State v. Creason, 313 N.C. 122, 326 S.E.2d 24 (1985).

The evil sought to be prevented by the legislature under subdivision (a)(1) is the possession of drugs with the intent to place them into commerce by transferring them from one to another by either the sale or delivery of the drug. State v. Creason, 313 N.C. 122, 326 S.E.2d 24 (1985).

Possession of Drug Paraphernalia Does Not Trigger Felony Enhancement. — Felonious possession of drug charge should have been dismissed where G.S. 90-95(e)(3) was the basis for the State's enhancement of the offense to a felony because the offense prior to enhancement, possession of drug paraphernalia is a misdemeanor punishable under G.S. 90-113.22, and did not fall within G.S. 90-95(e)(3). State v. Stevens, 151 N.C. App. 561, 566 S.E.2d 149, 2002 N.C. App. LEXIS 771 (2002).

The enumerated acts which constitute trafficking pursuant to subdivision (h)(3) are separate crimes. State v. Baize, 71 N.C. App. 521, 323 S.E.2d 36 (1984), cert. denied, 313 N.C. 174, 326 S.E.2d 33, 326 S.E.2d 34 (1985).

Possession with intent to sell and sale are distinct offenses, and the former is not a lesser included offense of the latter. State v. Saunders, 35 N.C. App. 359, 241 S.E.2d 351 (1978).

Neither the offense of unauthorized possession nor the offense of unauthorized sale of a controlled substance is included within the other offense, and one placed in jeopardy as to the one offense is not thereby placed in jeopardy as to the other. Thus, one charged with both offenses may be convicted of both and sentenced to imprisonment for each. State v. Aiken, 286 N.C. 202, 209 S.E.2d 763 (1974); State v. Fletcher, 92 N.C. App. 50, 373 S.E.2d 681 (1988).

Possession and sale are separate and distinct offenses. State v. Joyner, 37 N.C. App. 216, 245 S.E.2d 592 (1978).

Possession of methamphetamine and sale of methamphetamine are two separate and distinct offenses, and a defendant can be convicted of both crimes and not have his constitutional rights violated. State v. Salem, 50 N.C. App. 419, 274 S.E.2d 501, cert. denied, 302 N.C. 401, 279 S.E.2d 355 (1981).

Manufacturing marijuana and possession of marijuana are separate and distinct statutory offenses, neither of which is a lesser included offense of the other. State v. Jenkins, 74 N.C. App. 295, 328 S.E.2d 460 (1985).

Possession, manufacturing, and transporting heroin are separate and distinct offenses. Further, when a person commits any one of these offenses which involves four grams or more of heroin, he is guilty of trafficking. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

Possession of heroin and distribution of heroin are separate and distinct crimes, and each may be punished as provided by law. State v. Thornton, 283 N.C. 513, 196 S.E.2d 701 (1973), decided under this section as it stood prior to the 1973 revision.

Defendant was not subjected to double jeopardy when he was placed on trial for the two offenses of possession of heroin and distribution of heroin and consecutive sentences were imposed for two convictions. State v. Thornton, 283 N.C. 513, 196 S.E.2d 701 (1973), decided prior to the 1973 revision of this section.

Possession of a controlled substance and distribution of the same controlled substance are separate and distinct crimes, and each may be punished as provided by law, even where the possession and distribution in point of time were the same. Unlawful possession cannot be considered a lesser included offense of the crime of unlawful distribution. State v. Brown, 20 N.C. App. 71, 200 S.E.2d 666 (1973), cert. denied, 284 N.C. 617, 202 S.E.2d 274 (1974), decided under this section as it stood before the 1973 revision.

Possession and distribution of heroin are separate and distinct offenses, and a defendant may be prosecuted for both without violating the constitutional prohibition against double jeopardy. State v. Patterson, 21 N.C. App. 443, 204 S.E.2d 709 (1974), decided under this section as it stood before the 1973 revision.

Where each act is the product of but one agreement, only one conspiracy may be charged. State v. Agudelo, 89 N.C. App. 640, 366 S.E.2d 921, appeal dismissed and cert. denied, 323 N.C. 176, 373 S.E.2d 115 (1988), overruled on other grounds, State v. Barnes, 324 N.C. 539, 380 S.E.2d 118 (1989).

Where there existed only one plot or plan, scheme or conspiracy, covering both possessing marijuana and manufacturing marijuana, the defendant could only be sentenced for one count of conspiracy. Sanderson v. Rice, 777 F.2d 902 (4th Cir. 1985), cert. denied, 475 U.S. 1027, 106 S. Ct. 1226, 89 L. Ed. 2d 336 (1986).

Possession of Cocaine Held Encompassed by Conspiracy to Sell and Deliver Same. — Each defendant could be convicted of only one conspiracy where conspiracy to sell and deliver cocaine necessarily encompassed possession of the substance, and thus judgments as to defendants' convictions of conspiracy to possess would be arrested. State v. Worthington, 319 N.C. App. 677, 352 S.E.2d 695, cert. denied, 319 N.C. 677, 356 S.E.2d 785 (1987).

Possession and Sale of Heroin and Cocaine. — Although defendant possessed both heroin and cocaine at the same time and place, and sold both substances in the same transaction, he could be lawfully convicted of two possessing offenses and two selling offenses. State v. Horton, 75 N.C. App. 632, 331 S.E.2d 215, cert. denied, 314 N.C. 672, 335 S.E.2d 497 (1985).

Where a licensed physician merely writes a prescription for a controlled substance listed in Schedules II, III, IV or V, and nothing more, such act is not a violation of subdivision (a)(1). State v. Best, 292 N.C. 294, 233 S.E.2d 544 (1977).

However, if that prescription is written outside the normal course of professional practice in North Carolina and not for a legitimate medical purpose, the physician violates G.S. 90-108. McCall v. McCall, 138 N.C. App. 706, 531 S.E.2d 894, 2000 N.C. App. LEXIS 795 (2000).

Drug Referred to in Indictment by Trade Name. — Desoxyn is a trade name for methamphetamine hydrochloride. Thus there was no variance between the charge in the bill of indictment that defendant possessed Desoxyn and the evidence which tended to prove that defendant possessed methamphetamine. State v. Newton, 21 N.C. App. 384, 204 S.E.2d 724 (1974), decided under this section as it stood before the 1973 revision.

It was proper for the trial judge to take judicial notice and to instruct the jury that Desoxyn and methamphetamine are the same thing. State v. Newton, 21 N.C. App. 384, 204 S.E.2d 724 (1974), decided under this section as it stood before the 1973 revision.

Constitutional Rights Not Violated Where Samples, etc., of Destroyed Evidence Exist. — In prosecution under this section, destruction of marijuana by State for lack of storage facilities, where State made random samples, photographs and a copy of the laboratory report available to defendants, did not violate defendants' rights of confrontation under N.C. Const., Art. I, § 23, nor infringe defendants' due process rights under the federal and State Constitutions. State v. Anderson, 57 N.C. App. 602, 292 S.E.2d 163, cert. denied, 306 N.C. 559, 294 S.E.2d 372 (1982).

Nor Are Discovery Rights Violated. — In prosecution under this section, destruction of marijuana by State for lack of storage facilities did not violate defendant's discovery rights under G.S. 15A-903(e) where the State made random samples, photographs and a copy of the laboratory report of the State Bureau of Investigation available to defendants. State v. Anderson, 57 N.C. App. 602, 292 S.E.2d 163, cert. denied, 306 N.C. 559, 294 S.E.2d 372 (1982).

Establishing Identity of Substance. — Testimony by a special agent that, "Two of the three substances that I purchased were MDA" did not constitute substantial evidence that the drug possessed and sold by defendant was in fact 3, 4-methylenedioxyamphetamine as charged in bills of indictment. State v. Board, 296 N.C. 652, 252 S.E.2d 803 (1979).

Qualified chemist's identification of green vegetable material as marijuana constituted sufficient showing by the State that it was Cannabis sativa L., a controlled substance under this section. State v. Bell, 24 N.C. App. 430, 210 S.E.2d 905 (1975).

Acceptance of an expert witness in the field of marijuana identification and admission of her opinion as to the nature of the material seized was not improper where the witness was a chemist with the State Bureau of Investigation, whose duties consisted of the analysis of substances for the presence of controlled substances, including marijuana, where she had been so employed for almost two years, and where she had had special training in the analysis of controlled substances. State v. Jenkins, 74 N.C. App. 295, 328 S.E.2d 460 (1985).

Rejection of Expert Witness Testimony as to Proper Narcotics Practices and Procedures. — The court rightfully refused the testimony of defendant's expert, a private detective and retired police officer of 30 years, where the jury was perfectly capable of judging the improper methods and procedures used by the undercover narcotics officer without the assistance of the expert; the testimony was irrelevant, had insufficient probative value on the facts to be proved, and violated the rule prohibiting expert testimony as to witness credibility, G.S. 8C-1, Rules 405(a) and 608, as read together. State v. Mackey, 352 N.C. 650, 535 S.E.2d 555, 2000 N.C. LEXIS 751 (2000).

Weight of Marijuana. — The state, in order to prove the element of weight of the marijuana in question, must either offer evidence of its actual, measured weight or demonstrate that the quantity of marijuana itself is so large as to permit a reasonable inference that its weight satisfied this element. State v. Mitchell, 336 N.C. 22, 442 S.E.2d 24 (1994).

Unlike age, the weight of a given quantity of marijuana is not a matter of general knowledge and experience. This is a matter familiar only to those who regularly use or deal in the substance, who are engaged in enforcing the laws against it, or who have developed an acute ability to assess the weight of objects down to the ounce and the average juror does not fall into any of these categories. State v. Mitchell, 336 N.C. 22, 442 S.E.2d 24 (1994).

Indictment Defective for Failure to Specify Weight Possessed. — Appeals court vacated defendant's conviction of possession of more than 42 grams of marijuana under G.S. 90-95(a)(3) and (d)(4) since the trial court lacked jurisdiction to try him for that charge as the indictment did not charge an essential element of that crime (the weight of marijuana he possessed), and remanded the case to the trial court to impose a judgment of conviction and sentence of the lesser-included offense of Class 3 possession of marijuana since the essential elements of that crime, other than weight, were the same as the G.S. 90-95(a)(3), (d)(4) offense for which he was indicted and convicted. State v. Partridge, 157 N.C. App. 568, 579 S.E.2d 398, 2003 N.C. App. LEXIS 735 (2003).

Subsection (g) was not intended to apply

to proceedings which result in adjudications of delinquency in the district court. In re Arthur, 291 N.C. 640, 231 S.E.2d 614 (1977).

Application of Interested Witness Rule. — The trial court did not err in a prosecution for possession with intent to sell and deliver, and delivery, of marijuana in failing to find that undercover officer was an interested witness per se, and the jury was properly instructed that the interested witness rule would apply if the jury determined that he was an interested witness. State v. Richardson, 36 N.C. App. 373, 243 S.E.2d 918 (1978).

Comment on Refusal to Render Assistance Under Subdivision (h)(5). — Defendant's constitutional right to be free from compelled self-incrimination includes the right to choose, without the risk of being penalized before a jury, between the exercise of that right and the potential benefits which may later inure through a waiver thereof and the rendition of assistance as provided in subdivision (h)(5) of this section. State v. Worthington, 84 N.C. App. 150, 352 S.E.2d 695, cert. denied, 319 N.C. 677, 356 S.E.2d 785 (1987).

District attorney's argument that defendants had the information necessary to avail themselves of the provisions of subdivision (h)(5) of this section and had an opportunity to render assistance but had declined to do so amounted to an impermissible comment upon defendants' exercise of their constitutional right to remain silent. However, the trial court's error in overruling defendants' objection to the improper remark of the district attorney was harmless beyond a reasonable doubt, due to the overwhelming evidence of defendants' guilt of the offenses for which they were convicted. State v. Worthington, 84 N.C. App. 150, 352 S.E.2d 695, cert. denied, 319 N.C. 677, 356 S.E.2d 785 (1987).

Plea Agreement Regarding Rendering of Assistance. — If alleged plea agreement, to the effect that if defendant testified against his supplier his sentence would run concurrently with his previous sentence, existed and was proper, the actual assistance rendered by the defendant would have to be measured by the terms of the agreement and not by the "substantial assistance" standard of this section. State v. Mercer, 84 N.C. App. 623, 353 S.E.2d 682 (1987).

For case in which disclosure of the identity of State's confidential informant was held essential to a fair determination of defendant's case, see State v. Johnson, 81 N.C. App. 454, 344 S.E.2d 318, cert. denied, 317 N.C. 339, 346 S.E.2d 151 (1986).

Evidence of Other Drug Violations. — In drug cases, evidence of other drug violations is relevant and admissible if it tends to show plan or scheme, disposition to deal in illicit drugs, knowledge of the presence and character of the drug, or presence at and possession of the premises where the drugs are found. State v. Richardson, 36 N.C. App. 373, 243 S.E.2d 918 (1978); State v. Willis, 61 N.C. App. 23, 300 S.E.2d 420, modified and affirmed, 309 N.C. 451, 306 S.E.2d 779 (1983); State v. Sanderson, 62 N.C. App. 520, 302 S.E.2d 899 (1983); State v. Weldon, 65 N.C. App. 376, 309 S.E.2d 263 (1983), aff'd, 314 N.C. 401, 333 S.E.2d 701 (1985).

Where evidence of defendant's bad character related in part to his activities in the illegal drug trade, it bore a reasonable relationship to the purposes of sentencing for offenses under this section by demonstrating his increased culpability and was a proper aggravating factor. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

Defendant's prior conviction for selling cocaine was inadmissible under G.S. 8C-1-404(b) in defendant's prosecution for possession with intent to sell or deliver cocaine; the weight of cocaine rocks and the unpackaged state of the rocks did not make the prior conviction and the current charge similar, the events were eight years apart, and the admission was prejudicial under G.S. 15A-1443(a) when the inference afforded by the amount of drugs in defendant's possession did not outweigh the prejudice caused by the erroneous admission of his prior conviction. State v. Carpenter, 361 N.C. 382, 646 S.E.2d 105, 2007 N.C. LEXIS 596 (2007).

Evidence of other discoveries tended to show defendant's guilty knowledge, where defendant leased and lived in the house where heroin was found and was physically present on the occasion of each search; where during the first search, which occurred two months prior to the offense charged, heroin, a needle and syringe, and $648 were found on a table directly in front of defendant; and where during the last search, which took place three months after the offense, heroin was found at an easily accessible location about five feet from defendant's back door, and $201 was found on her person. State v. Weldon, 65 N.C. App. 376, 309 S.E.2d 263 (1983), aff'd, 314 N.C. 401, 333 S.E.2d 701 (1985).

Testimony that defendant's house had the reputation of being a site of illegal drug sale and use, although ordinarily considered hearsay, concerning the reputation of a place, was admissible where it tended to show the intent of the person charged. State v. Weldon, 65 N.C. App. 376, 309 S.E.2d 263 (1983), aff'd, 314 N.C. 401, 333 S.E.2d 701 (1985).

Sufficiency of Evidence to Withstand Motion for Nonsuit. — Evidence that (1) officers heard running through the house immediately after announcing the presence of the police and requesting entry; (2) defendants were found in the downstairs bedroom with packaged marijuana next to kitchen where manufacturing paraphernalia was assembled; and (3) two blenders were in operation and manufacturing appeared to be in progress, was sufficient to withstand a motion for nonsuit on charges of manufacture and possession of marijuana. State v. Shufford, 34 N.C. App. 115, 237 S.E.2d 481, cert. denied, 293 N.C. 592, 239 S.E.2d 265 (1977).

As to "close juxtaposition" of defendants to marijuana as sufficient to withstand nonsuit on charges of manufacture and possession, see State v. Shufford, 34 N.C. App. 115, 237 S.E.2d 481, cert. denied, 293 N.C. 592, 239 S.E.2d 265 (1977).

Burden of Showing Matter Seized Is Not Marijuana. — The burden would be upon the defendants to show that stalks were mature or that any other part of the matter or material seized did not qualify as "marijuana," as defined by G.S. 90-87(16). State v. Anderson, 57 N.C. App. 602, 292 S.E.2d 163, cert. denied, 306 N.C. 559, 294 S.E.2d 372 (1982).

Failure of Defendant to Show Material Was Not "Marijuana". — Trial court did not err in permitting continuation of case in which 12,410 pounds of marijuana plants, including stalks, and plastic pipes, was seized, where defendant failed to show that enough of the material seized did not qualify as marijuana. State v. Grainger, 78 N.C. App. 123, 337 S.E.2d 77 (1985).

Failure to Make Written Findings Held Not Prejudicial. — The trial court's mere clerical error in entering a judgment which stated that the court made no written findings of fact did not prejudice defendant, because written findings were unnecessary since defendant received the minimum sentence possible under subdivision (h)(1)a of this section, which overrides the presumptive term established for a Class H felony by G.S. 15A-1340.4(f)(6) [now repealed]. State v. Leonard, 87 N.C. App. 448, 361 S.E.2d 397 (1987), appeal dismissed, 321 N.C. 746, 366 S.E.2d 867 (1988).

Aggravating Factors Under Subdivision (a)(1). — While G.S. 15A-1340.4-(a)(1) prohibits using evidence necessary to prove an element of the offense to prove a factor in aggravation, use of evidence that the offense was committed for hire or pecuniary gain and that the offense involved an attempted or actual taking of property of great monetary value or damage causing great monetary loss or that the offense involved an unusually large quantity of contraband is permissible, since these two aggravating factors are not elements of subdivision (a)(1) of this section. State v. Thobourne, 59 N.C. App. 584, 297 S.E.2d 774 (1982).

Drug Purchases Within 300 Feet of School. — Testimony of school superintendent and principal that a measurement was made from the boundary of school to the site of the offense was sufficient to show that drug purchases were made within 300 feet of the boundary of real property used for a school. State v. Ussery, 106 N.C. App. 371, 416 S.E.2d 610 (1992).

There was plenary evidence that the drug sale, for which defendant was charged, took place within 300 feet of a school boundary in violation of subdivision (e)(8). State v. Alston, 111 N.C. App. 416, 432 S.E.2d 385 (1993).

Verdict and Judgment. — Where there was nothing in the record to indicate that the defendants had been convicted previously of a violation of subsection (d), the recital in the judgments that the defendants were found guilty of a felony as a result of possession of phencyclidine hydrochloride was erroneous, and the judgments were modified by striking the word "felony" as it related to the conviction of the defendants for simple possession of phencyclidine hydrochloride. State v. Gagne, 22 N.C. App. 615, 207 S.E.2d 384, cert. denied, 285 N.C. 761, 209 S.E.2d 285 (1974).

Punishment. — The trial court erred in sentencing defendant to imprisonment for 10 years for felonious possession of heroin where the indictment did not charge defendant with a prior conviction of that offense and the State did not prove a prior conviction, a sentence of five years being the maximum that could be imposed in such case. State v. Moore, 27 N.C. App. 245, 218 S.E.2d 496 (1975), decided under this section as it stood before the 1979 amendment.

Intent to Sell as Aggravating Factor. — Intent to sell is not an element of manufacturing, transporting, or possessing 28 grams or more of heroin, the reason a person possesses, manufactures, or transports the heroin being irrelevant; therefore, the trial judge properly found as an aggravating factor that defendant had the specific intent to sell the heroin that he possessed. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

The "any mixture" language in subdivision (h)(4) allows for conviction based on the total weight of heroin mixed with another substance; additionally, whether the "mixture" contains a controlled substance and neutral "cutting agents" or is made wholly of controlled substances is of no legal significance under the statute. State v. Agubata, 92 N.C. App. 651, 375 S.E.2d 702 (1989).

When a mixture contains only controlled substances, the State is not limited to charging the defendant with an offense based on the substance which makes up the majority of the mixture. State v. Agubata, 92 N.C. App. 651, 375 S.E.2d 702 (1989).

Sufficiency of Circumstantial Evidence. — Considered as a whole, circumstantial evidence of defendant's power and intent to control the sale of dilaudid on both dates listed in indictments was sufficient to support an inference of both his possession with an intent to sell or deliver the controlled substance and his participation in the transfer transactions themselves. State v. Thorpe, 326 N.C. 451, 390 S.E.2d 311 (1990).

Facts were sufficient under "totality of the circumstances" test to support a finding of probable cause when officers received information from an informant who admitted past use of cocaine and who had previously given information that led to the arrest of at least six people, since the information provided a substantial basis for the probability that cocaine was present in the described residence and had been sold there within the preceding 48 hours. State v. Graham, 90 N.C. App. 564, 369 S.E.2d 615 (1988).

Substantial Assistance to Include Testimony Against Co-Conspirator at Trial. — The statute's clear language includes assistance leading to the conviction of any co-conspirators; therefore, it is not unforeseeable that substantial assistance could include testimony rendered against a co-conspirator at trial. State v. Hamad, 92 N.C. App. 282, 374 S.E.2d 410 (1988), aff'd, 325 N.C. 544, 385 S.E.2d 144 (1989).

Standard of Review for a Court's Ruling on Substantial Assistance. — In order to overturn a sentencing decision involving a court's ruling on substantial assistance, the reviewing court must find an abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play. State v. Willis, 92 N.C. App. 494, 374 S.E.2d 613 (1988), cert. denied, 324 N.C. 341, 378 S.E.2d 808 (1989).

Substantial Assistance. — The trial court was within its discretionary authority to impose the mandatory minimum sentence where the court's conclusion was based upon the State's representation that defendant had not provided substantial assistance. State v. Willis, 92 N.C. App. 494, 374 S.E.2d 613 (1988), cert. denied, 324 N.C. 341, 378 S.E.2d 808 (1989).

The trial court's discretion in departing from minimum sentencing upon a finding that the defendant has rendered substantial assistance is not limited by the structured sentencing minimum of G.S. 15A-1340.17. State v. Saunders, 131 N.C. App. 551, 507 S.E.2d 911 (1998).

Court Did Not Need to Allow Time for "Substantial Assistance". — Trial court did not err in refusing to continue hearing in order to allow defendant time to provide State with "substantial assistance"; trial court is not required to continue a sentencing hearing so that the defendant may be afforded an opportunity to provide the State with substantial assistance. State v. Kamtsiklis, 94 N.C. App. 250, 380 S.E.2d 400, appeal dismissed and cert. denied, 325 N.C. 711, 388 S.E.2d 466 (1989).

Defendant Did Not Give Substantial Assistance. — Defendant's assistance did not constitute "substantial assistance" as contemplated by subdivision (h)(5) of this section. Since some of the statements given by defendant were false, doubts could have been raised as to defendant's credibility in subsequent proceedings. Moreover, the "substantial assistance" statute is permissive, not mandatory. State v. Kamtsiklis, 94 N.C. App. 250, 380 S.E.2d 400, appeal dismissed and cert. denied, 325 N.C. 711, 388 S.E.2d 466 (1989).

Trooper Had Defendant's Consent. — Where defendant gave trooper permission to search the entire contents of defendant's suitcase, and did not retract or limit the consent, the trooper had defendant's consent to open package of cocaine contained therein, and the trial court did not err in allowing the contents of the package into evidence at trial. State v. Jones, 96 N.C. App. 389, 386 S.E.2d 217 (1989), appeal dismissed and cert. denied, 326 N.C. 366, 389 S.E.2d 809 (1990).

Trooper Did Not Exceed Scope of Investigation. — On appeal from conviction for trafficking based upon drugs found in defendant's car after trooper had stopped car on suspicion that the driver was impaired, fact that trooper's conversation with defendant about driver's identity resulted in defendant giving his voluntary consent to search of the car did not support defendant's arguments that trooper exceeded the permissible scope of his investigation. State v. Jones, 96 N.C. App. 389, 386 S.E.2d 217 (1989), appeal dismissed and cert. denied, 326 N.C. 366, 389 S.E.2d 809 (1990).

Motion to Quash Indictment Denied. — Where, among other things, the two counts in defendant's indictment, when read together, apprised defendant that he was being charged with trafficking in cocaine by the sale of 35.1 grams of that substance, there was no possibility that defendant was confused about the offense charged, nor did defendant claim any problem with his trial preparation, and two counts in the indictment were based upon a single drug transaction between defendant and an undercover police officer, court did not err in denying defendant's motion to quash the indictment. State v. Epps, 95 N.C. App. 173, 381 S.E.2d 879 (1989).

Indictment Held Inadequate. — Court erred in denying defendant's motion to quash the indictment for conspiracy to traffic in cocaine where the indictment contained no reference to any particular statute and failed to refer to any weight or volume of cocaine involved. State v. Epps, 95 N.C. App. 173, 381 S.E.2d 879 (1989).

Indictment Must Allege Name of Purchaser. — The law is settled that an indictment for the sale and/or delivery of a controlled substance must accurately name the person to whom the defendant allegedly sold or delivered, if that person is known. State v. Wall, 96 N.C. App. 45, 384 S.E.2d 581 (1989).

The Fair Sentencing Act's presumptive sentences, set out in G.S. 15A-1340.4(f) [now repealed], do not apply if a separate statute provides its own presumptive sentence as this section does. State v. Willis, 92 N.C. App. 494, 374 S.E.2d 613 (1988), cert. denied, 324 N.C. 341, 378 S.E.2d 808 (1989).

Fair Sentencing Act's Presumptive Term for Class I Felony. — The offenses of sale and delivery of marijuana and possession with intent to sell and deliver marijuana are Class I felonies. The presumptive term for a Class I felony is two years, pursuant to G.S. 15A-1340.4(f)(7) [now repealed]. State v. Pavone, 104 N.C. App. 442, 410 S.E.2d 1 (1991).

The Rules of Evidence, G.S. 8C-1, do not apply to a sentencing hearing where the judge must determine whether or not defendant provided substantial assistance pursuant to subdivision (h)(5). State v. Willis, 92 N.C. App. 494, 374 S.E.2d 613 (1988), cert. denied, 324 N.C. 341, 378 S.E.2d 808 (1989).

Necessity of Proving Prior Conviction. — Where indictment did not charge defendant with a conviction for a prior offense and the State did not prove a prior conviction, case would be remanded for a new sentence hearing, since both are required before the higher penalty can be imposed. State v. Williams, 93 N.C. App. 510, 378 S.E.2d 216 (1989).

Findings of Factors in Aggravation and Mitigation Required. — Where conviction for the sale of cocaine, a Class H felony, had a presumptive term of three years and the trial court imposed a 10-year sentence, findings of factors in aggravation and mitigation were required. State v. Artis, 91 N.C. App. 604, 372 S.E.2d 905 (1988).

No Reversible Error Where Minimum Sentence Imposed. — Although defendants contended that trial court committed reversible error in imposing judgments upon defendants for multiple conspiracies where there was arguably only one conspiracy, the distribution of cocaine, vacation of the other consolidated conspiracy convictions was unnecessary due to the mandatory minimum sentence required by this section and imposed by the trial court. State v. Kite, 93 N.C. App. 561, 378 S.E.2d 588, appeal dismissed, 324 N.C. 579, 381 S.E.2d 778 (1989).

Joint Trial Held Proper. — Where defendants were charged with identical crimes emanating from the same instance of wrongdoing, and the offenses charged were so connected in time and place that the evidence presented at trial was competent and admissible as to both defendants, and the trial court instructed the jury that each defendant's case should be considered separate and apart from the other defendant's case, and defendants had shown absolutely no prejudice resulting from the court's failure to sever their trials, there was no abuse of discretion by the trial court in refusing to separate the trial of defendants for possession with intent to sell more than 28 grams of cocaine. State v. Kite, 93 N.C. App. 561, 378 S.E.2d 588, appeal dismissed and cert. denied, 324 N.C. 579, 381 S.E.2d 778 (1989).

Sentence Greater Than Presumptive Term. — In cases in which a statute mandates that an offender be punished as a felon of one of the classifications of G.S. 15A-1340.4(f), but sets a minimum sentence greater than the presumptive sentence established for the appropriate class of felony therein, the minimum sentence set out in the criminal statute becomes the presumptive sentence for purposes of sentencing under the Fair Sentencing Act. Therefore, in order to impose a sentence in excess of the minimum prescribed by subdivision (h)(4)c of this section (45 years and $500,000), it is necessary that the trial judge make proper findings of factors in aggravation and mitigation and find that the aggravating factors outweigh any mitigating factors. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

Evidence was sufficient for jury to infer that defendant was involved in drug deal because defendant and two other men were in a pickup truck where the money and drugs were found. State v. Jenkins, 167 N.C. App. 696, 606 S.E.2d 430 (2005), aff'd, 359 N.C. 423, 611 S.E.2d 833 (2005).

Underlying Felony in Felony Murder Conviction. — State did not have to prove that defendant knew the codefendant possessed a gun in order to for defendant to be convicted of felony murder under G.S. 14-17 based on trafficking in cocaine with a deadly weapon in violation of G.S. 90-95 under a concert of action theory; defendant's knowledge that the codefendant had a gun was irrelevant as long as the codefendant killed the victim while possession or attempting to possess the drugs, which the State substantially established was the common purpose of defendant and the codefendant. State v. Herring, 176 N.C. App. 395, 626 S.E.2d 742, 2006 N.C. App. LEXIS 521, appeal dismissed, cert. denied, 637 S.E.2d 183 (N.C. 2006).

State presented sufficient evidence that the codefendant had constructive possession of the cocaine around the time of the shooting to find that defendant, by virtue of concert of action, committed trafficking in cocaine by possession of more than 400 grams of cocaine while also possessing a deadly weapon in violation of G.S. 90-95; when the codefendant shot the victim, the codefendant obtained dominion and control over the victim and the area around him, including the cocaine, and the codefendant's shooting of the victim within moments of the codefendant stepping into the apartment with the gun to complete the gun transaction was sufficient to convict defendant of felony murder under G.S. 14-17. State v. Herring, 176 N.C. App. 395, 626 S.E.2d 742, 2006 N.C. App. LEXIS 521, appeal dismissed, cert. denied, 637 S.E.2d 183 (N.C. 2006).

Applied in State v. Guy, 13 N.C. App. 637, 186 S.E.2d 663 (1972); State v. Brady, 16 N.C. App. 555, 192 S.E.2d 640 (1972); State v. Higgins, 16 N.C. App. 581, 192 S.E.2d 699 (1972); State v. McEachin, 17 N.C. App. 634, 195 S.E.2d 349 (1973); State v. Cobb, 18 N.C. App. 221, 196 S.E.2d 521 (1973); State v. Clark, 18 N.C. App. 473, 197 S.E.2d 81 (1973); State v. Hendrix, 19 N.C. App. 99, 197 S.E.2d 892 (1973); State v. Watson, 19 N.C. App. 160, 198 S.E.2d 185 (1973); State v. Keitt, 19 N.C. App. 414, 199 S.E.2d 23 (1973); State v. Crisp, 19 N.C. App. 456, 199 S.E.2d 155 (1973); State v. Haddock, 19 N.C. App. 714, 200 S.E.2d 437 (1973); State v. McQueary, 20 N.C. App. 472, 201 S.E.2d 556 (1974); State v. Wooten, 20 N.C. App. 499, 201 S.E.2d 696 (1974); State v. Akel, 21 N.C. App. 415, 204 S.E.2d 549 (1974); State v. Blackwelder, 22 N.C. App. 18, 205 S.E.2d 609 (1974); State v. Armstrong, 22 N.C. App. 36, 205 S.E.2d 597 (1974); State v. Stalls, 22 N.C. App. 265, 206 S.E.2d 500 (1974); State v. Williams, 22 N.C. App. 502, 206 S.E.2d 783 (1974); State v. Carriker, 287 N.C. 530, 215 S.E.2d 134 (1975); State v. Battle, 26 N.C. App. 478, 216 S.E.2d 458 (1975); State v. Hardy, 31 N.C. App. 67, 228 S.E.2d 487 (1976); State v. Vinson, 31 N.C. App. 318, 229 S.E.2d 203 (1976); State v. Gillespie, 31 N.C. App. 520, 230 S.E.2d 154 (1976); State v. Mendez, 42 N.C. App. 141, 256 S.E.2d 405 (1979); State v. King, 44 N.C. App. 31, 259 S.E.2d 919 (1979); State v. Haynes, 54 N.C. App. 186, 282 S.E.2d 830 (1981); State v. Rosser, 54 N.C. App. 660, 284 S.E.2d 130 (1981); State v. Ellers, 56 N.C. App. 683, 289 S.E.2d 924 (1982); State v. Long, 58 N.C. App. 467, 294 S.E.2d 4 (1982); State v. Willis, 58 N.C. App. 617, 294 S.E.2d 330 (1982); State v. Holmes, 59 N.C. App. 79, 296 S.E.2d 1 (1982); State v. Williams, 307 N.C. 452, 298 S.E.2d 372 (1983); State v. Parker, 61 N.C. App. 585, 301 S.E.2d 450 (1983); State v. Jamerson, 64 N.C. App. 301, 307 S.E.2d 436 (1983); State v. Brown, 64 N.C. App. 637, 308 S.E.2d 346 (1983); State v. Simmons, 65 N.C. App. 294, 309 S.E.2d 493 (1983); State v. Boone, 310 N.C. 284, 311 S.E.2d 552 (1984); State v. Brown, 310 N.C. 563, 313 S.E.2d 585 (1984); State v. Siler, 310 N.C. 731, 314 S.E.2d 547 (1984); State v. Siler, 66 N.C. App. 165, 311 S.E.2d 23 (1984); State v. Holloway, 66 N.C. App. 491, 311 S.E.2d 707 (1984); State v. Rozier, 69 N.C. App. 38, 316 S.E.2d 893 (1984); State v. Perry, 69 N.C. App. 477, 317 S.E.2d 428 (1984); State v. Dorsey, 71 N.C. App. 435, 322 S.E.2d 405 (1984); State v. Smith, 312 N.C. 361, 323 S.E.2d 316 (1984); State v. Ford, 71 N.C. App. 748, 323 S.E.2d 358 (1984); State v. Ruiz, 77 N.C. App. 425, 335 S.E.2d 32 (1985); State v. Diaz, 78 N.C. App. 488, 337 S.E.2d 147 (1985); State v. Damon, 78 N.C. App. 421, 337 S.E.2d 170 (1985); State v. Stallings, 316 N.C. 535, 342 S.E.2d 519 (1986); State v. Steele, 86 N.C. App. 476, 358 S.E.2d 98 (1987); State v. Winslow, 97 N.C. App. 551, 389 S.E.2d 436 (1990); State v. Moore, 102 N.C. App. 434, 402 S.E.2d 435 (1991); State v. Wells, 104 N.C. App. 274, 410 S.E.2d 393 (1991); State v. O'Neal, 108 N.C. App. 661, 424 S.E.2d 680 (1993); State v. Williamson, 110 N.C. App. 626, 430 S.E.2d 467 (1993); State v. Baker, 112 N.C. App. 410, 435 S.E.2d 812 (1993); State v. Acolatse, 158 N.C. App. 485, 581 S.E.2d 807 (2003); State v. Howell, 169 N.C. App. 741, 611 S.E.2d 200, 2005 N.C. App. LEXIS 795 (2005).

Cited in Eury v. North Carolina Emp. Sec. Comm'n, 115 N.C. App. 590, 446 S.E.2d 383, cert. denied, 338 N.C. 309, 451 S.E.2d 635 (1994); State v. Jackson, 280 N.C. 563, 187 S.E.2d 27 (1972); State v. McIntyre, 281 N.C. 304, 188 S.E.2d 304 (1972); State v. Godwin, 13 N.C. App. 700, 187 S.E.2d 400 (1972); State v. Cobb, 21 N.C. App. 66, 202 S.E.2d 801 (1974); State v. Crews, 286 N.C. 41, 209 S.E.2d 462 (1974); State v. Chapman, 24 N.C. App. 462, 211 S.E.2d 489 (1975); State v. Reese, 33 N.C. App. 89, 234 S.E.2d 41 (1977); State v. Beddard, 35 N.C. App. 212, 241 S.E.2d 83 (1978); Dove v. North Carolina Bd. of Alcoholic Control, 37 N.C. App. 605, 246 S.E.2d 584 (1978); State v. Bagley, 39 N.C. App. 328, 250 S.E.2d 87 (1979); State v. King, 42 N.C. App. 210, 256 S.E.2d 247 (1979); State v. Cuthrell, 50 N.C. App. 195, 272 S.E.2d 616 (1980); State v. Williams, 299 N.C. 529, 263 S.E.2d 571 (1980); State v. Beam, 45 N.C. App. 82, 262 S.E.2d 350 (1980); State v. Greenwood, 47 N.C. App. 731, 268 S.E.2d 835 (1980); State v. Lombardo, 52 N.C. App. 316, 278 S.E.2d 318 (1981); State v. Gray, 56 N.C. App. 667, 289 S.E.2d 894 (1982); State v. Cooke, 306 N.C. 132, 291 S.E.2d 618 (1982); State v. Gray, 55 N.C. App. 568, 286 S.E.2d 357 (1982); State v. Cherry, 55 N.C. App. 603, 286 S.E.2d 368 (1982); State v. Windham, 57 N.C. App. 571, 291 S.E.2d 876 (1982); State v. Rivard, 57 N.C. App. 672, 292 S.E.2d 174 (1982); State v. Lombardo, 306 N.C. 594, 295 S.E.2d 399 (1982); State v. Pearson, 59 N.C. App. 87, 295 S.E.2d 499 (1982); State v. Grainger, 60 N.C. App. 188, 298 S.E.2d 203 (1982); State v. Atwell, 62 N.C. App. 652, 303 S.E.2d 407 (1983); State v. Myrick, 60 N.C. App. 362, 299 S.E.2d 439 (1983); State v. McGee, 60 N.C. App. 658, 299 S.E.2d 796 (1983); State v. Byrd, 60 N.C. App. 740, 300 S.E.2d 16 (1983); State v. Sugg, 61 N.C. App. 106, 300 S.E.2d 248 (1983); State v. Myers, 61 N.C. App. 554, 301 S.E.2d 401 (1983); State v. Bond, 61 N.C. App. 739, 301 S.E.2d 745 (1983); State v. Atwell, 62 N.C. App. 643, 303

S.E.2d 402 (1983); State v. Willis, 67 N.C. App. 320, 313 S.E.2d 173 (1984); State v. Massenburg, 66 N.C. App. 127, 310 S.E.2d 619 (1984); State v. Essick, 67 N.C. App. 697, 314 S.E.2d 268 (1984); State v. Arrington, 311 N.C. 633, 319 S.E.2d 254 (1984); State v. Holloway, 311 N.C. 573, 319 S.E.2d 261 (1984); State v. Jones, 70 N.C. App. 467, 320 S.E.2d 26 (1984); State v. Walker, 70 N.C. App. 403, 320 S.E.2d 31 (1984); State v. Bryant, 73 N.C. App. 647, 326 S.E.2d 910 (1985); State v. Lombardo, 74 N.C. App. 460, 328 S.E.2d 780 (1985); In re Baxley, 74 N.C. App. 527, 328 S.E.2d 831 (1985); State v. Norman, 76 N.C. App. 623, 334 S.E.2d 247 (1985); State v. Seagroves, 78 N.C. App. 49, 336 S.E.2d 684 (1985); State v. Sessoms, 79 N.C. App. 444, 339 S.E.2d 458 (1986); State v. Thomas, 81 N.C. App. 200, 343 S.E.2d 588 (1986); State v. Brooks, 83 N.C. App. 179, 349 S.E.2d 630 (1986); State v. Tarantino, 83 N.C. App. 473, 350 S.E.2d 864 (1986); State v. Hyleman, 89 N.C. App. 424, 366 S.E.2d 530 (1988); State v. Phillips, 88 N.C. App. 526, 364 S.E.2d 196 (1988); State v. Banks, 88 N.C. App. 737, 364 S.E.2d 452 (1988); State v. Noll, 88 N.C. App. 753, 364 S.E.2d 726 (1988); State v. Fowler, 89 N.C. App. 10, 365 S.E.2d 301 (1988); State v. Braxton, 90 N.C. App. 204, 368 S.E.2d 56 (1988); State v. Phillips, 325 N.C. 222, 381 S.E.2d 325 (1989); United States v. Alston, 717 F. Supp. 378 (M.D.N.C. 1989), aff'd, 902 F.2d 267 (4th Cir. 1990); State v. Morocco, 99 N.C. App. 421, 393 S.E.2d 545 (1990); State v. Foland, 97 N.C. App. 309, 388 S.E.2d 195 (1990); State v. Hartness, 326 N.C. 561, 391 S.E.2d 177 (1990); State v. Townsend, 99 N.C. App. 534, 393 S.E.2d 551 (1990); State v. Hyder, 100 N.C. App. 270, 396 S.E.2d 86 (1990); In re Sherrill, 328 N.C. 719, 403 S.E.2d 255 (1991); State v. Morgan, 329 N.C. 654, 406 S.E.2d 833 (1991); State v. Hudson, 103 N.C. App. 708, 407 S.E.2d 583 (1991); State v. Lyons, 330 N.C. 298, 410 S.E.2d 906 (1991); State v. Hall, 104 N.C. App. 375, 410 S.E.2d 76 (1991); State v. Schirmer, 104 N.C. App. 472, 409 S.E.2d 704 (1991); State v. Tate, 105 N.C. App. 175, 412 S.E.2d 368 (1992); State v. Beckham, 105 N.C. App. 214, 412 S.E.2d 114 (1992); State v. Allen, 332 N.C. 123, 418 S.E.2d 225 (1992); State v. Farris, 111 N.C. App. 254, 431 S.E.2d 803 (1993); State v. Beveridge, 112 N.C. App. 688, 436 S.E.2d 912 (1993); State v. Oakes, 113 N.C. App. 332, 438 S.E.2d 477 (1994); United States v. D'Anjou, 16 F.3d 604 (4th Cir. 1994); State v. McEachern, 114 N.C. App. 218, 441 S.E.2d 574 (1994); State v. Harris, 115 N.C. App. 42, 444 S.E.2d 226 (1994); State v. Hauser, 115 N.C. App. 431, 445 S.E.2d 73 (1994); State v. Taylor, 117 N.C. App. 644, 453 S.E.2d 225 (1995); State v. Hodge, 118 N.C. App. 655, 456 S.E.2d 855 (1995); State v. Ballenger, 123 N.C. App. 179, 472 S.E.2d 572 (1996), aff'd, 345 N.C. 626, 481 S.E.2d 84, cert. denied, 522 U.S. 817, 118 S. Ct. 68, 139 L. Ed. 2d 29 (1997); State v. Truesdale, 123 N.C. App. 639, 473 S.E.2d 670 (1996); State v. Chaplin, 122 N.C. App. 659, 471 S.E.2d 653 (1996); State v. Chavis, 134 N.C. App. 546, 518 S.E.2d 241 (1999); State v. Briggs, 140 N.C. App. 484, 536 S.E.2d 858 (2000); In re Spencer, 140 N.C. App. 776, 538 S.E.2d 236 (2000); State v. Moraitis, 141 N.C. App. 538, 540 S.E.2d 756 (2000); State v. Johnson, 143 N.C. App. 307, 547 S.E.2d 445 (2001); State v. Martinez, 150 N.C. App. 364, 562 S.E.2d 914, appeal dismissed, cert. denied, 356 N.C. 172, 568 S.E.2d 859 (2002); State v. Boyd, 154 N.C. App. 302, 572 S.E.2d 192 (2002); State v. Wagner, 356 N.C. 599, 572 S.E.2d 777 (2002); State v. Wilson, 155 N.C. App. 89, 574 S.E.2d 93 (2002), appeal dismissed, cert. denied, 356 N.C. 693, 579 S.E.2d 98, cert. denied, 540 U.S. 843, 124 S. Ct. 113, 157 L. Ed. 2d 78 (2003); State v. Bell, 156 N.C. App. 350, 576 S.E.2d 695 (2003); In re Hartsock, 158 N.C. App. 287, 580 S.E.2d 395 (2003); State v. Oaks, 163 N.C. App. 719, 594 S.E.2d 788 (2004); State v. Leach, 166 N.C. App. 711, 603 S.E.2d 831 (2004); State v. Boston, 165 N.C. App. 214, 598 S.E.2d 163 (2004); State v. Scott, 167 N.C. App. 783, 607 S.E.2d 10 (2005); State ex rel. City of Salisbury v. Campbell, 169 N.C. App. 829, 610 S.E.2d 799, 2005 N.C. App. LEXIS 803 (2005); State v. Shearin, 170 N.C. App. 222, 612 S.E.2d 371, 2005 N.C. App. LEXIS 1002 (2005), appeal dismissed, cert. denied, — N.C. —, 624 S.E.2d 369 (2005); State v. Berryman, 170 N.C. App. 336, 612 S.E.2d 672, 2005 N.C. App. LEXIS 1004 (2005), aff'd, — N.C. —, 624 S.E.2d 350 (2006); State v. Edwards, 172 N.C. App. 821, 616 S.E.2d 634, 2005 N.C. App. LEXIS 1766 (2005), cert. denied, 360 N.C. 69, 623 S.E.2d 776 (2005); State v. Mewborn, 178 N.C. App. 281, 631 S.E.2d 224, 2006 N.C. App. LEXIS 1411 (2006); State v. Agnew, 361 N.C. 333, 643 S.E.2d 581, 2007 N.C. LEXIS 409 (2007).

II. MANUFACTURE.

The manufacturing of marijuana is a felony, regardless of the quantity manufactured or the intent of the offender. This differs from the offense of possession of marijuana in that in specified cases simple possession constitutes a misdemeanor while possession for purpose of distribution is made a felony. State v. Elam, 19 N.C. App. 451, 199 S.E.2d 45, cert. denied, 284 N.C. 256, 200 S.E.2d 656 (1973), decided under this section as it stood before the 1973 revision.

Indictment for Manufacture Need Not Allege Intent to Distribute. — The averment in the indictment "with intent to distribute" is not necessary in charging the felony of manufacturing marijuana and is treated as surplusage. State v. May, 20 N.C. App. 179, 201 S.E.2d 95 (1973), decided under this section as it stood before the 1973 revision.

When Intent to Distribute Must Be Proved. — The burden is on the State to prove from the evidence beyond a reasonable doubt that, in cases where the defendant is charged with manufacture of a controlled substance and the activity constituting manufacture is preparation or compounding, that the defendant intended to distribute the controlled substance. In proving such intent, the State would be able to rely upon ordinary circumstantial evidence (e.g., the amount of the controlled substance possessed, the nature of its packaging, labeling and storage, if any, the activities of the defendant with reference to the controlled substance) as evidence pertinent to intent. State v. Childers, 41 N.C. App. 729, 255 S.E.2d 654, cert. denied, 298 N.C. 302, 259 S.E.2d 916 (1979).

In those cases where production, propagation, conversion or processing of a controlled substance are involved, the intent of the defendant, either to distribute or consume personally, will be irrelevant and does not form an element of the offense. State v. Muncy, 79 N.C. App. 356, 339 S.E.2d 466, cert. denied, 316 N.C. 736, 345 S.E.2d 396 (1986).

Intent to distribute is not a necessary element of the offense of manufacturing a controlled substance unless the manufacturing activity is preparation or compounding. State v. Muncy, 79 N.C. App. 356, 339 S.E.2d 466, cert. denied, 316 N.C. 736, 345 S.E.2d 396 (1986).

Possession of controlled substance with intent to manufacture is separate and distinct offense from possession of such substance with the intent to transfer it. State v. Johnson, 78 N.C. App. 68, 337 S.E.2d 81 (1985).

Evidence Insufficient to Establish Manufacture. — Where the only evidence of manufacturing was the fact that the marijuana was "packaged," and there was no showing when the marijuana was packaged, by whom, or for what purpose, and the marijuana and other items found were not established to have been defendant's, other than on the theory of constructive possession, the State failed to prove a sufficient nexus between the defendant, the marijuana, and other items to establish that (1) marijuana was being manufactured and (2) that it was being done by the defendant. State v. Baxter, 21 N.C. App. 81, 203 S.E.2d 93, rev'd on other grounds, 285 N.C. 735, 208 S.E.2d 696 (1974), overruled on other grounds, State v. Childers, 41 N.C. App. 729, 255 S.E.2d 654 (1979), decided under this section as it stood before the 1973 revision.

Evidence Sufficient to Establish Manufacture. — Evidence was sufficient to withstand a motion for judgment as of nonsuit on a charge of manufacture of marijuana where stripped stalks of marijuana were found growing behind a television antenna connected to the defendant's residence and marijuana plants were found growing in flower pots on a table in the defendant's front yard 32 feet from his residence. State v. Wiggins, 33 N.C. App. 291, 235 S.E.2d 265, cert. denied, 293 N.C. 592, 241 S.E.2d 513 (1977).

Evidence held to place defendant in such "close juxtaposition" to six patches of marijuana growing in the environs of his mobile home as to justify a jury finding that defendant was engaged in its manufacture. State v. Jenkins, 74 N.C. App. 295, 328 S.E.2d 460 (1985).

Evidence held ample to give rise to a reasonable inference that defendant manufactured heroin by packing controlled substance. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

Evidence was sufficient to support the charge of manufacturing cocaine under subdivision (a)(1) of this section, where in addition to cocaine and packaging materials, the police also discovered a small set of scales, measuring spoons, and sifters on the premises, as this evidence permitted the jury to infer that defendant packaged or repackaged the cocaine. State v. Jones, 97 N.C. App. 189, 388 S.E.2d 213 (1990).

Jury could reasonably infer that defendant used items seized from her outbuilding, such as tubing that had methamphetamine residue, acetone, and PVC piping, together with items found in her residence, to manufacture methamphetamine; thus, there was sufficient physical and testimonial evidence from which a reasonable juror could find that defendant manufactured methamphetamine within 300 feet of an elementary school, and the trial court properly denied defendant's motion to dismiss. State v. Alderson, 173 N.C. App. 344, 618 S.E.2d 844, 2005 N.C. App. LEXIS 2033 (2005).

Sufficient evidence supported defendant's conviction for manufacturing marijuana by packaging it, as: (1) when arrested, defendant had in defendant's pants pocket a plastic bag containing marijuana that was the same, or similar to, the plastic bags found in an apartment; (2) an accomplice testified that defendant resided in the apartment with the accomplice; and (3) the accomplice testified that the accomplice had seen defendant near a blue bowl, plastic bags, and scales, and that defendant had been bagging up marijuana. State v. Brown, — N.C. App. —, 641 S.E.2d 850, 2007 N.C. App. LEXIS 574 (2007).

III. SALE OR DELIVERY.

Legislature Intended to Prevent Placement of Drugs into Commerce. — By criminalizing the sale or delivery of a controlled substance, the legislature sought to prevent all attempts to place drugs into commerce by any act of transfer, and to expedite this purpose the more inclusive word "delivery" was used in the statute. The only difference in the terms "sell" and "delivery" is that money changes hands in a sale; otherwise, the terms in this context are the same. State v. Moore, 95 N.C. App. 718, 384 S.E.2d 67 (1989).

Sale Includes Exchange of Goods Without Exchange of Money. — Since the term "sale" within the context of the North Carolina Controlled Substances Act, N.C. Gen. Stat. G.S. 90-86, et seq., encompassed any transfer or attempted transfer of a controlled substance for consideration, it included the exchange of cocaine for sweatshirts and a video game. State v. Carr, 145 N.C. App. 335, 549 S.E.2d 897 (2001).

"Delivery" Means "Transfer". — In a prosecution for felonious sale and delivery of marijuana, and felonious possession of marijuana with intent to sell, trial judge's charge to the jury placing the burden on the State to prove that defendant "transferred" the marijuana was not prejudicial error, since "delivery" means "transfer" under G.S. 90-87. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

A sale is a transfer of property for a specified price payable in money. State v. Creason, 313 N.C. 122, 326 S.E.2d 24 (1985).

Intent of Defendant Is Gravamen of Offense. — In the context of controlled substance statutes, "deliver" means the actual, constructive, or attempted transfer from one person to another of a controlled substance. It is the intent of the defendant that is the gravamen of the offense. State v. Creason, 313 N.C. 122, 326 S.E.2d 24 (1985).

There is no separate statutory offense entitled delivery of marijuana. Subdivision (b)(2) of this section, however, describes a situation limited in its applicability to the delivery of marijuana. If defendant transfers less than five grams of marijuana and receives no remuneration, he is not guilty of a delivery in violation of subdivision (a)(1) of this section. State v. Pevia, 56 N.C. App. 384, 289 S.E.2d 135, cert. denied, 306 N.C. 391, 294 S.E.2d 218 (1982).

When Offense of Delivery Complete. — The offense of delivery under this section is complete when there has been a transfer of a controlled substance. State v. Pevia, 56 N.C. App. 384, 289 S.E.2d 135, cert. denied, 306 N.C. 391, 294 S.E.2d 218 (1982).

One may unlawfully sell a controlled substance which he lawfully possesses. State v. Aiken, 286 N.C. 202, 209 S.E.2d 763 (1974).

The sale of a controlled substance is a specific act and occurs only at one specific time. State v. Lankford, 31 N.C. App. 13, 228 S.E.2d 641 (1976).

The delivery of a controlled substance is a specific act and occurs only at one specific time. State v. Lewis, 32 N.C. App. 298, 231 S.E.2d 693 (1977).

Sale and delivery of narcotics are separate offenses. State v. Thrift, 78 N.C. App. 199, 336 S.E.2d 861 (1985), cert. denied, 316 N.C. 557, 344 S.E.2d 15 (1986). But see, State v. Moore, 327 N.C. 378, 395 S.E.2d 124 (1990).

Sale and Delivery Charged as Single Offense. — In a prosecution for felonious sale and delivery of marijuana and felonious possession of marijuana with intent to sell, the fact that the State included in the same count as a single offense both sale and delivery, even though the two acts could have been charged as separate offenses, was not prejudicial to the defendant. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976). But see, State v. Moore, 327 N.C. 378, 395 S.E.2d 124 (1990).

Each Transaction Is One Offense Committed by Either or Both Acts. — By phrasing subdivision (a)(1) to make it unlawful to "manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance," the legislature, solely for the purpose of this statutory subdivision, has made each single transaction involving transfer of a controlled substance one criminal offense, which is committed by either or both of two acts — sale or delivery. State v. Moore, 327 N.C. 378, 395 S.E.2d 124 (1990).

Indictment for sale and/or delivery of a controlled substance must name the person to whom the defendant allegedly sold or delivered. State v. Pulliam, 78 N.C. App. 129, 336 S.E.2d 649 (1985).

Intent to Sell "or" Deliver Is Sufficient Even Where Intent to Sell "and" Deliver Is Alleged. — Where an indictment alleged that defendant unlawfully, willfully and feloniously did possess with intent to sell and deliver cocaine, and the trial court instructed the jury on the possible verdict of guilty of possession of cocaine with intent to sell or deliver, the difference between the indictment and the court's instruction did not impermissibly lower the State's burden of proof. State v. Wall, 96 N.C. App. 45, 384 S.E.2d 581 (1989).

Indictment Must Allege Name of Purchaser. — An indictment charging the unlawful sale of marijuana must allege the name of the purchaser or that his name is unknown. State v. Long, 14 N.C. App. 508, 188 S.E.2d 690 (1972), decided prior to the 1971 revision of this Article.

This section contains no modification of the common-law requirement that the name of the person to whom the accused allegedly sold narcotics unlawfully, be stated in the indictment when it is known. State v. Bennett, 280 N.C. 167, 185 S.E.2d 147 (1971), decided prior to the 1971 revision of this Article.

An indictment which does not include the narcotics purchaser's name, if known, fails to state sufficient facts to sustain a conviction. The Controlled Substances Act does not expressly eliminate the requirement that the name of a known purchaser be alleged in the indictment. State v. Ingram, 20 N.C. App. 464, 201 S.E.2d 532 (1974), decided under this section as it stood before the 1973 revision.

Where the bill of indictment alleges a sale of narcotics to one person and the proof tends to show only a sale to a different person, the variance is fatal. State v. Ingram, 20 N.C. App. 464, 201 S.E.2d 532 (1974), decided under this section as it stood before the 1973 revision.

Indictment for sale and delivery of cocaine was fatally flawed because it did not state the name of the person to whom defendant allegedly sold narcotics when the state knew name of that individual. State v. Calvino, 179 N.C. App. 219, 632 S.E.2d 839, 2006 N.C. App. LEXIS 1834 (2006).

Finding of Marijuana to Be a Controlled Substance Not Required. — In a prosecution for felonious sale and delivery of marijuana and felonious possession of marijuana with intent to sell, it is not necessary for the State to show that the Drug Authority (now Commission) has made a finding that marijuana is a controlled substance, since it has been listed as such under G.S. 90-94. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

Proof of Remuneration Not Required. — It is not necessary for the State to prove that defendant received remuneration for the transfer. State v. Pevia, 56 N.C. App. 384, 289 S.E.2d 135, cert. denied, 306 N.C. 391, 294 S.E.2d 218 (1982).

Nor Quantity Transferred. — The State is not required initially to prove the quantity transferred. State v. Pevia, 56 N.C. App. 384, 289 S.E.2d 135, cert. denied, 306 N.C. 391, 294 S.E.2d 218 (1982).

Conspiracy to Sell and Deliver Not Found. — Since where one of two persons who allegedly conspired to do an illegal act is an officer of the law acting in discharge of his duties and intends to frustrate the conspiracy, the other person cannot be convicted of conspiracy. Thus, it was error for the trial court to instruct the jury that defendant could be convicted of conspiracy to sell and deliver over 50 pounds of marijuana if he conspired only with undercover agent to sell and deliver the marijuana. State v. Hammette, 58 N.C. App. 587, 293 S.E.2d 824 (1982).

Conspiracy to Deliver Found. — Where defendant was convicted of conspiracy to traffic in cocaine by delivery, and where defendant contended that the evidence was insufficient because (1) the alleged conspiracy involved the original package, which the State did not prove to contain cocaine and (2) the conspiracy could not be based on the participation of the courier, who feigned his acquiescence to assist the police, defendant's contentions were meritless; because the agreement itself constituted the crime, what the package contained was not relevant to the offense, and the agreement was reached before the courier was apprehended, so his acquiescence was not feigned at that time. State v. Rosario, 93 N.C. App. 627, 379 S.E.2d 434, cert. denied, 325 N.C. 275, 384 S.E.2d 527 (1989).

No Conviction for Sale and Delivery of Controlled Substance from One Transaction. — A defendant may not be convicted under subdivision (a)(1) of this section of both the sale and the delivery of a controlled substance arising from one transaction. State v. Moore, 327 N.C. 378, 395 S.E.2d 124 (1990).

A defendant may not be convicted under subdivision (a)(1) of this section of both the sale and delivery of a controlled substance arising from a single transfer. Whether the defendant is tried for transfer by sale, by delivery, or by both, the jury in such cases should determine whether the defendant is guilty or not guilty of transferring a controlled substance to another person. State v. Wooten, 104 N.C. App. 125, 408 S.E.2d 202 (1991).

Verdicts of Guilty of Sale But Not Guilty of Possession. — A court does not err in not setting aside a guilty verdict on the sale of marijuana when the verdict for possession with intent to sell was not guilty. The courts have treated sale and possession with intent to sell a controlled substance as two separate offenses. Possession is not an element of sale and sale is not an element of possession. State v. Paul, 58 N.C. App. 723, 294 S.E.2d 762, cert. denied, 307 N.C. 128, 297 S.E.2d 402 (1982).

Where the State does not "conclusively" prove that defendant made sale without possession, but merely fails to prove possession, verdicts of guilty of sale of marijuana but not guilty of possession of marijuana with intent to sell are not inconsistent. State v. Paul, 58 N.C. App. 723, 294 S.E.2d 762, cert. denied, 307 N.C. 128, 297 S.E.2d 402 (1982).

Verdict finding that defendant "feloniously did sell or deliver" cocaine was fatally defective and ambiguous. State v. McLamb, 313 N.C. 572, 330 S.E.2d 476 (1985).

Verdict in disjunctive for "sale or delivery" of LSD was ambiguous and fatally defective, and would require a new trial. State v. Pulliam, 78 N.C. App. 129, 336 S.E.2d 649 (1985).

Improper to Issue Separate Sentences for Sale and Delivery of Same Controlled Substance. — The legislature did not intend to impose consecutive sentences for both the offense of sale of a controlled substance and delivery of the same contraband when one individual has made the transfer, and it was improper for a trial court to issue separate sentences for both the sale of a controlled substance and the delivery of the same controlled substance. State v. Moore, 95 N.C. App. 718, 384 S.E.2d 67 (1989).

A completed sale or delivery of controlled substances need not be shown in order to convict defendant of possession with intent to sell or deliver. State v. Wall, 96 N.C. App. 45, 384 S.E.2d 581 (1989).

Third-Party Purchase by Undercover Officer. — In order to survive defendant's motion to dismiss charges of selling and delivering cocaine to an undercover officer where the officer actually purchased the cocaine from a third party, at a minimum, the evidence would have to show two things: (1) that defendant had knowledge that the third party was buying or taking delivery of the cocaine for another person; and (2) that the person named in the indictment was that other person. State v. Wall, 96 N.C. App. 45, 384 S.E.2d 581 (1989).

Evidence of Marijuana Use in Prosecution for Sale of LSD and Cocaine. — In a prosecution for sale of LSD and cocaine under this section, the State's introduction of evidence of defendant's use and possession of marijuana was properly introduced in an attempt to show that defendant had a predisposition to commit the crimes at issue and was therefore not entrapped. State v. Goldman, 97 N.C. App. 589, 389 S.E.2d 281, cert. denied, 327 N.C. 434, 395 S.E.2d 691 (1990).

Evidence Admissible. — Admission of testimony revealing that police informant became informant as a result of being arrested for buying cocaine from defendant and promising to help catch the seller, i.e. the defendant, was proper to prove intent, a common plan or scheme, and to identify defendant. State v. Montford, 137 N.C. App. 495, 529 S.E.2d 247 (2000).

Sufficient Evidence to Show Sale or Delivery. — Defendant's motion to dismiss a charge of possession of marijuana with intent to sell and deliver, in violation of G.S. 90-95(a), was properly dismissed because the State met its burden of proving that defendant possessed marijuana and that he intended to sell or deliver it where: (1) the marijuana, along with surveillance equipment and other drug paraphernalia, was found in a common area of a house that was listed on defendant's driver's license and car registration as his home address; (2) defendant received mail at the address; (3) although the evidence tended to show that defendant shared the house with at least one other individual, considering the totality of the circumstances, a reasonable inference could be drawn that defendant had the power to control the use and disposition of the substance since it was located in a common area of his residence; (4) police found 414.5 grams of marijuana; and, (5) police found surveillance equipment, guns, and a bag with what appeared to be a cutting agent for cocaine, items that are normally used by those who deal in illicit drugs. State v. Baldwin, 161 N.C. App. 382, 588 S.E.2d 497 (2003).

Where the evidence showed that defendant gave drugs to two persons when officers arrived at a residence to search for a fugitive, there was sufficient evidence to support a finding of delivery; therefore, a motion to dismiss was properly denied since the credibility of the witnesses was within the province of the jury. State v. Price, — N.C. App. —, 611 S.E.2d 891 (2005).

IV. POSSESSION.

A. In General.

Types of Possession. — An accused's possession of narcotics may be actual or constructive. State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972). See also State v. Bagnard, 24 N.C. App. 54, 210 S.E.2d 93 (1974), cert. denied, 286 N.C. 416, 211 S.E.2d 796 (1975); State v. Finney, 290 N.C. 755, 228 S.E.2d 433 (1976); State v. Weems, 31 N.C. App. 569, 230 S.E.2d 193 (1976); State v. Reddick, 55 N.C. App. 646, 286 S.E.2d 654, cert. denied, 305 N.C. 398, 290 S.E.2d 368 (1982); State v. Weldon, 314 N.C. 401, 333 S.E.2d 701 (1985); State v. Anderson, 76 N.C. App. 434, 333 S.E.2d 762 (1985).

Possession Includes Mixtures. — The offense of trafficking in heroin or any of the other substances referred to in this section does not consist of just possessing the stated amount of the listed drugs; it also consists of possessing "any mixture containing such substance." Where the evidence indicated that defendant had in her possession several heroin containing mixtures that weighed more than 22 grams altogether, there was no issue as to the lesser included offense of felonious possession and the court did not have to charge on it. State v. Agubata, 94 N.C. App. 710, 381 S.E.2d 191 (1989).

Possession of a 273-gram mixture containing only 27 grams of pure cocaine is legally sufficient to support a conviction for trafficking in 200-400 grams of cocaine; the relevant question is the weight of the total substances seized, regardless of the substances' purity. State v. Broome, 136 N.C. App. 82, 523 S.E.2d 448 (1999), cert. denied, 351 N.C. 362, 543 S.E.2d 136 (2000).

Possession of more than one gram of cocaine is not a lesser included offense under subdivision (a)(1). It is an offense by itself under subsection (d) and is punishable as a Class 1 felony under subdivision (d)(2). State v. Hyatt, 98 N.C. App. 214, 390 S.E.2d 355 (1990).

Possession may be in a single individual or in combination with another. State v. Anderson, 76 N.C. App. 434, 333 S.E.2d 762 (1985).

Elements of Felonious Possession. — Felonious possession of a controlled substance has two essential elements. The substance must be possessed, and the substance must be knowingly possessed. State v. Weldon, 314 N.C. 401, 333 S.E.2d 701 (1985).

Handling for Inspection Purposes Did Not Constitute Possession. — The record failed to contain substantial evidence that the defendant possessed cocaine within the meaning of the statute where the the officer sat down next to the defendant in the back seat of the informant's vehicle and handed the defendant a package containing cocaine which he passed on to another person, who was sitting in the front seat, who tested the cocaine by tasting it, handed it back to the officer and stated that he did not want to purchase the cocaine because the quality was not good. Defendant's handling of the cocaine for inspection purposes did not constitute possession within the meaning of this section, as he did not have the power and intent to control its disposition or use. State v. Wheeler, 138 N.C. App. 163, 530 S.E.2d 311 (2000).

Constructive Possession Defined. — Constructive possession is that which exists without actual personal dominion over a chattel, but with an intent and capability to maintain control and dominion. State v. Allen, 279 N.C. 406, 183 S.E.2d 680 (1971); State v. Spencer, 281 N.C. 121, 187 S.E.2d 779 (1972); State v. Davis, 25 N.C. App. 181, 212 S.E.2d 516 (1975); State v. Wells, 27 N.C. App. 144, 218 S.E.2d 225 (1975); State v. Wiggins, 33 N.C. App. 291, 235 S.E.2d 265, cert. denied, 293 N.C. 592, 241 S.E.2d 513 (1977).

Where a defendant has both the power and intent while acting in combination with others to control the disposition and use of heroin, he has it in his constructive possession. State v. Allen, 279 N.C. 406, 183 S.E.2d 680 (1971), decided prior to the 1971 revision of this Article.

The doctrine of constructive possession applies when a person lacking actual physical possession nevertheless has the intent and capability to maintain control and dominion over a controlled substance. State v. Baize, 71 N.C. App. 521, 323 S.E.2d 36 (1984), cert. denied, 313 N.C. 174, 326 S.E.2d 33, 326 S.E.2d 34 (1985).

A person is in "possession" of a controlled substance within the meaning of this section if he has the power and intent to control it; possession need not be actual. The State is not required to prove that the defendant owned the controlled substance, or that defendant was the only person with access to it. State v. Rich, 87 N.C. App. 380, 361 S.E.2d 321 (1987).

Evidence Insufficient to Establish Constructive Possession. — See State v. Forbes, 104 N.C. App. 507, 410 S.E.2d 83 (1991).

The defense of impossibility properly applied to bar a conviction under this section, and constructive possession was inapplicable because there was no evidence as to the actual source of the drugs and, although the defendant may well have had the requisite intent, there was no evidence he ever had the capability to exercise dominion and control over the original shipment of drugs; instead, an appropriate charge would have been an attempt, pursuant to G.S. 90-98. State v. Clark, 137 N.C. App. 90, 527 S.E.2d 319 (2000).

Constructive possession has been found when the narcotics were (1) on property in which the defendant had some exclusive possessory interest and there was evidence of his or her presence on the property; (2) on property of which defendant, although not an owner, had sole or joint physical custody; or (3) in an area which the defendant frequented, usually near his or her property. State v. Baize, 71 N.C. App. 521, 323 S.E.2d 36 (1984), cert. denied, 313 N.C. 174, 326 S.E.2d 33, 326 S.E.2d 34 (1985).

Where police officers found over 28 grams of cocaine and a letter addressed to defendant in a bedroom in the house, and defendant's mother and father testified that defendant kept his clothes in the bedroom and used the room when he occasionally stayed there, and defendant admitted that he had moved the bags of cocaine from a closet to the box under the dresser, the evidence clearly raised an inference of constructive possession sufficient to be submitted to the jury. State v. Graham, 90 N.C. App. 564, 369 S.E.2d 615 (1988).

There was sufficient evidence to establish the constructive possession of cocaine in a drug case where the evidence showed that defendant was the only person present during the search, and papers relating to the car where the drugs were located were found with defendant's name on them. State v. Nettles, 170 N.C. App. 100, 612 S.E.2d 172, 2005 N.C. App. LEXIS 950 (2005).

When Constructive Possession May Be Found. — Where controlled substances are found on the premises under defendant's exclusive control, this fact alone may be sufficient to give rise to an inference of constructive possession and take the case to the jury; however, where possession of the premises by defendant is nonexclusive, constructive possession of the contraband materials may not be inferred without other incriminating circumstances. State v. Givens, 95 N.C. App. 72, 381 S.E.2d 869 (1989).

Where evidence presented by the State showed that officers who searched mobile home found a bill of sale to a mobile home which matched the description of the mobile home being searched, and the name on the bill of sale was that of defendant, and a bottle of prescription drugs with the name of defendant was found on a coffee table beside the chair defendant was sitting in when the officers arrived, and that when the officers searched defendant, they found white tablets in the pockets of his pants and on the chair where he had been sitting, there was sufficient evidence to go to the jury under an instruction on constructive possession. State v. Davis, 325 N.C. 693, 386 S.E.2d 187 (1989).

Constructive Possession in Vehicle. — If a defendant possesses a controlled substance while in a vehicle, he is guilty at least of possession of a controlled substance. If a vehicle contains a controlled substance but the defendant is not in the vehicle, he may be guilty of possession of a controlled substance by operation of the doctrine of constructive possession. State v. Mitchell, 336 N.C. 22, 442 S.E.2d 24 (1994).

Trial court's denial of defendant's motion to dismiss, as well as the denial of his post-trial motion to set aside the verdict, was proper where there was sufficient evidence to support an inference of constructive possession for purposes of defendant's possession of cocaine charge, as a police investigator saw defendant at a suspected drug dealer's home, he saw defendant drive away with a known drug runner from the home, and the runner informed the investigator where to find drugs in the vehicle; defendant was the driver of the vehicle where the cocaine was found and all reasonable inferences provided support for the conviction. State v. Baublitz, 172 N.C. App. 801, 616 S.E.2d 615, 2005 N.C. App. LEXIS 1778 (2005).

An acting in concert theory is not generally applied to possession offenses, as it tends to confuse the issues. However, where the State not only produced evidence that both defendant and partner were present at the scene of the possession crime, but also produced evidence leading to a reasonable inference that defendant possessed cocaine and that defendant and partner acted together pursuant to a common plan to sell the cocaine, the trial court did not err in instructing on acting in concert for the possession offense. State v. Cotton, 102 N.C. App. 93, 401 S.E.2d 376, cert. denied, 329 N.C. 501, 407 S.E.2d 543 (1991).

Cocaine Can Be Considered One Possession Although in Different Parts of Room. — If separate packages of illicit drugs located within a few feet of each other in the same room must be considered separate possessions, drug dealers could simply divide cocaine into packages containing less than one gram each to avoid being prosecuted for a felony; therefore, the cocaine can be considered one possession even though in different parts of the room. State v. Smith, 99 N.C. App. 67, 392 S.E.2d 642 (1990), cert. denied, 328 N.C. 96, 402 S.E.2d 824 (1991).

Possession In Local Confinement Facility. — Holding cell where defendant was held upon arrest was a local confinement facility; G.S. 90-95(e)(9) is not restricted solely to individuals in custody of a local confinement facility or those actions occurring at a particular section of the facility. State v. Dent, 174 N.C. App. 459, 621 S.E.2d 274, 2005 N.C. App. LEXIS 2491 (2005).

Knowledge may be implied when there is no direct evidence that a defendant actually had knowledge of a certain fact but the circumstances are such as would lead the defendant to believe that the fact existed. State v. Bogle, 90 N.C. App. 277, 368 S.E.2d 424, rev'd on other grounds, 324 N.C. 190, 376 S.E.2d 745 (1988).

When one occupies a house, either alone or together with others as a tenant and as such has control over the premises, this fact in and of itself gives rise to the inference of both knowledge and control. State v. Walsh, 19 N.C. App. 420, 199 S.E.2d 38, cert. denied, 284 N.C. 258, 200 S.E.2d 658 (1973), decided under this section as it stood before the 1973 revision.

Possession Is a Continuing Offense. — The possession of a controlled substance with the intent to sell it is a continuing offense from the time it was unlawfully obtained until the time the possessor divests himself of the possession. State v. Lankford, 31 N.C. App. 13, 228 S.E.2d 641 (1976); State v. Lewis, 32 N.C. App. 298, 231 S.E.2d 693 (1977).

Purpose of Different Treatment of Offenses Involving Marijuana and Hashish. — In the Controlled Substances Act marijuana and hashish are treated differently only in this section, which sets the penalty for felony possession. Simple possession of each is a misdemeanor; possession of more than an ounce of marijuana is a felony; possession of more than one-tenth of an ounce of hashish is a felony. This distinction was apparently made by the legislature because the active ingredient in marijuana is contained in the plant's resin, which is more concentrated in the extracted hashish than in the dried leaves of the plant itself. State v. Peoples, 65 N.C. App. 168, 308 S.E.2d 500 (1983).

Search and Seizure. — Defendant's arrest and subsequent search conducted by a police officer were permissible under U.S. Const. amend. IV because the officer had sufficient probable cause, pursuant to G.S. 15A-401(b)(1) and (b)(2)(a), to believe that defendant was committing, or had committed, a felony in light of information provided by a confidential informant, to the effect that a black male matching defendant's description was selling drugs outside a local store in violation of G.S 90-95(a)(1) and (b)(1); the informant's 14 years of personal dealings with the officer resulting in over 100 arrests and numerous convictions allowed the conclusion that the informant was reliable. State v. Stanley, 175 N.C. App. 171, 622 S.E.2d 680, 2005 N.C. App. LEXIS 2707 (2005).

Indictment. — Where an indictment did not use the word "feloniously" or state the statute showing a charge was felony, it was fatally defective and the charge was vacated. State v. Blakney, 156 N.C. App. 671, 577 S.E.2d 387, cert. denied, 357 N.C. 252, 582 S.E.2d 611 (2003).

Included Offenses. — To prove the offense of possession of over one ounce of marijuana, the State must show possession and that the amount possessed was greater than one ounce. To prove the offense of possession with intent to sell or deliver marijuana, the State must show possession of any amount of marijuana and that the person possessing the substance intended to sell or deliver it. Thus, the two crimes each contain one element that is not necessary for proof of the other crime. One is not a lesser included offense of the other. State v. McGill, 296 N.C. 564, 251 S.E.2d 616 (1979).

Although possession of a controlled substance is a lesser included offense of delivery, the crime of possession is not a lesser included offense of selling a controlled substance. State v. Moore, 327 N.C. 378, 395 S.E.2d 124 (1990).

Within the context of this section, possession of a controlled substance is a lesser included offense when a defendant is charged with an offense involving delivery. State v. Clark, 71 N.C. App. 55, 322 S.E.2d 176 (1984), overruled on other grounds, State v. Moore, 327 N.C. 378, 395 S.E.2d 124 (1990).

Simple Possession is Necessarily a Lesser-Included Offense of Possession With Intent to Sell and Deliver. — As a jury found defendant guilty of possession with intent to sell and deliver, for which the evidence was insufficient as a matter of law, it necessarily found him guilty of simple possession; therefore, the appellate court vacated the conviction and ordered defendant sentenced on the lesser charge, for which the evidence had been sufficient to convict. State v. Turner, 168 N.C. App. 152, 607 S.E.2d 19 (2005).

Attempt to traffic in marijuana by possession is a lesser-included offense of trafficking in marijuana by possession, although the penalty for conviction of an attempted controlled substance offense is the same as the penalty for a conviction of the underlying crime. State v. Clark, 137 N.C. App. 90, 527 S.E.2d 319 (2000).

State Need Not Elect Between Charges of Transporting and Possessing Marijuana. — Defendant's assignment of error had no merit to the court's denial of her motion to compel the State to elect between the charges of transporting and possessing marijuana. It is well-settled that each may be punished as a separate and distinct offense, without violating any constitutional protections. State v. Cash, 89 N.C. App. 563, 366 S.E.2d 584 (1988).

To aid or abet one in the crime of possession the act or encouragement must be done knowingly with the intent to aid the possessor to obtain or retain possession. State v. Keeter, 42 N.C. App. 642, 257 S.E.2d 480 (1979).

Establishing Possession. — An accused has possession of narcotics within the meaning of the law when he has both the power and intent to control their disposition or use. State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972); State v. Davis, 20 N.C. App. 191, 201 S.E.2d 61 (1973), cert. denied, 284 N.C. 618, 202 S.E.2d 274 (1974); State v. Bagnard, 24 N.C. App. 54, 210 S.E.2d 93 (1974), cert. denied, 286 N.C. 416, 211 S.E.2d 796 (1975); State v. Finney, 290 N.C. 755, 228 S.E.2d 433 (1976); State v. Weems, 31 N.C. App. 569, 230 S.E.2d 193 (1976); State v. Casey, 59 N.C. App. 99, 296 S.E.2d 473 (1982); State v. Weldon, 314 N.C. 401, 333 S.E.2d 701 (1985); State v. Anderson, 76 N.C. App. 434, 333 S.E.2d 762 (1985); State v. Fletcher, 92 N.C. App. 50, 373 S.E.2d 681 (1988).

The requirements of power and intent necessarily imply that a defendant must be aware of the presence of an illegal drug if he is to be convicted of possessing it. State v. Davis, 20 N.C. App. 191, 201 S.E.2d 61 (1973), cert. denied, 284 N.C. 618, 202 S.E.2d 274 (1974), decided under this section as it stood before the 1973 revision; State v. Casey, 59 N.C. App. 99, 296 S.E.2d 473 (1982); State v. Casey, 59 N.C. App. 99, 296 S.E.2d 473 (1982).

Where narcotics are found on premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession. State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972); State v. Balsom, 17 N.C. App. 655, 195 S.E.2d 125 (1973); State v. Finney, 290 N.C. 755, 228 S.E.2d 433 (1976); State v. Wiggins, 33 N.C. App. 291, 235 S.E.2d 265, cert. denied, 293 N.C. 592, 241 S.E.2d 513 (1977); State v. Blackburn, 34 N.C. App. 683, 239 S.E.2d 626, cert. denied, 294 N.C. 442, 241 S.E.2d 522 (1977); State v. Reddick, 55 N.C. App. 646, 286 S.E.2d 654, cert. denied, 305 N.C. 398, 290 S.E.2d 368 (1982); State v. Casey, 59 N.C. App. 99, 296 S.E.2d 473 (1982); State v. Weldon, 314 N.C. 401, 333 S.E.2d 701 (1985).

Where narcotics are found on premises under the control of defendant, this fact, in and of itself, gives rise to an inference of knowledge and possession by him which may be sufficient to sustain a conviction for unlawful possession of narcotics, absent other facts which might leave in the minds of the jury a reasonable doubt as to his guilt. State v. Allen, 279 N.C. 406, 183 S.E.2d 680 (1971); State v. Wells, 27 N.C. App. 144, 218 S.E.2d 225 (1975).

The rule establishing "possession" by power and intent to control use and disposition does not compel submission of the case to the jury in every instance in which controlled substances are found on the premises of an accused. State v. Davis, 20 N.C. App. 191, 201 S.E.2d 61 (1973), cert. denied, 284 N.C. 618, 202 S.E.2d 274 (1974), decided under this section as it stood before the 1973 revision.

An accused has possession of contraband material within the meaning of the law when he has both the power and the intent to control its disposition or use. State v. Davis, 25 N.C. App. 181, 212 S.E.2d 516 (1975).

The crime of possession requires that the contraband be in the custody and control of the defendant and subject to his disposition. State v. Keeter, 42 N.C. App. 642, 257 S.E.2d 480 (1979).

An accused has possession of a controlled substance within the meaning of this section when he has both the power and the intent to control its disposition or use. Possession does not require ownership of the controlled substance. State v. Pevia, 56 N.C. App. 384, 289 S.E.2d 135, cert. denied, 306 N.C. 391, 294 S.E.2d 218 (1982).

In a prosecution for possession of contraband materials, the prosecution is not required to prove actual physical possession of the materials. Proof of constructive possession is sufficient, and that possession need not always be exclusive. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986); State v. Leonard, 87 N.C. App. 448, 361 S.E.2d 397 (1987).

Direct evidence of a defendant's possession of heroin is not required; it is sufficient if defendant's possession can reasonably be inferred from the evidence. State v. Welch, 89 N.C. App. 135, 365 S.E.2d 190, appeal dismissed, 322 N.C. 485, 370 S.E.2d 235 (1988).

Defendant's presence on the premises, possession of a large amount of cash, and close proximity to a controlled substance were circumstances which could support an inference of constructive possession, despite the fact that others were present in the room where the drugs were found. State v. Alston, 91 N.C. App. 707, 373 S.E.2d 306 (1988).

State was not required to show who placed opium in a parcel delivered to defendant; it was required to show defendant knew or expected that the package contained opium and intended to control its disposition or use. State v. Rashidi, 172 N.C. App. 628, 617 S.E.2d 68, 2005 N.C. App. LEXIS 1790 (2005), aff'd, 360 N.C. 166, 622 S.E.2d 493 (2005).

Elements of Possession of More Than One Ounce. — To prove the offense of possession of over one ounce of marijuana under subdivision (d)(4) of this section, the State must prove two elements: (1) possession by defendant, and (2) that the amount possessed was greater than one ounce. The trial court must give proper instructions with respect to each of these elements. State v. Gooch, 307 N.C. 253, 297 S.E.2d 599 (1982).

Simple Possession and Possession of over One Ounce Compared. — The sole distinction between the offenses of possession of more than one ounce of marijuana under subdivision (d)(4) of this section and simple possession of marijuana under subdivision (a)(3) of this section is the element of amount. In the former, the jury must find that defendant possessed more than one ounce; in the latter, possession of any amount is sufficient for conviction. Otherwise, the elements of the two offenses are the same. State v. Gooch, 307 N.C. 253, 297 S.E.2d 599 (1982).

The State is not required to prove exclusive possession or control of a controlled substance. State v. Barnes, 18 N.C. App. 263, 196 S.E.2d 576 (1973), decided prior to the 1973 revision of this section.

An accused has possession of marijuana within the meaning of this Article when he has both the power and the intent to control its disposition or use, which power may be in him alone or in combination with another. Constructive possession is sufficient. State v. Baxter, 285 N.C. 735, 208 S.E.2d 696 (1974).

Where control of the premises is nonexclusive, constructive possession may not be inferred without other incriminating circumstances. State v. Rich, 87 N.C. App. 380, 361 S.E.2d 321 (1987).

Mere proximity to persons or locations with drugs about them is usually insufficient, in the absence of other incriminating circumstances, to convict for possession. State v. Balsom, 17 N.C. App. 655, 195 S.E.2d 125 (1973); State v. Weems, 31 N.C. App. 569, 230 S.E.2d 193 (1976).

Mere presence in a room where drugs are located does not itself support an inference of constructive possession. State v. James, 81 N.C. App. 91, 344 S.E.2d 77 (1986).

Amount of Substance Irrelevant. — Evidence that defendant possessed at most only a tiny amount of the substance heroin is sufficient for conviction. State v. Thomas, 20 N.C. App. 255, 201 S.E.2d 201 (1973), cert. denied, 284 N.C. 622, 202 S.E.2d 277 (1974), decided under this section as it stood before the 1973 revision.

For purposes of this section, no limitation is set of the amount of the controlled substance which must be possessed in order to come within its prohibition. State v. Young, 20 N.C. App. 316, 201 S.E.2d 370 (1973), decided under this section as it stood before the 1973 revision.

This section makes it unlawful to possess any amount of heroin regardless of value. State v. Bell, 33 N.C. App. 607, 235 S.E.2d 886, appeal dismissed, 293 N.C. 254, 237 S.E.2d 536 (1977).

Statute makes it unlawful for any person to possess a controlled substance without regard to the amount involved. State v. Williams, 149 N.C. App. 795, 561 S.E.2d 925, cert. denied, 355

N.C. 757, 566 S.E.2d 481, cert. denied, 537 U.S. 1035, 123 S. Ct. 553, 154 L. Ed. 2d 455 (2002).

A defendant could not be convicted if he was ignorant of the presence of marijuana in his car, even though he may have had "reason to know" of its existence. State v. Bogle, 90 N.C. App. 277, 368 S.E.2d 424, rev'd on other grounds, 324 N.C. 190, 376 S.E.2d 745 (1988).

Substance Supplied by Law Officers. — Defendant was convicted for possession of a controlled substance even though the substance was supplied by law officers; unlike stolen property, controlled substances do not lose their status as controlled substances merely because they are lawfully possessed. State v. Rosario, 93 N.C. App. 627, 379 S.E.2d 434, cert. denied, 325 N.C. 275, 384 S.E.2d 527 (1989).

Constructive Possession Not Shown. — Although there was evidence that defendant knew that there was cocaine in building, that he was "waiting for his" and "he come [sic] to receive some drugs," this was not substantial evidence that defendant had the capability to maintain control and dominion over one gram or more of cocaine; therefore, the State did not show constructive possession and the trial court erred in denying defendant's motion to dismiss. State v. Givens, 95 N.C. App. 72, 381 S.E.2d 869 (1989).

Possessor's Knowledge of Nature of Substance. — Possession of a bottle cap containing a residue of heroin by a person unfamiliar with the uses of heroin might well be consistent with innocent possession because of lack of knowledge by the possessor of the contraband nature of the article possessed. Possession of such an article by one sophisticated in the use of drugs is quite another matter. Evidence of the marks on defendant's arms was admissible as being relevant to show his prior knowledge. State v. Thomas, 20 N.C. App. 255, 201 S.E.2d 201 (1973), cert. denied, 284 N.C. 622, 202 S.E.2d 277 (1974), decided under this section as it stood before the 1973 revision.

Establishing Time and Place of Unlawful Possession Not Essential. — For a charge of unlawful possession of narcotics, time and place are not essential elements of the offense. State v. Bennett, 280 N.C. 167, 185 S.E.2d 147 (1971), decided prior to the 1971 revision of this Article.

Evidence of Prior Drug-Related Activity. — Testimony of a defendant's alleged prior drug sale in order to show motive and intent to possess cocaine was inadmissible and admission of testimony was prejudicial error requiring that defendant be granted a new trial. State v. Williams, 156 N.C. App. 661, 577 S.E.2d 143 (2003).

Evidence of Prior Convictions. — In defendant's trial on a charge of felony possession of cocaine, the trial court erred by allowing a deputy clerk to testify regarding defendant's prior convictions for possession with intent to sell and deliver cocaine and sale of cocaine for substantive purposes under G.S. 8C-1, N.C. R. Evid. 404(b), without requiring evidence of the underlying facts of the prior convictions to show similarities between the prior convictions and the offense charged; given the conflicting evidence in defendant's case, the error was prejudicial. State v. Hairston, 156 N.C. App. 202, 576 S.E.2d 121 (2003).

Evidence Insufficient. — Where there was no evidence concerning whether flower bed and cornfield in which marijuana was located were on defendant's property or otherwise under his control, nor any evidence linking defendant to the marijuana other than the fact that it was growing near his trailer, admission of the marijuana into evidence was error in a prosecution for manufacture and possession of marijuana with intent to sell and deliver. State v. Wiggins, 33 N.C. App. 291, 235 S.E.2d 265, cert. denied, 293 N.C. 592, 241 S.E.2d 513 (1977).

Where the only incriminating circumstance going beyond defendant's presence in room where cocaine was found was the fact that he had a gun in his hand and was "sneaking around" when police raided the house, this single circumstance was insufficient to establish constructive possession of the cocaine. Likewise, the evidence was insufficient for the charge to be considered by the jury on an acting in concert theory. State v. James, 81 N.C. App. 91, 344 S.E.2d 77 (1986).

Where defendant's testimony was that he knew nothing of any of the controlled substances found in the house, there was no basis on which a jury could find that a lesser offense was committed. At trial the defendant denied knowledge of all of the controlled substances, not just those not in "plain view." Therefore, the trial court did not err in refusing to instruct the jury on a lesser included offense of felonious possession of heroin. State v. Agubata, 92 N.C. App. 651, 375 S.E.2d 702 (1989).

State failed to present substantial evidence that the defendant possessed diazepam unlawfully. State v. Tuggle, 109 N.C. App. 235, 426 S.E.2d 724, appeal dismissed, 333 N.C. 794, 431 S.E.2d 29 (1993).

Positive urine test, without more, does not satisfy the intent or the knowledge requirement inherent in North Carolina's statutory definition of possession. State v. Harris, 178 N.C. App. 723, 632 S.E.2d 534, 2006 N.C. App. LEXIS 1684 (2006).

Because the state presented no evidence regarding the marijuana charge other than the positive urine test, there was insufficient evidence that defendant possessed marijuana. State v. Harris, 178 N.C. App. 723, 632 S.E.2d 534, 2006 N.C. App. LEXIS 1684 (2006).

When defendant was prosecuted for possession of marijuana, evidence of marijuana metabolites in defendant's urine was, by itself, insufficient to sustain a conviction because it did not speak to the aspect of the possession element requiring defendant to have the power and intent to control the disposition or use of marijuana; it only raised a suspicion or conjecture that defendant had such power and intent and the evidence did not rise to the level of tending to prove a fact in issue, nor was it reasonably conducive to that conclusion as a fairly logical and legitimate deduction. State v. Harris, 361 N.C. 400, 646 S.E.2d 526, 2007 N.C. LEXIS 598 (2007).

Positive urinalysis indicating the presence of marijuana metabolites in a defendant's system alone was not substantial evidence sufficient to prove that a defendant knowingly and intentionally possessed marijuana under G.S. 90-95(a). State v. Harris, 361 N.C. 400, 646 S.E.2d 526, 2007 N.C. LEXIS 598 (2007).

Reversible Error to Give Willful Blindness Instruction. — All substantive and material features of the crime with which defendant is charged must be addressed in the trial courts' instructions to the jury, and where a "willful blindness" jury instruction failed to adequately address the material element of knowledge, such instruction was inconsistent with North Carolina law and constituted reversible error. State v. Bogle, 324 N.C. 190, 376 S.E.2d 745 (1989).

Evidence Sufficient. — Where the state's evidence tended to show that defendant specifically stated to police officers that he had known marijuana plants were growing behind his residence, where defendant, when first seen by the officers, was coming around the house from the general direction of the barn and marijuana field, and where defendant was wearing coveralls and sweating heavily, from this the jury reasonably could have inferred that he had just come from working in the marijuana patches and the barn used for curing marijuana. State v. Beaver, 317 N.C. 643, 346 S.E.2d 476 (1986).

Although the evidence did not support a finding that defendant was in exclusive possession of a mobile home in which controlled substances were found, the evidence was sufficient to provide the other incriminating circumstances necessary for constructive possession when the possession is nonexclusive; namely, that defendant's name was on a bill of sale for a mobile home which matched the description of the home being searched, that a bottle of prescription drugs with defendant's name was found beside defendant, and that when police officers searching the house searched defendant they found white tablets in the pockets of his pants and on the chair where he had been sitting. State v. Davis, 325 N.C. 693, 386 S.E.2d 187 (1989).

The State's evidence was sufficient to support a reasonable inference that marijuana was in defendant's possession where it placed defendant within three or four feet of marijuana in defendant's home, and no one else was in the room where the marijuana was found. State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972), decided prior to the 1973 revision of this section.

The State's evidence was sufficient to support a reasonable inference that defendant exercised custody, control, and dominion over marijuana found in a pig shed located approximately 20 yards directly behind defendant's residence, where it tended to show that defendant had been seen on numerous occasions in and around the outbuildings directly behind his house, and that marijuana seeds were found in defendant's bedroom. State v. Spencer, 281 N.C. 121, 187 S.E.2d 779 (1972), decided prior to the 1973 revision of this section.

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of feloniously growing marijuana where it tended to show that (1) marijuana seeds were found in defendant's bedroom, (2) marijuana was found in a pigpen located 20 yards directly behind defendant's residence, (3) an unintersected path began at the edge of the pigpen and extended some distance to a cornfield where marijuana was found growing, and (4) the wire fencing at the beginning of the path was lower than the remainder of the path. State v. Spencer, 281 N.C. 121, 187 S.E.2d 779 (1972), decided prior to the 1973 revision of this section.

Where marijuana was found in a bedroom of defendant's home, and correspondence addressed to defendant was in the room, it is clear that the defendant was in possession of this marijuana. It was in his custody and control and subject to his disposition. State v. McDougald, 18 N.C. App. 407, 197 S.E.2d 11, cert. denied, 283 N.C. 756, 198 S.E.2d 726 (1973), decided under this section as it stood before the 1973 revision.

Evidence of constructive possession of marijuana was sufficient to show both the power and intent to control disposition or use of an apartment where: the apartment was rented to defendants; there was absolutely no evidence that they had sublet to anyone; the current telephone bill showed telephone calls to the homes of defendants; one defendant's I.D. card was found in a bedroom; and the rental record showed the rent to have been paid by the defendants. State v. Cockman, 20 N.C. App. 409, 201 S.E.2d 740, cert. denied, 285 N.C. 87, 203 S.E.2d 61 (1974), decided under this section as it stood before the 1973 revision.

Where police found 3,214 hits of blotter acid (L.S.D. in dots on pieces of paper) in the refrigerator, and there was evidence that the defendant was the lessee of the trailer in question and had been living there for six months or more, the State's evidence of possession was ample. State v. Juan, 20 N.C. App. 208, 200 S.E.2d 824 (1973), cert. denied, 284 N.C. 620, 202 S.E.2d 276 (1974), decided under this section as it stood before the 1973 revision.

Nothing else appearing, a man residing with his wife in an apartment, no one else residing or being present therein, may be deemed in constructive possession of marijuana located therein, notwithstanding the fact that he is temporarily absent from the apartment and his wife is present therein. State v. Baxter, 285 N.C. 735, 208 S.E.2d 696 (1974).

Where defendant had been given the keys and the custody of a vehicle by its owner, and there were 443.1 grams of marijuana found in the car while defendant was the driver and one of the two bags of marijuana was located just inside the car's door on the driver's side, unobstructed by the seat, the jury, viewing the evidence in a light most favorable to the State, could find that defendant had both the power and the intent to control its disposition or use so as to have it in his constructive possession. State v. Bagnard, 24 N.C. App. 54, 210 S.E.2d 93 (1974), cert. denied, 286 N.C. 416, 211 S.E.2d 796 (1975).

Evidence tending to show that defendant had possession and control of and claimed ownership to automobile in which drugs were located was sufficient to show that defendant had constructive possession of the drugs in question. State v. Leonard, 34 N.C. App. 131, 237 S.E.2d 347 (1977).

Marijuana located in flower pots 32 feet in front of defendant's trailer and beside defendant's television antenna was within such close proximity to defendant's residence as to raise the inference that defendant had at least constructive possession of it. State v. Wiggins, 33 N.C. App. 291, 235 S.E.2d 265, cert. denied, 293 N.C. 592, 241 S.E.2d 513 (1977).

Where the evidence tended to show that 10 glassine bags were wrapped together when removed from defendant, that a chemical analysis was made on only one of the bags and that bag was found to contain heroin, and that a visual examination only was made of the contents of the other bags, all the bags were competent to show what the search of defendant's premises produced and the evidence of the contents of the one tested glassine bag was sufficient for a conviction of possession of a quantity of narcotic drugs. State v. Steele, 18 N.C. App. 126, 196 S.E.2d 379 (1973), decided prior to the 1973 revision of this section.

Where there was ample evidence that each defendant had actual possession of LSD at the time they brought bottles to a prosecution witness and delivered them to him for safekeeping, it was not necessary that the State show that defendants had possession, either actual or constructive, when they were subsequently arrested. State v. Hultman, 20 N.C. App. 201, 200 S.E.2d 841 (1973), cert. denied, 284 N.C. 619, 202 S.E.2d 275 (1974), decided under this section as it stood before the 1973 revision.

Where the State relied upon several factors to show that the defendant was in constructive possession of heroin, it was not necessary for the State to prove each separate fact beyond a reasonable doubt. It is enough, if upon the whole evidence, the jury is satisfied beyond a reasonable doubt of the defendant's guilt. State v. Davis, 25 N.C. App. 181, 212 S.E.2d 516 (1975).

Where expert witness testified that he had examined and identified marijuana in numerous prior cases and trials, that he examined the contents of all the envelopes taken from defendant and that the contents of each appeared to be the same and that he selected five envelopes at random, all of which, after analysis of the contents, were found to contain marijuana, this evidence was sufficient to submit to the jury on the issue of whether the contents of all the envelopes were marijuana. State v. Hayes, 291 N.C. 293, 230 S.E.2d 146 (1976).

The evidence was more than sufficient to raise an inference that defendant had both the intent and the capability to exercise control over marijuana plants growing 282 feet from defendant's residence and being irrigated by pipe connected to water supply in defendant's house. State v. Roten, 71 N.C. App. 203, 321 S.E.2d 557 (1984).

Evidence that defendants were found at house in which marijuana was found, that their fingerprints were found on items within the house, that one defendant had in his possession a key that fit the gate and the door to the house and that his truck, which was present on the premises, contained twine identical to the twine used to tie marijuana plants to stakes and to twine found within the house, and that the other defendant admitted that he looked after the place was sufficient to permit the jury to find that each of the defendants had constructive possession of the marijuana. State v. Moore, 79 N.C. App. 666, 340 S.E.2d 771 (1986), cert. improvidently granted, 319 N.C. 393, 354 S.E.2d 228 (1987).

When the State offered evidence that there was a large quantity of marijuana in house, over which defendants had constructive possession, and there was a field of marijuana 1,400 feet down a path from the house, the jury could conclude that the defendants controlled the field and were bringing marijuana from the field to the house. State v. Moore, 79 N.C. App. 666, 340 S.E.2d 771 (1986), cert. improvidently granted, 319 N.C. 393, 354 S.E.2d 228 (1987).

Evidence of defendant's control of apartment where heroin and implements of manufacturing of heroin were found, when considered with evidence of transportation of 82.9 grams of heroin mixture, was ample evidence of such actual and constructive possession as to support a reasonable inference that defendant had the power and intent to control the disposition and use of the contraband and that he possessed and transported heroin in violation of subsection (h)(4)(c) of this section. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

Evidence held sufficient to show that defendant was constructively in possession of marijuana being grown and dried in barn on property near his residence, so as to support his conviction for manufacturing same. State v. Beaver, 317 N.C. 643, 346 S.E.2d 476 (1986).

Evidence held sufficient to show joint custody and access to the premises and other incriminating circumstances so as to allow the jury to consider defendant's constructive possession of heroin found in his sister's house, where defendant admitted to police officers that his clothes were on a mattress in one room of the house, where the officers also found a pay stub bearing his name, where he admitted staying over at the house occasionally to baby-sit for his sister's child, and where he had been seen there the day before and was standing on the porch nearest the heroin when police arrived. State v. James, 81 N.C. App. 91, 344 S.E.2d 77 (1986).

Testimony of chemist held sufficient to permit the jury to decide whether defendant possessed a mixture of cocaine weighing 28 grams or more. State v. Worthington, 84 N.C. App. 150, 352 S.E.2d 695, cert. denied, 319 N.C. 677, 356 S.E.2d 785 (1987).

Evidence which, viewed in the light most favorable to the State, was sufficient to establish that marijuana was found in the bedroom of a house belonging to defendants; that only the defendants and two small children were present in the house; and that the marijuana found there weighed 193 grams, or slightly under seven ounces, was sufficient to establish each of the elements of felonious possession of marijuana, that is: (i) knowing (ii) possession (iii) of over one and one-half ounces (iv) of marijuana. State v. Edwards, 85 N.C. App. 145, 354 S.E.2d 344, cert. denied, 320 N.C. 172, 358 S.E.2d 58 (1987).

Evidence held sufficient to establish that defendant had nonexclusive control over premises and was in constructive possession of cocaine. State v. Rich, 87 N.C. App. 380, 361 S.E.2d 321 (1987).

From evidence indicating that defendant had an object the size of a cigarette pack in a paper sack when he got off plane, that the sack was empty when he was searched, that between the two times he had no opportunity to get rid of the object except while in two adjacent phone booths, that the drugs were in the first phone booth within a minute after defendant was in it, and that no one else was seen around the phone booths, it could be reasonably inferred that defendant had the drug-filled cigarette package in the sack when he got off the plane and that he put it in the phone booth. State v. Welch, 89 N.C. App. 135, 365 S.E.2d 190, appeal dismissed, 322 N.C. 485, 370 S.E.2d 235 (1988).

Evidence held sufficient to show that defendant had the intent and power to control contraband. State v. Peek, 89 N.C. App. 123, 365 S.E.2d 320 (1988).

Evidence was sufficient to show that defendant had possession of a controlled substance where he knew an undercover-agent was interested in buying marijuana, led the agent to his house after indicating to her he had "stuff" to smoke and sell, and obtained the marijuana from his house and brought it to the agent after she requested an ounce. State v. Fletcher, 92 N.C. App. 50, 373 S.E.2d 681 (1988).

Evidence was sufficient to show defendant's actual or constructive possession of both delivered package of cocaine and smaller bags of cocaine upon which lesser trafficking charge was based, where it showed that defendant took the delivered package from the courier and placed it in his freezer, and that he removed it from the freezer and put it in a garbage can outside the house when he learned that police were in the area, and where, in addition, a witness testified that she had witnessed defendant sell cocaine in the house on numerous occasions, that she often found cocaine in the house and that she had seen defendant use cocaine grinder and scales. State v. Rosario, 93 N.C. App. 627, 379 S.E.2d 434, cert. denied, 325 N.C. 275, 384 S.E.2d 527 (1989).

Evidence that a powdery substance (later proven to be cocaine) was found in the car which defendant was driving and that, when shown the substance, defendant stated it was not his and it was only baking soda which he and a friend had bagged up to look like cocaine so they could sell it, was sufficient to support a conviction under this section. State v. Washington, 102 N.C. App. 535, 402 S.E.2d 851 (1991).

Evidence was sufficient to link defendant to the items found although defendant had nonexclusive control over his residence where: defendant owned the house that was searched and occupied this residence with his wife and daughter; marijuana cigarettes and rolling papers were found under what appeared to be men's clothing in a dresser drawer in the master bedroom; he owned the plastic bags, which were of a type used for selling and delivering narcotics and which were found in a kitchen cabinet with scales covered with cocaine residue. His admitted ownership of the bags suggested some relationship between the bags and the scales. State v. Mitchell, 104 N.C. App. 514, 410 S.E.2d 211 (1991), cert. granted, 331 N.C.

120, 414 S.E.2d 764 (1992), discretionary review improvidently granted, 336 N.C. 22, 442 S.E.2d 24 (1994).

Where the State's evidence tended to show that defendant rented two motel rooms, was the sole occupant of the rooms, that defendant retained keys to both rooms, and only his belongings were seized from the rooms, there was sufficient evidence of defendant's exclusive control and constructive possession of the controlled substance. State v. Williams, 136 N.C. App. 218, 523 S.E.2d 428 (1999).

Evidence was sufficient to find that defendant took possession of drugs in exchange for money in spite of defendant's claim that substance never left police's possession where officer placed them on defendant's back seat, where the parking lot was surrounded by police, and where the defendant was unable to leave the lot and never touched the drugs. State v. Broome, 136 N.C. App. 82, 523 S.E.2d 448 (1999), cert. denied, 351 N.C. 362, 543 S.E.2d 136 (2000).

Trial court did not err in denying defendant's motion to dismiss the possession charge because a juror could reasonably have inferred that defendant had the power and intent to control the cocaine found next to the driver's seat in the vehicle and therefore, constructively possessed the cocaine. The arresting officer observed defendant in the vehicle seemingly nervous and evasive, and when stopped, defendant ultimately fled. State v. Lane, 163 N.C. App. 495, 594 S.E.2d 107 (2004).

Where (1) a tube containing crack cocaine was found, concealed in a blanket, on a loveseat between defendant and another man, and (2) an officer testified that the two were passing the tube back and forth, that defendant appeared agitated, and that his hands were "jumbling" around "nervously," evidence of defendant's proximity to the drugs, attempts to conceal them, and guilty knowledge was sufficient to permit a jury to find he constructively possessed them. State v. Turner, 168 N.C. App. 152, 607 S.E.2d 19 (2005).

Although defendant argued that he did not expect pictures mailed to his residence from his brother in Iran to contain opium, the State offered evidence of incriminating circumstances that would permit a jury to conclude otherwise where: (1) defendant admitted that he had used opium and officers found a film canister containing traces of opium in his front pocket; (2) during a search of defendant's car, officers found in its console hand-held scales of a type frequently used to weigh drugs, a safety pin or "wire stem" coated in opium, and $1,160 in cash; and (3) the delivery to defendant was not a random, unexpected occurrence as officers found multiple, similarly addressed packages in defendant's carport. State v. Rashidi, 172 N.C. App. 628, 617 S.E.2d 68, 2005 N.C. App. LEXIS 1790 (2005), aff'd, 360 N.C. 166, 622 S.E.2d 493 (2005).

Because positive urine screen gave rise to the inference that defendant ingested cocaine, and the witness's testimony that the witness saw defendant snort cocaine provided corroborating evidence that defendant exercised the power and intent to control the substance's disposition or use, and that defendant was aware of its presence, there was sufficient evidence to support defendant's conviction for possession. State v. Harris, 178 N.C. App. 723, 632 S.E.2d 534, 2006 N.C. App. LEXIS 1684 (2006).

Evidence that defendant was found alone with the methamphetamine and precursor chemicals in a shed that was locked from the inside, and that an envelope addressed to defendant containing a tax document was also found in the shed, was sufficient to allow the jury to infer that defendant had constructive possession over the contraband. State v. Loftis, — N.C. App. —, 649 S.E.2d 1, 2007 N.C. App. LEXIS 1701 (2007).

Evidence Sufficient to Establish Possession for the Purpose of This Section. — The evidence was sufficient to support a conclusion that the defendant had actual possession of some of the drugs and constructive possession of others where the defendant was found in the dwelling with the drugs, he was seen there on several other occasions, he attempted to flee from the officers, 7.5 grams of marijuana were found on his person, and approximately 72.7 grams of marijuana were found in and about the house. State v. Bowens, 140 N.C. App. 217, 535 S.E.2d 870 (2000).

Trial court did not err in denying defendant's motion to dismiss pursuant to G.S. 15A-1227(a)(2), as there was sufficient evidence to convict defendant of possession of cocaine pursuant to G.S. 90-95 where an officer testified that, while surveilling defendant, the officer witnessed defendant possessing a bag of crack cocaine and passing the bag to defendant's girlfriend, on whose person the bag was later found in a search; this evidence was sufficient to persuade a rational juror to accept the conclusion that defendant possessed the cocaine recovered from the girlfriend. State v. Peoples, 167 N.C. App. 63, 604 S.E.2d 321 (2004).

Sufficient evidence was presented to allow a jury to find that defendant knowingly possessed the opium that had been mailed to him where he received the package addressed to him at his residence and, before or shortly after law enforcement officers announced their presence, he hid the opium in a trash bag of clothes in a bedroom; this evidence supported an inference of knowing possession. State v. Rashidi, 172 N.C. App. 628, 617 S.E.2d 68, 2005 N.C. App. LEXIS 1790 (2005), aff'd, 360 N.C. 166, 622 S.E.2d 493 (2005).

Commingling of Substances. — Where an officer conducting an investigation at the crime scene combined a large quantity of white powder found in a sealed plastic bag in a soldering iron box in a stereo shelf located approximately a foot and a half from a glass table with a smaller portion of white powder lying on that table, it was for the jury to decide whether defendant possessed a mixture of cocaine weighing more than 200 but less than 400 grams. State v. Teasley, 82 N.C. App. 150, 346 S.E.2d 227 (1986), cert. denied and appeal dismissed, 318 N.C. 701, 351 S.E.2d 759 (1987).

Circumstantial Evidence. — The State may overcome a motion to dismiss or motion for judgment as of nonsuit by presenting evidence which places the accused within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession. State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972); State v. Bagnard, 24 N.C. App. 54, 210 S.E.2d 93 (1974), cert. denied, 286 N.C. 416, 211 S.E.2d 796 (1975); State v. Finney, 290 N.C. 755, 228 S.E.2d 433 (1976); State v. Wiggins, 33 N.C. App. 291, 235 S.E.2d 265, cert. denied, 293 N.C. 592, 241 S.E.2d 513 (1977); State v. Reddick, 55 N.C. App. 646, 286 S.E.2d 654, cert. denied, 305 N.C. 398, 290 S.E.2d 368 (1982).

Finding of Not Guilty of Possession But Guilty of Manufacture. — Failure of the jury to find defendants guilty of the possession of marijuana does not preclude it from finding defendants guilty of manufacturing the illicit drug, as a jury is not required to be consistent, and mere inconsistency will not invalidate a verdict. State v. Rosser, 54 N.C. App. 660, 284 S.E.2d 130 (1981).

Evidence Supported Simple Possession and Not Intent to Distribute. — Evidence, including a single rock of crack cocaine and $271 in cash, was insufficient to show that defendant, a juvenile, intended to distribute crack cocaine but supported a conviction for simple possession. In re I.R.T., — N.C. App. —, 647 S.E.2d 129, 2007 N.C. App. LEXIS 1624 (2007).

Proof of Conspiracy to Possess. — Although it is not necessary for the State to prove that defendant personally possessed marijuana in order to convict him of conspiracy to possess marijuana, it is necessary to offer evidence from which the jury could reasonably infer that he agreed with someone else to possess it. State v. LeDuc, 306 N.C. 62, 291 S.E.2d 607 (1982).

Mere Presence Instruction. — The court did not err in refusing defendant's request for a specific mere presence instruction where it provided defendant's requested instruction in substance. State v. Williams, 136 N.C. App. 218, 523 S.E.2d 428 (1999).

Instruction on Constructive Possession. — The trial court may properly instruct the jury that it may infer a defendant's constructive possession of contraband from his control of the premises if the instruction clearly leaves it to the jury to decide whether to make the inference. State v. Peek, 89 N.C. App. 123, 365 S.E.2d 320 (1988).

The court's refusal to label the distinction between actual and constructive possession was not error where it had provided defendant's request in substance. State v. Williams, 136 N.C. App. 218, 523 S.E.2d 428 (1999).

Failure to Instruct as to Quantity Under Subdivision (d)(4). — Possession of more than one ounce of marijuana is an essential element of the offense under subdivision (d)(4) of this section and the trial judge's failure to so charge is error. State v. Gooch, 307 N.C. 253, 297 S.E.2d 599 (1982).

Repetition of Instruction Not Prejudicial. — Trial judge neither prejudiced the defendant nor unduly emphasized its instruction on possession by clarifying the instruction to the jury three times. State v. Williams, 136 N.C. App. 218, 523 S.E.2d 428 (1999).

Verdict and Judgment. — Where the judgment and commitment indicate that defendant was found guilty of possession of heroin with intent to distribute, but that he pleaded not guilty to the charge of possession and the verdict was guilty of a charge of possession only, the record should be conformed to correct the judgment to show that defendant pleaded not guilty to possession of heroin and that he was found guilty of possession of heroin. State v. Byrum, 20 N.C. App. 265, 201 S.E.2d 193 (1973), decided under this section as it stood before the 1973 revision.

Chain of Custody. — Mere weakness in the chain of custody speaks only to the weight of the evidence, not its admissibility. State v. Carr, 122 N.C. App. 369, 470 S.E.2d 70 (1996).

Habitual felon indictment was facially invalid as it was based on defendant's previous conviction for possession of cocaine; the plain language of G.S. 90-95(d)(2) stated that possession of cocaine was a misdemeanor, punishable as a felony and therefore, it could not be considered a felony to support a habitual felon indictment.

Possession of Cocaine is Considered a Felony to Support a Habitual Felon Indictment. — Under G.S. 90-95(d)(2), the phrase "punishable as a Class I felony" does not simply denote a sentencing classification, but rather, dictates that a conviction for possession of the substances listed therein, including cocaine, is elevated to a felony classification for all purposes; concerning the controlled substances listed therein, the specific exceptions contained in § 90-95(d)(2) control over the general rule that possession of any Schedule II, III, or IV controlled substance is a misdemeanor. State v. Jones, 358 N.C. 473, 598 S.E.2d 125 (2004).

Legislative history of G.S. 90-95(d)(2) evinces the North Carolina General Assembly's acquiescence to the long-standing practice in the North Carolina criminal justice system of classifying possession of cocaine as a felony. State v. Jones, 358 N.C. 473, 598 S.E.2d 125 (2004).

Defendant was properly sentenced as a habitual offender where the record showed that defendant had been convicted of three previous felony offenses, including possession of cocaine. State v. Nettles, 170 N.C. App. 100, 612 S.E.2d 172, 2005 N.C. App. LEXIS 950 (2005).

B. Possession with Intent to Sell or Deliver.

Elements of Offense. — The offense of possession with intent to sell or deliver has three elements. One, there must be possession of a substance. Two, the substance must be a controlled substance. Three, there must be intent to distribute or sell the controlled substance. State v. Casey, 59 N.C. App. 99, 296 S.E.2d 473 (1982); State v. Fletcher, 92 N.C. App. 50, 373 S.E.2d 681 (1988).

Intent Is Gravamen of Offense. — It is the intent of the defendant that is the gravamen of the offense of possession with the intent to sell or deliver. Therefore, the defendant need not complete the sale to be found guilty of possession with the intent to sell or deliver. State v. Bunch, 104 N.C. App. 106, 408 S.E.2d 191 (1991).

Quantity of Drugs Seized Not An Element. — Although the quantity of drugs seized is evidence of the intent to sell, it is not an element of subdivision (a)(1) of this section. State v. Thobourne, 59 N.C. App. 584, 297 S.E.2d 774 (1982).

Interaction with Another Is Not Element of Offense. — Subdivision (h)(4)a of this section has two elements: (1) knowing possession (either actual or constructive) of (2) a specified amount of heroin. The defendant need not interact in any way with another individual to facilitate the commission of this crime. State v. Keys, 87 N.C. App. 349, 361 S.E.2d 286 (1987).

Possession is an element of possession with intent to deliver and the unauthorized possession is, of necessity, an offense included within the charge that the defendant did unlawfully possess with intent to deliver. State v. Aiken, 286 N.C. 202, 209 S.E.2d 763 (1974); State v. Stanley, 24 N.C. App. 323, 210 S.E.2d 496 (1974), rev'd on other grounds, 288 N.C. 19, 215 S.E.2d 589 (1975); State v. Cloninger, 37 N.C. App. 22, 245 S.E.2d 192 (1978).

It is impossible to possess a controlled substance with intent to distribute without having first possessed it, either actually upon the person or constructively, with the possible exception of a conspiracy or aiding and abetting. State v. Aikens, 22 N.C. App. 310, 206 S.E.2d 348, aff'd, 286 N.C. 202, 209 S.E.2d 763 (1974); State v. Stanley, 24 N.C. App. 323, 210 S.E.2d 496 (1974), rev'd on other grounds, 288 N.C. 19, 215 S.E.2d 589 (1975).

Elements of possession of LSD with intent to sell or deliver are (i) the unlawful (ii) possession (iii) of a controlled substance (iv) with the intent to sell or deliver it. State v. Pulliam, 78 N.C. App. 129, 336 S.E.2d 649 (1985).

Element of Possession with Intent Is Same Regardless of Substance Involved. — Although hashish, cocaine and marijuana are different controlled substances, the element of possession with intent to sell and deliver under subdivision (a)(1) is the same. State v. Hyatt, 98 N.C. App. 214, 390 S.E.2d 355 (1990).

Possession and Distribution Are Separate Offenses. — The two offenses, (1) the distribution, and (2) the possession with intent to distribute, are separate offenses. State v. Rush, 19 N.C. App. 109, 197 S.E.2d 891 (1973), decided under this section as it stood before the 1973 revision.

The possession and distribution of a single quantity of marijuana taking place on one occasion constitute two crimes, for each of which defendant may be convicted and punished. State v. Yelverton, 18 N.C. App. 337, 196 S.E.2d 551, cert. denied, 283 N.C. 670, 197 S.E.2d 880 (1973), decided prior to the 1973 revision of this section.

Possession with intent to sell and sale are not alternative offenses, but separate offenses. State v. Stoner, 59 N.C. App. 656, 298 S.E.2d 66 (1982).

Simple Possession Is Lesser Included Offense. — Simple possession of marijuana under subdivision (a)(3) of this section, unlike possession of more than one ounce of marijuana under subdivision (d)(4) of this section, is a lesser included offense of possession of marijuana with intent to manufacture, sell or deliver under subdivision (a)(1) of this section. State v. Gooch, 307 N.C. 253, 297 S.E.2d 599 (1982).

Felony possession of hashish is not a lesser included offense of possession with intent to sell and deliver hashish. The crime of felony possession of hashish contains an element that possession with the intent to sell and deliver hashish does not. The amount of hashish possessed is not an element of the crime of possessing with the intent to sell and deliver hashish, as established by subdivision (a)(1), whereas, under subdivision (d)(4), the crime of felony possession of hashish consists of possessing more than one-tenth of an ounce of hashish. State v. Peoples, 65 N.C. App. 168, 308 S.E.2d 500 (1983).

Misdemeanor Possession of Hashish as Included Offense. — Misdemeanor possession of hashish, the unauthorized possession of any quantity of the substance at all, is a lesser included offense of possession with intent to sell and deliver hashish. State v. Peoples, 65 N.C. App. 168, 308 S.E.2d 500 (1983).

Possession with Intent to Sell or Deliver Is One Offense. — While the sale of narcotics and the delivery of narcotics are separate offenses, the possession of narcotics with the intent to sell or deliver is one offense. On this charge the state is required to prove two elements: (1) defendant's possession of the drug, and (2) defendant's intention to sell or deliver the drug. State v. Creason, 313 N.C. 122, 326 S.E.2d 24 (1985).

Possession with Intent to Transfer, Whether by Sale or Delivery, Constitutes Crime. — It is to be noted that the words "sell" and "deliver" are not separated by a comma but are coupled together by the conjunction "or." By omitting the comma, the legislature manifested its intent that "sell or deliver" is a phrase modifying the required intent. It is thus apparent that the legislature intended the crime to be complete if one possesses the narcotic with intent to transfer it, whether by sale or delivery. State v. Creason, 313 N.C. 122, 326 S.E.2d 24 (1985).

Establishing Intent to Distribute. — The jury can reasonably infer an intent to distribute from the amount of the substance found, the manner in which it was packaged, and the presence of other packaging materials. State v. Baxter, 285 N.C. 735, 208 S.E.2d 696 (1974).

The quantity of narcotics found in defendant's possession, its packaging, its location and the paraphernalia for measuring and weighing are all circumstances from which it could properly be inferred that it was possessed for sale rather than for personal use. State v. Mitchell, 27 N.C. App. 313, 219 S.E.2d 295 (1975), cert. denied, 289 N.C. 301, 222 S.E.2d 701 (1976).

The method of packaging a controlled substance, as well as the amount of the substance, may constitute evidence from which a jury can infer an intent to distribute. State v. Williams, 71 N.C. App. 136, 321 S.E.2d 561 (1984); State v. Alston, 91 N.C. App. 707, 373 S.E.2d 306 (1988).

Evidence Sufficient to Show Possession. — Despite the fact that other people resided at a house, defendant's motion to dismiss the charges of trafficking in cocaine by possession and possession with intent to sell and deliver cocaine were not dismissed at the close of the state's evidence because there was sufficient evidence to sustain the conviction based on the fact that defendant's identification was found six inches from cocaine, defendant's name was spoken on a video tape showing a party at the premises, defendant told a probation officer that he lived there, and defendant paid for cable services there. State v. Shine, 173 N.C. App. 699, 619 S.E.2d 895, 2005 N.C. App. LEXIS 2306 (2005).

State had established constructive possession sufficiently for the trial court to deny defendant's motion to dismiss; utility and rent receipts in defendant's name, defendant's presence on the premises, miscellaneous drug paraphernalia, the fact that defendant had $2,609 in cash on him, and his close proximity to the drugs constituted substantial evidence of constructive possession. State v. Hart, 179 N.C. App. 30, 633 S.E.2d 102, 2006 N.C. App. LEXIS 1675 (2006), affirmed in part, reversed in part on other grounds, and remanded, 361 N.C. 309, 644 S.E.2d 201 (2007).

The quantity of the drug seized is a relevant factor in determining whether there was an intent to sell, and where the quantity seized is extremely small, the court should not instruct the jury on the intent to sell portion of the charge. State v. Francum, 39 N.C. App. 429, 250 S.E.2d 705 (1979).

This section clearly permits North Carolina courts and juries to examine and utilize the quantities of drugs seized as one possible indicator of intent to distribute. State v. Mitchell, 27 N.C. App. 313, 219 S.E.2d 295 (1975), cert. denied, 289 N.C. 301, 222 S.E.2d 701 (1976).

The quantity of the drug seized is an indicator of intent to sell. State v. Cloninger, 37 N.C. App. 22, 245 S.E.2d 192 (1978).

In proving intent to distribute, the State may rely upon ordinary circumstantial evidence, such as the amount of controlled substance possessed, the nature of its packaging, labeling, and storage, and the activities of defendant with reference to the controlled substance. State v. Childers, 41 N.C. App. 729, 255 S.E.2d 654, cert. denied, 298 N.C. 302, 259 S.E.2d 916 (1979).

Although the State has the burden of proving that the defendant intended to sell or deliver the controlled substance, it may rely upon ordinary circumstantial evidence, such as the amount of the controlled substance possessed and the nature of its packaging and labeling, to carry the burden. State v. Casey, 59 N.C. App. 99, 296 S.E.2d 473 (1982).

Evidence Sufficient to Establish Intent. — Evidence of possession of 276 grams of marijuana, reinforced by other evidence showing concealment and that the marijuana was separated into smaller containers, indicating that it was being broken up for more ready distribution, would support a jury finding that the defendant actually had the intent to distribute. State v. McDougald, 18 N.C. App. 407, 197 S.E.2d 11, cert. denied, 283 N.C. 756, 198 S.E.2d 726 (1973), decided under this section as it stood before the 1973 revision.

Although defendant possessed less than one ounce of marijuana, where it was packaged in 17 separate, small brown envelopes known in street terminology as "nickle or dime bags," the circumstances of the packaging could be considered by the jury in finding defendant guilty of the felony offense of possession for sale and delivery. State v. Williams, 71 N.C. App. 136, 321 S.E.2d 561 (1984).

Evidence that cocaine which was found, although of small quantity, was packaged in multiple envelopes of a type commonly used in the sale of drugs, that there were a large number of syringes in the house, as well as a large number of bags of heroin under the porch, and that defendant had brought the cocaine with him to the house, taken it away, and returned with it several hours later, despite the small amount and his admission that he used cocaine, along with evidence admitted without objection that the area where the house was located was frequented by drug dealers, sufficiently raised a jury question as to defendant's intent to distribute the cocaine as part of drug-related activities at the house. State v. James, 81 N.C. App. 91, 344 S.E.2d 77 (1986).

Evidence showing the amount of cocaine and the presence of packaging materials and a chemical commonly used to dilute cocaine was sufficient to show defendant's intent to sell and deliver. State v. Rich, 87 N.C. App. 380, 361 S.E.2d 321 (1987).

Where shortly after an informant purchased cocaine, law enforcement officials entered mobile home, and pursuant to a search warrant, found the $2,100 which informant had used to purchase the cocaine, along with 21.46 grams of cocaine hidden in a heating unit, which was in the same general area as that where the drug transaction had taken place, a jury could reasonably infer that defendant had the intent and capability to maintain control and dominion over the cocaine sold to the informant and the cocaine seized from the table and heating unit, and that defendant had the intent to sell the controlled substance. State v. Narcisse, 90 N.C. App. 414, 368 S.E.2d 654, cert. denied, 323 N.C. 368, 373 S.E.2d 553 (1988).

Evidence was sufficient to submit case of sale of a controlled substance to the jury where defendant brought marijuana from his house to a place where an undercover police officer was waiting, knew the police officer wanted to buy the marijuana, received $50.00 in cash proceeds for the marijuana, and at no time made any verbal or physical efforts to return or reject the money. State v. Fletcher, 92 N.C. App. 50, 373 S.E.2d 681 (1988).

Evidence was sufficient to establish constructive possession and intent to sell. State v. Carr, 122 N.C. App. 369, 470 S.E.2d 70 (1996).

Defendant intended to sell or deliver cocaine, where the amount of cocaine found on defendant exceeded the amount a typical user would possess for personal use, the cocaine was packaged separately, testimony indicated that drug dealers often kept cocaine in individual packages so it was readily available for sale, and finally, the drugs were found in close proximity to money seized from defendant. State v. Davis, 160 N.C. App. 693, 586 S.E.2d 804 (2003).

In a possession with intent to sell or deliver case, the trial court did not err in denying defendant's motion to dismiss based on insufficiency of the evidence because the evidence showed that: (1) the undercover officers approached defendant and asked if they could get drugs; (2) defendant advised the undercover officers that he could get them marijuana or cocaine if they gave him money first; (3) the officers gave defendant money, and he returned with two bags of marijuana and one bag of cocaine; (4) a special agent testified that the substance submitted for testing was cocaine; and (5) any conflicting testimony about the color of the baggie containing the cocaine defendant sold to the undercover officers was a discrepancy in the state's evidence, properly considered by the jury in weighing the reliability of the evidence. State v. Bunn, 173 N.C. App. 729, 619 S.E.2d 918, 2005 N.C. App. LEXIS 2301 (2005).

Defendant's motion to dismiss the charge of possession with intent to sell or deliver cocaine was properly denied where he, along with co-defendant, shared possession of the room where the drugs were located and where other incriminating evidence existed, connecting him with the drugs, including his "lunge" into the bathroom and the placing of his hands into the bathroom ceiling, where the drugs were later found. State v. Frazier, 142 N.C. App. 361, 542 S.E.2d 682 (2001).

Defendant's motion to dismiss a possession with intent to sell or deliver cocaine charge was properly denied where: (1) defendant fled an area in which drugs were being sold, (2) during the chase, defendant put his hand behind a chair, (3) 22 rocks of individually-wrapped cocaine, weighing 5.5 grams were found behind the chair, and (4) defendant admitted to an officer that the cocaine was his, but denied making the statement during his trial. State v. McNeil, 165 N.C. App. 777, 600 S.E.2d 31 (2004).

Trial court properly denied defendant's motion to dismiss the charge against him of possession with intent to sell or deliver cocaine where defendant at least admitted that he had constructive possession of cocaine, as defendant acknowledged that cocaine he threw behind a chair while a police officer was chasing him belonged to him, even as he contested whether three bags of a powdery substance found on the ground near where the officer first started chasing him belonged to him. State v. McNeil, 359 N.C. 800, 617 S.E.2d 271, 2005 N.C. LEXIS 841 (2005).

Evidence of drug paraphernalia found in various areas of the house where both defendants resided, and the testimony of a co-defendant that both defendants were engaged in the sale of marijuana and both had access to the garage where marijuana was found, were sufficient for the issue of possession to survive a motion to dismiss. State v. Harrington, 171 N.C. App. 17, 614 S.E.2d 337, 2005 N.C. App. LEXIS 1189 (2005), cert. denied, sub nom. State v. Rattis, 360 N.C. 70, 623 S.E.2d 36 (2005).

Evidence Insufficient to Establish Intent. — Possession of 215.5 grams of marijuana, without some additional evidence, is not sufficient to raise an inference that the marijuana was for the purpose of distribution, and therefore is not sufficient to withstand a motion for judgment as of nonsuit on a charge of possession with intent to sell and distribute. State v. Wiggins, 33 N.C. App. 291, 235 S.E.2d 265, cert. denied, 293 N.C. 592, 241 S.E.2d 513 (1977).

Police officer's opinion testimony that the amount of crack cocaine defendant possessed was more than drug users "normally" carried, without any other circumstantial evidence of defendant's intent, was insufficient to submit the issue of intent to sell and deliver to the jury. State v. Turner, 168 N.C. App. 152, 607 S.E.2d 19 (2005).

Conviction for possession with intent to manufacture, sell, or deliver cocaine under G.S. 90-95 was reversed because there was insufficient evidence of intent; defendant did not have a substantial amount of drugs, it was not packaged in a manner consistent with sale, no unexplained cash was found, and only one piece of paraphernalia was found. State v. Nettles, 170 N.C. App. 100, 612 S.E.2d 172, 2005 N.C. App. LEXIS 950 (2005).

State conceded that the evidence was insufficient to sustain defendant's conviction for possession of diazepam/valium with intent to sell, under G.S. 90-95(a)(1), because there was no evidence other than defendant's possession of 30 diazepam tablets of his intent to sell, but the evidence was sufficient to sustain a conviction for misdemeanor possession of diazepam. State v. Sanders, 171 N.C. App. 46, 613 S.E.2d 708, 2005 N.C. App. LEXIS 1158 (2005), aff'd, 360 N.C. 170, 622 S.E.2d 492 (2005).

Evidence Sufficient For Conviction. — Admissible testimony and opinions of woman who, with victim who died from smoking methamphetamine and defendant, smoked an eightball of meth was sufficient evidence to convict defendant of possession and its sale, by exchange for work, under G.S. 90-95 and involuntary manslaughter under G.S. 14-18. State v. Yelton, 175 N.C. App. 349, 623 S.E.2d 594, 2006 N.C. App. LEXIS 44 (2006).

Exemption Through Authorization. — One may be exempt from State prosecution for the possession or the sale or delivery of controlled substances if that person is authorized by the North Carolina Controlled Substances Act to so possess or sell or deliver such substances, but proof of such exemption through authorization must be provided by the defendant. State v. McNeil, 47 N.C. App. 30, 266 S.E.2d 824, cert. denied and appeal dismissed, 301 N.C. 102, 273 S.E.2d 306 (1980), cert. denied, 450 U.S. 915, 101 S. Ct. 1356, 67 L. Ed. 2d 339 (1981).

The failure to admit testimony challenging the undercover procedures used by an undercover agent in obtaining drugs from the defendant did not constitute an abuse of discretion, under G.S. 8C-1-702, where the evidence was already sufficient to prove the drug charges, under this section, and where the record already contained evidence that the agent used the drugs from the buys and the jury, therefore, had the ability, on its own, to assess the agent's credibility. State v. Mackey, 137 N.C. App. 734, 530 S.E.2d 306, aff'd, 352 N.C. 650, 535 S.E.2d 555 (2000).

Admission of reputation evidence in criminal trial reversible error. — Defendant, convicted of possession with intent to sell counterfeit cocaine and possession with intent to deliver counterfeit cocaine, was granted a new trial where the trial court erred in admitting testimony indicating that defendant was in a neighborhood known as an open air market for drugs when arrested. Such reputation testimony, which characterized the conduct and frequency of drug sales in the residential area surrounding the area in which he was arrested, was not harmless error because there was a reasonable possibility that a different result would have been reached at trial had the jury not heard such reputation testimony. State v. Williams, 164 N.C. App. 638, 596 S.E.2d 313 (2004).

Entrapment No Defense Where Essential Elements of the Offense Denied. — Where a defendant was prosecuted for possession with intent to sell and sale and delivery of LSD, the question of entrapment did not arise from defendant's evidence, since entrapment is not available as a defense when the accused denies the essential elements of the offense. State v. Neville, 49 N.C. App. 684, 272 S.E.2d 164 (1980), aff'd, 302 N.C. 623, 276 S.E.2d 373 (1981).

Defendants may be convicted of substantive offense of trafficking in cocaine if they were accessories before the fact. State v. Agudelo, 89 N.C. App. 640, 366 S.E.2d 921, appeal dismissed and cert. denied, 323 N.C. 176, 373 S.E.2d 115 (1988), overruled on other grounds, State v. Barnes, 324 N.C. 539, 380 S.E.2d 118 (1989).

Verdict Form Upheld. — Verdict form finding defendant guilty of possession with intent to sell or deliver cocaine was not fatally ambiguous. State v. McLamb, 313 N.C. 572, 330 S.E.2d 476 (1985).

It was proper for jury to return verdict of possession with intent to sell or deliver under subdivision (a)(1). Such a verdict is no less proper when the indictment charges possession with intent to sell and deliver since conjunctive "and" is acceptable to specify the exact bases for the charge. State v. Mercer, 89 N.C. App. 714, 367 S.E.2d 9 (1988).

Conviction Under Subdivision (a)(1) Was "Misconduct" Under G.S. 96-14. — Petitioner's conviction for possession of cocaine with intent to sell or deliver, in violation of subdivision (a)(1) of this section was misconduct within the meaning of G.S. 96-14(2), disqualifying him from drawing unemployment benefits. Lynch v. PPG Indus., 105 N.C. App. 223, 412 S.E.2d 163 (1992).

Jury Instructions. — Where a police officer had probable cause to stop defendant's vehicle and defendant was predisposed to commit the crime, the trial court properly denied defendant's motions to suppress and for a jury instruction on entrapment. State v. Reynolds, 161 N.C. App. 144, 587 S.E.2d 456 (2003).

Conviction and Sentencing Upheld. — Defendant's possession with the intent to manufacture, sell, or deliver cocaine conviction, and his resulting sentence were both proper where the evidence pertaining to prior convictions for possession with intent to manufacture, sell, and deliver cocaine were properly admitted and the trial court properly gave a limiting instruction to the jury, the State and defendant stipulated as to the chain of custody and evidentiary testing procedures on what was later found to be cocaine, and it was clear from the record that the trial court relied on defendant's stipulation admitting he was a Level IV felon with ten prior record points. State v. Renfro, 174 N.C. App. 402, 621 S.E.2d 221, 2005 N.C. App. LEXIS 2483 (2005), aff'd, — N.C. —, 627 S.E.2d 463 (2006).

V. TRAFFICKING.

Legislative Intent. — In creating the offense of trafficking under subsection (h) of this section, the legislature has determined that certain amounts of controlled substances indicate an intent to distribute on a large scale. State v. McCoy, 105 N.C. App. 686, 414 S.E.2d 392 (1992).

Statute Aimed at Large Scale Drug Activity. — The trafficking in drugs statute is aimed at an offender who is facilitating a large scale flow of drugs, and the General Assembly aimed to deal with such an offender. State v. Willis, 61 N.C. App. 23, 300 S.E.2d 420, modified and aff'd, 309 N.C. 451, 306 S.E.2d 779 (1983).

The harsh penalties prescribed in the North Carolina Controlled Substances Act represent an attempt by the legislature to deter large scale distribution of drugs and thereby to decrease the number of people potentially harmed by drug use. Therefore, subdivision (h)(4) of this section is not a violation of equal protection rights because it penalizes possession of a particular amount of any mixture containing heroin without regard to the percentage of heroin in the mixture. State v. Willis, 61 N.C. App. 23, 300 S.E.2d 420, modified and aff'd, 309 N.C. 451, 306 S.E.2d 779 (1983).

Subsection (h) of this section was added in response to a growing concern regarding the gravity of illegal drug activity in this State and the need for effective laws to deter the corrupting influence of drug dealers and traffickers. The purpose behind subsection (h) of this section is to deter trafficking in large amounts of certain controlled substances. State v. Proctor, 58 N.C. App. 631, 294 S.E.2d 240, cert. denied, 306 N.C. 749, 295 S.E.2d 484 (1982); 459 U.S. 1172, 103 S. Ct. 818, 74 L. Ed. 2d 1016 (1983).

The 1979 amendments to this section, by the addition of subsections (h) and (i), are responsive to a growing concern regarding the gravity of illegal drug activity in this State and the need for effective laws to deter the corrupting influence of drug dealers and traffickers. State v. Anderson, 57 N.C. App. 602, 292 S.E.2d 163, cert. denied, 306 N.C. 559, 294 S.E.2d 372 (1982).

The legislature intended the trafficking statute to prevent large scale distribution of controlled substances. State v. Mebane, 101 N.C. App. 119, 398 S.E.2d 672 (1990), overruled on other grounds, State v. Pipkins, 337 N.C. 431, 446 S.E.2d 360 (1994).

"Transportation" is any real carrying about or movement from one place to another; therefore, where defendant admitted to having cocaine in his truck as he backed out of his driveway, and stated that he would have continued out of his driveway but for the arrival of an SBI agent, this was an admission of transportation of controlled substances and was sufficient to sustain a charge of felonious transportation of cocaine. State v. Outlaw, 96 N.C. App. 192, 385 S.E.2d 165 (1989), cert. denied, 326 N.C. 266, 389 S.E.2d 118 (1990).

There was substantial evidence that defendant transported marijuana as: (1) defendant arrived at a shopping center in a car driven by a middle man; (2) the middle man was assisting the police in the undercover drug purchase; and (3) defendant supplied the marijuana seized from the trunk of the car; defendant did not contest a finding that defendant had possession of marijuana at the time of defendant's arrest, and it would be illogical to conclude that defendant was guilty of trafficking in marijuana by possession but was not personally involved in transporting marijuana to the shopping center.

State v. Sares, — N.C. App. —, 643 S.E.2d 49, 2007 N.C. App. LEXIS 746 (2007).

Tossing Drugs from Dwelling Is "Transportation". — Where a person moves drugs from a dwelling to a point beyond its curtilage, such movement is sufficient to constitute real and substantial movement. Thus, the mere act of tossing the drugs from a dwelling and to a point outside its curtilage amounts to transportation. State v. Greenidge, 102 N.C. App. 447, 402 S.E.2d 639 (1991).

Evidence that defendant tossed a bag of cocaine from his back porch into the yard next door was sufficient to sustain the charge of trafficking in cocaine by transportation in violation of subdivision (h)(3) of this section. State v. Greenidge, 102 N.C. App. 447, 402 S.E.2d 639 (1991).

Trafficking by Possession Can Be Shown Through Constructive Possession. — Trafficking in cocaine by possession and trafficking in cocaine by transportation, in violation of G.S. 90-95(h)(3), require the State to prove that the substance was knowingly possessed and transported, but the possession can be actual or constructive; when a defendant does not have actual possession, but has the power and intent to control the use or disposition of the substance, he is said to have constructive possession. State v. Baldwin, 161 N.C. App. 382, 588 S.E.2d 497 (2003).

When Constructive Possession Need Not Be Shown. — When the State has established that a defendant was present while a trafficking offense occurred, and that he acted in concert with others to commit the offense pursuant to a common plan or purpose, it is not necessary to invoke the doctrine of constructive possession. State v. Diaz, 317 N.C. 545, 346 S.E.2d 488 (1986).

Trafficking by possession and trafficking by manufacture are separate offenses. under subsection (h) of this section; thus, convictions for both offenses do not violate the double jeopardy clause of the U.S. Constitution. Sanderson v. Rice, 777 F.2d 902 (4th Cir. 1985), cert. denied, 475 U.S. 1027, 106 S. Ct. 1226, 89 L. Ed. 2d 336 (1986).

Sale, manufacture, delivery, transportation, and possession of 28 grams or more of cocaine as defined under subdivision (h)(3) are separate trafficking offenses for which a defendant may be separately convicted and punished. State v. Garcia, 111 N.C. App. 636, 433 S.E.2d 187 (1993).

The trial court properly held that the sale of cocaine and fleeing with the remainder constituted two separate offenses, where the defendant's fleeing the area, after the police officers identified themselves, for some distance, with 109 grams of cocaine, constituted substantial movement of the cocaine and warranted a separate charge. State v. Manning, 139 N.C. App. 454, 534 S.E.2d 219, 2000 N.C. App. LEXIS 983, cert. denied and appeal dismissed, 353 N.C. 273, 546 S.E.2d 385 (2000), aff'd, 353 N.C. 449, 545 S.E.2d 211 (2001).

The court did not err in entering judgment and sentencing defendant for both trafficking by possession and trafficking by delivery based on the same transaction. State v. Thrift, 78 N.C. App. 199, 336 S.E.2d 861 (1985), appeal dismissed and cert. denied, 316 N.C. 557, 344 S.E.2d 15 (1986).

Sale, manufacture, delivery, transportation and possession of 50 pounds or more of marijuana are separate trafficking offenses for which a defendant may be separately convicted and punished. State v. Diaz, 317 N.C. 545, 346 S.E.2d 488 (1986).

Defendant could properly be convicted and punished separately for trafficking in heroin by possessing 28 grams or more of heroin, trafficking in heroin by manufacturing 28 grams or more of heroin, and trafficking in heroin by transporting 28 grams or more of heroin, even when the contraband material in each separate offense was the same heroin. Thus the trial judge did not err in denying defendant's motion that he direct the State to elect between prosecuting defendant for trafficking in heroin and the offenses of possession, manufacturing and transporting heroin. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

Amendment by Session Laws 1983, c. 294, s. 6, inserting "cocoa" into subdivision (h)(3) rather than "coca," appeared to be a typographical error. State v. Thrift, 78 N.C. App. 199, 336 S.E.2d 861 (1985), appeal dismissed and cert. denied, 316 N.C. 557, 344 S.E.2d 15 (1986).

Indictment Referring to "Cocoa" Rather Than "Coca" Not Defective. — Indictment which alleged trafficking in "a compound obtained from cocoa leaves," which is not a controlled substance, was not so defective as to deprive the trial court of subject matter jurisdiction, where the trial evidence showed over 637 grams of a 35% cocaine mixture, as at no time could defendant realistically have thought that he was charged with trafficking in chocolate. State v. Thrift, 78 N.C. App. 199, 336 S.E.2d 861 (1985), appeal dismissed and cert. denied, 316 N.C. 557, 344 S.E.2d 15 (1986).

The purpose behind subdivision (h)(3)a is to deter "trafficking" in controlled substances. State v. Tyndall, 55 N.C. App. 57, 284 S.E.2d 575 (1981).

Amount of Cocaine Determines Level of Offense. — The only difference between the greater and lesser levels of the offense of trafficking in cocaine, relate to the amount of cocaine found. State v. Wilson, 155 N.C. App. 89, 574 S.E.2d 93 (2002), appeal dismissed, cert. denied, 356 N.C. 693, 579 S.E.2d 98, cert.

denied, 540 U.S. 843, 124 S. Ct. 113, 157 L. Ed. 2d 78 (2003).

Quantity of Mixture Under Subdivision (h)(3)a Sufficient. — The quantity of the mixture containing cocaine may be sufficient in itself to constitute a violation of subdivision (h)(3)a. State v. Tyndall, 55 N.C. App. 57, 284 S.E.2d 575 (1981).

Nothing in Statute Requires 28 Grams to Be in One Container. — Under subdivision (h)(3) of this section, trafficking in cocaine requires proof of possession of cocaine in the amount of 28 grams or more; nothing in the statute requires the 28 grams to be in one container. State v. King, 99 N.C. App. 283, 393 S.E.2d 152 (1990).

Legislature's use of the word "mixture" in subdivision (h)(4) establishes that the total weight of dosage units of Dilaudid may be a sufficient basis to charge a suspect with trafficking. State v. Jones, 85 N.C. App. 56, 354 S.E.2d 251, cert. denied, 320 N.C. 173, 358 S.E.2d 61, cert. denied, 484 U.S. 969, 108 S. Ct. 465, 98 L. Ed. 2d 404 (1987).

Trial court properly included the weight of filler substances that were mixed with a controlled substance when it determined whether defendant had sold more than four grams of the controlled substance and could be charged with trafficking. State v. McCracken, 157 N.C. App. 524, 579 S.E.2d 492 (2003).

Quantity of Mixture Under Subdivision (h)(4)a. — The evidence presented, namely, that defendant possessed and sold six tinfoil packets to an undercover agent, which, when all their contents were dumped together, weighed 6.65 grams, with one measure of heroin to about 20 measures of sugar, was sufficient to support a conviction under subdivision (h)(4)a of this section, despite defendant's contention that all of the heroin could have been in just one packet, the contents of which weighed no more than one gram and a fraction. State v. Horton, 75 N.C. App. 632, 331 S.E.2d 215, cert. denied, 314 N.C. 672, 335 S.E.2d 497 (1985).

Possession of Certain Amounts Indicates Intent to Distribute on Large Scale. — The legislature has determined that certain amounts of controlled substances and certain amounts of mixtures containing controlled substances indicate an intent to distribute on a large scale. Large scale distribution increases the number of people potentially harmed by use of drugs. The penalties for sales of such amounts, therefore, are harsher than those under subdivision (a)(1) of this section. State v. Proctor, 58 N.C. App. 631, 294 S.E.2d 240, cert. denied, 306 N.C. 749, 295 S.E.2d 484 (1982); 459 U.S. 1172, 103 S. Ct. 818, 74 L. Ed. 2d 1016 (1983).

Subdivision (h)(5) is permissive, not mandatory, and defendant has no right to a lesser sentence even if he does provide what he believes to be substantial assistance. State v. Perkerol, 77 N.C. App. 292, 335 S.E.2d 60 (1985), cert. denied, 315 N.C. 595, 341 S.E.2d 36 (1986).

The phrase "substantial assistance," in subdivision (h)(5), is not unconstitutionally vague in defining a convicted defendant who is eligible for leniency in sentencing. State v. Willis, 61 N.C. App. 23, 300 S.E.2d 420, modified and aff'd, 309 N.C. 451, 306 S.E.2d 779 (1983).

Language "has rendered such substantial assistance" in subdivision (h)(5) of this section commonsensically sets no time limit on when such assistance must be rendered. State v. Perkerol, 77 N.C. App. 292, 335 S.E.2d 60 (1985), cert. denied, 315 N.C. 595, 341 S.E.2d 36 (1986).

Construction of Phrase "Substantial Assistance." — Being a description of a post-conviction form of plea bargaining rather than a definition of the crime itself, the phrase "substantial assistance" can tolerate subjectivity to an extent which normally would be impermissible for penal statutes. The phrase, in any event, is susceptible of common understanding in the context of the whole statute. State v. Willis, 61 N.C. App. 23, 300 S.E.2d 420, modified and aff'd, 309 N.C. 451, 306 S.E.2d 779 (1983).

"Substantial" Movement Shown. — Where defendant removed drugs from a dwelling house and carried them to a car which he used to leave the premises, such movement was "substantial" and sufficient to sustain the charge of trafficking by transporting in violation of subdivision (h)(3) of this section. Durham Herald Co. v. North Carolina Low-Level Radioactive Waste Mgt. Auth., 110 N.C. App. 607, 430 S.E.2d 441, cert. denied, 334 N.C. 625, 435 S.E.2d 347 (1993).

There was a "substantial movement" for a conviction for trafficking of cocaine when the defendant threw cocaine into the bushes, thus avoiding being caught with the cocaine and making it possible to later retrieve it for his subsequent use and benefit. State v. Wilder, 124 N.C. App. 136, 476 S.E.2d 394 (1996).

Constitutional Rights Not Lost in Order to Gain Benefits from Assisting Prosecution. — Nothing in this section suggests that substantial assistance must incriminate the defendant of crimes other than those for which he has already been convicted (and for which no privilege under is obviously necessary). The risk of prosecution in other jurisdictions is acknowledged. Nonetheless, a defendant need not invoke subdivision (h)(5) of this section, U.S. Const., Amend. V as nothing in the statute is compulsive. Putting a defendant to a difficult choice is not necessarily forbidden by U.S. Const., Amend. V, and no constitutional deprivation results if a defendant elects to reap the benefits of subdivision (h)(5) of this section. State v. Willis, 61 N.C. App. 23, 300 S.E.2d 420, modified and aff'd, 309 N.C. 451, 306 S.E.2d 779 (1983).

State's Acceptance of Defendant's Offer Not Prerequisite. — Subdivision (h)(5) of this section does not make the State's acceptance of a defendant's offer a prerequisite to finding substantial assistance. State v. Perkerol, 77 N.C. App. 292, 335 S.E.2d 60 (1985), cert. denied, 315 N.C. 595, 341 S.E.2d 36 (1986).

Words "guilty of a felony . . . known as 'trafficking in marijuana'" in subsection (h) of this section relate primarily to the preceding words "50 pounds (avoirdupois) of marijuana." State v. Anderson, 57 N.C. App. 602, 292 S.E.2d 163, cert. denied, 306 N.C. 559, 294 S.E.2d 372 (1982).

Use of the word "felony" in singular form refers to the singular crime known as "trafficking in marijuana," a crime consisting of any one or more of the denounced acts, any one of which is a separate crime. State v. Anderson, 57 N.C. App. 602, 292 S.E.2d 163, cert. denied, 306 N.C. 559, 294 S.E.2d 372 (1982).

Visual Inspection with Chemical Testing of Random Sample. — The evidence was sufficient to convict defendant of trafficking by either possession or sale although only three of the 14 packets of powder involved were chemically analyzed, where the total weight of all 14 packets was in excess of six grams and a State Bureau of Investigation forensic chemist with over 14 years experience visually analyzed all packets in question, chemically tested a random sample, and testified that in his opinion the plastic packet "all contain[ed] similar material which would contain heroin." State v. Anderson, 76 N.C. App. 434, 333 S.E.2d 762 (1985).

Weight of the marijuana is an essential element of trafficking in marijuana under subsection (h) of this section. State v. Goforth, 65 N.C. App. 302, 309 S.E.2d 488 (1983).

Weight is one of the essential elements of a crime charged under subdivision (h)(1)d of this section; thus, the State bears the burden of proving beyond a reasonable doubt that the weight of the marijuana was 10,000 pounds or more. State v. Diaz, 88 N.C. App. 699, 365 S.E.2d 7, cert. denied, 322 N.C. 327, 368 S.E.2d 870 (1988).

When Weight Element Critical in Trafficking Charge. — The weight element upon a charge of trafficking in marijuana becomes more critical if the State's evidence of the weight approaches the minimum weight charged. State v. Anderson, 57 N.C. App. 602, 292 S.E.2d 163, cert. denied, 306 N.C. 559, 294 S.E.2d 372 (1982).

Evidence was sufficient to support convictions for trafficking in marijuana by possession and trafficking in marijuana by manufacture where marijuana seized from defendant had been weighed three different times, and, although each result was different, all three times showed that the weight of the marijuana exceeded 10 pounds; since the weight of the marijuana was not an element of the lesser included offense of manufacture of marijuana, it was unnecessary to include any reference to weight in the applicable jury instruction. State v. Lemonds, 160 N.C. App. 172, 584 S.E.2d 841 (2003).

Where indictments stated that defendant possessed "10 pounds or more but less than 50 pounds" of marijuana, the over-inclusive drafting of the indictments did not invalidate them as "more than 10 pounds" was the same as "in excess of 10 pounds." State v. Trejo, 163 N.C. App. 512, 594 S.E.2d 125 (2004).

Procedure for Weighing Contraband. — The criminal statutes do not provide specific procedures for obtaining weights of contraband. Thus ordinary scales, common procedures, and reasonable steps to ensure accuracy must suffice. State v. Diaz, 88 N.C. App. 699, 365 S.E.2d 7, cert. denied, 322 N.C. 327, 368 S.E.2d 870 (1988).

When marijuana seized from defendant was weighed one day after it was seized, and found to weigh more than the statutory minimum required for a charge of trafficking in marijuana, this weight could properly include moisture naturally present within the plant because such moisture was not specifically listed in G.S. 90-87(16) as an exclusion from such weight, so, even though the marijuana weighed less than the statutory minimum when it was weighed over one month after being seized, this did not, as a matter of law, require dismissal of the trafficking charge, and it was reversible error for the trial court to apply a requirement that the marijuana's weight, for purposes of the trafficking charge, was determined when it was "usable or suitable for consumption." State v. Gonzales, 164 N.C. App. 512, 596 S.E.2d 297 (2004), aff'd, 359 N.C. 420, 611 S.E.2d 832 (2005).

Weight of Heroin Sufficiently Established. — The State presented sufficient evidence to support a conviction under this section and the finding that 28 or more grams of heroin were seized from the defendant although the bags of heroin seized from him were not weighed together; the State's expert testified that he randomly weighed 50 of 671 bags at an average of 0462 grams per bag, after establishing that each of the 671 bags contained an off-white or tan substance. State v. Holmes, 142 N.C. App. 614, 544 S.E.2d 18 (2001).

Inference of Contents from Testing of Part. — Trial court did not err by permitting offenses of trafficking in heroin to be submitted to the jury, on grounds that there was no evidence that there was heroin mixture in each of 390 separate glassine packets contained in foil-wrapped package so as to raise a reasonable inference that defendant was guilty of trafficking, as an expert chemist may give his opinion as to the whole when only a part of the whole has been tested, and testimony of expert witness, when considered in conjunction with the State's evidence as to possession, manufacturing and transporting, was more than ample to support a reasonable inference of trafficking and that defendant engaged in trafficking more than 28 grams of heroin. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

The quantity of the entire mixture containing cocaine may be sufficient to constitute a violation of subdivision (h)(3) of this section. State v. Muncy, 79 N.C. App. 356, 339 S.E.2d 466, cert. denied, 316 N.C. 736, 345 S.E.2d 396 (1986).

Indictment Stating "in at Least 50 Pounds" Does Not Properly Charge Conspiracy to Traffic. — Conspiracy to traffic in marijuana was not alleged by an indictment containing the phrase "in at least 50 pounds," because "in at least 50 pounds" is not "in excess of 50 pounds." Because of the fatal error in failing to allege all the necessary elements of the offense, the indictment was invalid. State v. Goforth, 65 N.C. App. 302, 309 S.E.2d 488 (1983).

Variance which stated that defendant sold 28 grams of cocaine, rather than 28 grams of a mixture containing cocaine, as described in subdivision (h)(3)a, was not fatal. State v. Tyndall, 55 N.C. App. 57, 284 S.E.2d 575 (1981).

Evidence of Weight Sufficient. — A state agent's testimony that he opened a plastic bag that contained nine smaller plastic bags of heroin and removed the powder from each of the bags to measure the combined total weight of the heroin at once in one weighing tray and that the total weight of the heroin was 4.4 ounces was sufficient to show that defendant was trafficking more than 4 ounces of heroin. State v. Jones, 146 N.C. App. 394, 553 S.E.2d 79 (2001), cert. denied, 355 N.C. 754, 566 S.E.2d 83 (2002).

Evidence Relative to Other Occasions. — In a prosecution for trafficking in heroin, evidence of the discovery of other controlled substances on other occasions on defendant's premises was admissible to show her guilty knowledge. State v. Weldon, 314 N.C. 401, 333 S.E.2d 701 (1985).

Reputation of Defendant's House. — The trial court erred in admitting, at defendant's trial for trafficking in heroin, evidence that defendant's house had a reputation as a place where illegal drugs could be bought and sold. However, the error was not such as to warrant a new trial. State v. Weldon, 314 N.C. 401, 333 S.E.2d 701 (1985).

An indictment stated the essential elements of trafficking in heroin where it charged defendant with possessing more than four but less than 14 grams of heroin, even though the indictment excluded from criminal prosecution the possession of exactly four grams, whereas the statute includes the possession of exactly four grams. The indictment, while limiting the scope of defendant's liability, was clearly within the confines of the statute. State v. Keys, 87 N.C. App. 349, 361 S.E.2d 286 (1987).

Expert's Opinion Based upon Preliminary Color Test. — Though not a positive opinion that substance in cellophane package contained cocaine, analyst's opinion that the substance "could" contain cocaine was properly admissible in trial for trafficking, where the opinion was based upon a preliminary color test with a positive result. State v. White, 104 N.C. App. 165, 408 S.E.2d 871 (1991).

Evidence Showed Only One On-Going Conspiracy Instead of Two Conspiracies. — Where the conspiracies charged occurred within hours of each other, one on the evening of February 19, and the other on the morning of February 20, 1987, where the alleged participants in the first conspiracy were defendant, his brothers, and a middleman for the police and the participants in the second were defendant and his brothers, where although the amount of cocaine varied in the first and second alleged conspiracies, the objective was the same, i.e., to traffic in cocaine, and where the State argued throughout the trial that there was a "continuing conspiracy" among the defendants, there was evidence of only one on-going conspiracy and both of defendant's conspiracy convictions could not stand. State v. Fink, 92 N.C. App. 523, 375 S.E.2d 303 (1989).

Jury Instructions. — Defendant was entitled to a new trial after being convicted of trafficking in cocaine by possession and of possession with intent to manufacture, sell, or deliver cocaine because the trial court erred in refusing to instruct the jury on entrapment; based on defendant's version of events, it was possible that defendant was tricked by law enforcement into buying a larger amount of cocaine than defendant had intended, entitling defendant to the instruction where defendant, who allegedly a user but not a dealer, intended to commit only simple possession. State v. Foster, 162 N.C. App. 665, 592 S.E.2d 259, aff'd, 359 N.C. 179, 604 S.E.2d 913 (2004).

In a drug case, trafficking jury instructions properly excluded a statement that the State was required to prove that defendant knowingly possessed an amount of drugs beyond a reasonable doubt because there was no such requirement under G.S. 90-95(h)(3b). State v.

Cardenas, 169 N.C. App. 404, 610 S.E.2d 240, 2005 N.C. App. LEXIS 681 (2005).

Trial court properly instructed the jury on the theory of acting in concert with respect to cocaine trafficking charges against defendants; even though neither defendant was present when two other persons were seen leaving cocaine on a roadside embankment, there was evidence that defendants were involved in transporting the drugs. State v. Diaz, 155 N.C. App. 307, 575 S.E.2d 523 (2002), cert. denied, 357 N.C. 464, 586 S.E.2d 271 (2003), cert. denied, 357 N.C. 659, 590 S.E.2d 396 (2003).

Jury Instruction Insufficient to Allow Jury Unanimity. — While the evidence presented by the State tended to show that the marijuana weighed 18 pounds, defendant testified that the weight of the box was about six or seven pounds, thus, the evidence could support an inference that defendant possessed and/or transported exactly 10 pounds of marijuana, which did not qualify as trafficking in marijuana under G.S. 90-95(h)(1)(a). Considering the evidence and erroneous jury instructions that the jury should find defendant guilty if it found that he possessed "10 pounds or more but less than 50 pounds" of marijuana, the appellate court could not conclude that the jury unanimously convicted defendant under the conduct proscribed in G.S. 90-95(h)(1)(a). State v. Trejo, 163 N.C. App. 512, 594 S.E.2d 125 (2004).

Evidence held sufficient to give rise to a reasonable inference that defendant and her co-defendants agreed between themselves to commit the unlawful act of trafficking in cocaine, even though defendant absconded with the money involved in the transaction and the crime of trafficking was never completed. State v. Lipford, 81 N.C. App. 464, 344 S.E.2d 307 (1986).

Evidence was sufficient to submit to the jury the issue of defendants' guilt of conspiracy to traffic in more than 200 grams of cocaine. State v. Worthington, 84 N.C. App. 150, 352 S.E.2d 695, cert. denied, 319 N.C. 677, 356 S.E.2d 785 (1987).

Proximity of pocketbook in which heroin was found to defendant's person and presence of defendant's identification within the pocketbook were sufficient to give rise to an inference of defendant's possession of the heroin. State v. Keys, 87 N.C. App. 349, 361 S.E.2d 286 (1987).

Evidence was sufficient, independent of out-of-court statements made by co-conspirators, to establish a prima facie case of conspiracy; therefore, the out-of-court statements were properly admitted in evidence. State v. Fink, 92 N.C. App. 523, 375 S.E.2d 303 (1989).

In trial for charges of trafficking in cocaine where the state offered uncontroverted evidence that a plastic bag containing 44.2 grams of powder of which approximately thirty percent was cocaine hydrochloride was found underneath the seat of the truck defendant was driving. The trial court properly denied defendant's motion to dismiss at the end of all the evidence. State v. Chandler, 100 N.C. App. 706, 398 S.E.2d 337 (1990).

While there was no direct evidence that defendant expressly agreed to commit the crime of trafficking cocaine, there was sufficient circumstantial evidence in the form of a pin register showing telephone calls to defendant by coconspirator while he was in this State; testimony by coconspirator to create a reasonable inference that defendant knew of his desire to obtain cocaine; and testimony that there was an implied understanding that if coconspirator drove to Maryland, defendant would procure the cocaine for resale in this State, so as to establish that a conspiracy existed and supported jurisdiction over defendant. State v. Drakeford, 104 N.C. App. 298, 409 S.E.2d 319 (1991).

Evidence was sufficient as to the amount and identity of the controlled substance even though the only evidence of the weights and nature of the substance was the uncorroborated testimony of persons involved in the conspiracy, who were testifying under agreement with the State and would receive a lesser sentence in exchange for their testimony, and even though there was no stipulation and no physical evidence and defendants were unable to examine and confront the substance. State v. Crummy, 107 N.C. App. 305, 420 S.E.2d 448, cert. denied, 332 N.C. 669, 424 S.E.2d 411 (1992).

Evidence was sufficient to support finding as an aggravating factor that defendant induced others to participate in the trafficking of cocaine. State v. Smallwood, 112 N.C. App. 76, 434 S.E.2d 615 (1993).

The evidence was sufficient under this section where the defendant had nonexclusive possession of a motel room but law enforcement officers found $ 800.00 cash and 2.22 grams of cocaine in the pocket of defendant's pants, enough to allow a reasonable person to infer that defendant had the power and intent to control the cocaine found in the bathroom, and, therefore, constructively possessed the cocaine. State v. Jackson, 137 N.C. App. 570, 529 S.E.2d 253 (N.C. Ct. App. 2000).

Reasonable jury in considering the evidence could have found that defendant possessed and transported 28 grams or more of cocaine and therefore was guilty of one count of trafficking in cocaine by possession and one count of trafficking in cocaine by transportation. State v. Shook, 155 N.C. App. 183, 573 S.E.2d 249 (2002).

State presented substantial evidence of each element of the crime of trafficking to preclude a motion to dismiss where an agent testified that cocaine seized from defendant weighed 55.4 grams. State v. Carmon, 156 N.C. App. 235, 576 S.E.2d 730, 2003 N.C. App. LEXIS 109 (2003), aff'd, 357 N.C. 500, 586 S.E.2d 90 (2003).

Defendant's conviction of trafficking in methamphetamine by possession and by transportation, G.S. 90-95(h)(3b), was supported by sufficient evidence; the State was not required to prove that the defendant had knowledge of the weight or amount of methamphetamine which defendant possessed, and the State presented ample evidence that defendant knew that a package he received in the mail contained methamphetamine. State v. Shelman, 159 N.C. App. 300, 584 S.E.2d 88, cert. denied sub nom. State v. Shelman, 357 N.C. 581, 589 S.E.2d 363 (2003).

Defendant's motion to dismiss charges of trafficking in cocaine by possession and trafficking in cocaine by transportation, in violation of G.S. 90-95(h)(3) was properly dismissed because there was sufficient evidence from which a jury could reasonably infer that defendant knowingly possessed cocaine where, although a package containing cocaine was addressed to someone else: (1) defendant identified himself as the addressee and signed for the package using the name of the addressee; (2) defendant exercised control over the package by taking it inside, placing it in one vehicle, and then moving it to another vehicle; and (3) surveillance equipment, guns, and plastic bags containing traces of cocaine were found in the residence. State v. Baldwin, 161 N.C. App. 382, 588 S.E.2d 497 (2003).

Defendant's statement that he obtained half a kilo from an unidentified person was sufficient evidence to establish conspiracy to traffic in more than 400 grams of cocaine where defendant's statement was supported by a substantial quantity of cocaine and trafficking paraphernalia found in defendant's home and an earlier controlled buy of 26 grams of cocaine from defendant by a police informant. State v. Sims, 174 N.C. App. 829, 622 S.E.2d 132, 2005 N.C. App. LEXIS 2613 (2005), cert. denied, — N.C. —, 630 S.E.2d 451 (2006).

Defendant's motion to dismiss a charge of trafficking in opiate derivatives was properly denied under circumstances in which substantial evidence tended to show that defendant, along with his fiance, shared possession of the home where the drugs were located, and other evidence included the fact that neither defendant's sister nor his brother-in-law were present because they lived in Tennessee; there was also evidence from which the jury could have reasonably concluded that the prescription drugs found at defendant's home were for trafficking and not for use by his brother-in-law and sister. State v. Lakey, — N.C. App. —, 645 S.E.2d 159, 2007 N.C. App. LEXIS 1093 (2007).

Evidence that 54.3 grams of cocaine was found in the fender well of the car, which was registered to first defendant, digital scales were found in the center console of the car, and paraphernalia for use with cocaine was found in first defendant's hotel room, was sufficient to support defendants' convictions for trafficking in cocaine by possession, trafficking in cocaine by transporation, and possession of cocaine with intent to sell. State v. Wiggins, — N.C. App. —, 648 S.E.2d 865, 2007 N.C. App. LEXIS 1804 (2007).

Evidence that first defendant consented to a search of the hotel room where the opium derivatives were found and admitted that marijuana and other paraphernalia would be found in room, that pills were found in the same bag as the marijuana, and that a man matching first defendant's description was seen opening the door to the subject hotel room, provided sufficient evidence to conclude that defendant constructively possessed the opium derivatives. State v. Wiggins, — N.C. App. —, 648 S.E.2d 865, 2007 N.C. App. LEXIS 1804 (2007).

Evidence Held Insufficient. — Testimony by a co-defendant that defendants stored marijuana in a house where they resided and sold marijuana from an apartment was insufficient to support the charge of trafficking by transportation because no one testified to observing defendants personally or actively moving or carrying any controlled substance. State v. Harrington, 171 N.C. App. 17, 614 S.E.2d 337, 2005 N.C. App. LEXIS 1189 (2005), cert. denied, sub nom. State v. Rattis, 360 N.C. 70, 623 S.E.2d 36 (2005).

Defendant's conviction for trafficking in cocaine by transportation was reversed as: (1) there was no evidence that defendant moved the cocaine from one place to another, (2) when law enforcement arrived at the scene, defendant's vehicle containing the two kilograms of cocaine was already backed into a parking space and remained stationary during the course of the law enforcement operation, and (3) there was no evidence as to how the vehicle arrived at the scene or whether the cocaine was moved by defendant before a confidential informant arrived. State v. Williams, 177 N.C. App. 725, 630 S.E.2d 216, 2006 N.C. App. LEXIS 1219 (2006).

Evidence Not Probative of Trafficking. — Where defendant was charged with trafficking in cocaine, the mere ownership of a passport showing travel to Colombia was not probative of a fact at issue in the case. State v. Cuevas, 121 N.C. App. 553, 468 S.E.2d 425 (1996).

In defendant's prosecution for trafficking in cocaine by possession, the admission of testimony about defendant's alleged gang affiliation was erroneous under G.S. 8C-1-403 because such testimony was irrelevant under G.S. 8C-1-401 as to whether defendant trafficked in or possessed cocaine under G.S. 90-95(h)(3), but the error was harmless because the evidence of defendant's guilt was overwhelming, so defendant could not show that defendant was prejudiced. State v. Gayton, — N.C. App. —, 648 S.E.2d 275, 2007 N.C. App. LEXIS 1739 (2007).

The fact that an informant put a finger into cocaine did not establish that the informant had power and intent to control its disposition or use, so as to make him a participant in the offense of trafficking in cocaine. State v. Moose, 101 N.C. App. 59, 398 S.E.2d 898 (1990), cert. denied, 328 N.C. 575, 403 S.E.2d 519 (1991).

Verdict in Disjunctive Held Ambiguous. — Conviction on the charge of "trafficking in heroin by selling and delivering," where the verdict form read "Guilty of trafficking . . . by selling or delivering in excess of four grams of a mixture containing heroin," could not stand, because use of the disjunctive "or" in the verdict form rendered the verdict inherently ambiguous and deprived defendant of the right to a unanimous verdict. State v. Anderson, 76 N.C. App. 434, 333 S.E.2d 762 (1985).

By instructing the jury that it could find defendant guilty of trafficking in marijuana if it found that defendant knowingly possessed or knowingly transported 10,000 pounds or more of marijuana, the trial judge submitted two possible crimes to the jury, as the jury could find defendant guilty if it found that he committed either or both of the crimes submitted to it. Thus, the jury's verdict of guilty was fatally defective because it was ambiguous, depriving defendant of his constitutional right to be convicted by a unanimous jury. State v. Diaz, 317 N.C. 545, 346 S.E.2d 488 (1986).

No Error in Court's Denial of Lesser Included Offense. — In trial for trafficking in cocaine, there was no error in court's denial of defendant's request to instruct on lesser included offense of simple possession on the basis that defendant maintained throughout the trial that none of the cocaine was hers. State v. King, 99 N.C. App. 283, 393 S.E.2d 152 (1990).

The mere denial of charges of trafficking in cocaine by possession and trafficking in cocaine by transportation by the defendant, where there was positive evidence on each element of the crime charged and where there was no conflicting evidence relating to any element, did not require submission of lesser included offense of felonious possession to the jury. State v. White, 104 N.C. App. 165, 408 S.E.2d 871 (1991).

The defendant's sentence was not disproportionate to her crimes although her more culpable co-conspirators received lesser or equivalent sentences after plea-arrangements where the sentences imposed upon defendant, albeit consecutive, were within the presumptive statutory range authorized for her drug trafficking offenses under the Structured Sentencing Act. State v. Parker, 137 N.C. App. 590, 530 S.E.2d 297 (2000).

Single Sentence for Multiple Courts. — Although defendant was charged with three counts of trafficking in cocaine, only a single minimum sentence of seven years was mandated by the language of subdivision (h)(6). State v. Bozeman, 115 N.C. App. 658, 446 S.E.2d 140 (1994).

Indictment Failed to State Essential Element Alleging Conspiracy to Traffic in Cocaine. — An indictment charging defendant with committing conspiracy to traffic in cocaine which did not allege that he engaged in a conspiracy to facilitate the transfer of 28 grams or more of cocaine was not sufficient. State v. Outlaw, 159 N.C. App. 423, 583 S.E.2d 625, 2003 N.C. App. LEXIS 1510, cert. denied, 357 N.C. 510, 588 S.E.2d 380 (2003).

Elements. — To convict an individual of drug trafficking pursuant to G.S. 90-95, the State is not required to prove that a defendant had knowledge of the weight or amount of methamphetamine which he knowingly possessed or transported. Instead, the statute requires only that the defendant knowingly possess or transport the controlled substances. If the amount exceeds 28 grams, then a conviction for trafficking may be obtained. State v. Shelman, 159 N.C. App. 300, 584 S.E.2d 88, cert. denied sub nom. State v. Shelman, 357 N.C. 581, 589 S.E.2d 363 (2003).

To convict defendant of trafficking by possession, the State had to show more than that the package was addressed to defendant and contained opium, because such proof did not necessarily establish defendant's knowledge of the contents of the package and his intent to exercise control over the opium. State v. Rashidi, 172 N.C. App. 628, 617 S.E.2d 68, 2005 N.C. App. LEXIS 1790 (2005), aff'd, 360 N.C. 166, 622 S.E.2d 493 (2005).

Sentence Imposed Was Not Severe or Disproportionate. — Defendant's sentence for a conviction of trafficking in methamphetamine by possession and by transportation was proper; defendant received the minimum sentence permitted by G.S. 90-95(h)(3b)(c), and the trial court did not err by sentencing defendant to a greater sentence than that received by a co-defendant pursuant to a plea bargain. State v. Shelman, 159 N.C. App. 300, 584 S.E.2d 88, cert. denied sub nom. State v. Shelman, 357 N.C. 581, 589 S.E.2d 363 (2003).

Entrapment as a Matter of Law Not Found. — Defendant was not entrapped into trafficking in cocaine as a matter of law as he had a predisposition and opportunity to commit the offense where: (1) defendant initially gave a known drug dealer his pager number in case he needed defendant to do some work; (2) on one occasion defendant refused to deliver a package for the dealer because he did not want to be involved in drug-related activities; (3) yet, when defendant returned the dealer's pager later, the two men once again discussed defendant delivering a package to make money, and defendant spoke with another known drug dealer and agreed to make a delivery and pick up money from the first dealer, in exchange for $50; and (4) defendant's testimony at trial clearly indicated that he knew that the powder he was delivering to the first dealer was an illegal substance. State v. Collins, 160 N.C. App. 310, 585 S.E.2d 481 (2003), aff'd, 358 N.C. 135, 591 S.E.2d 518 (2004).

Defendant's motion to dismiss a charge of trafficking in cocaine by possession and of possession with intent to manufacture, sell, or deliver cocaine was properly denied; defendant's lack of knowledge of the weight of the cocaine was irrelevant because he knew that he possessed cocaine. State v. Foster, 162 N.C. App. 665, 592 S.E.2d 259, aff'd, 359 N.C. 179, 604 S.E.2d 913 (2004).

Substantial Assistance to Law Enforcement. — In deciding not to reduce defendant's sentence after defendant pleaded guilty to trafficking in cocaine pursuant to a plea bargain, the trial court did not abuse its discretion in finding that defendant failed to render substantial assistance to law enforcement. State v. Robinson, 177 N.C. App. 225, 628 S.E.2d 252, 2006 N.C. App. LEXIS 849 (2006).

VI. EVIDENTIARY CHAIN OF CUSTODY.

Lab Report Admissible. — A trial court did not commit plain error in admitting a State Bureau of Investigation laboratory report of the nature, quality, and amount of cocaine seized under G.S. 90-95(g), even though the record was unclear as to whether the State notified defendant, as required by G.S. 90-95(g), of its intent to admit the report, because defendant had stipulated during the trial that the package contained cocaine. State v. Baldwin, 161 N.C. App. 382, 588 S.E.2d 497 (2003).

Discovery of Procedures Used to Conduct Laboratory Tests. — Defendant permitted to discover information about procedures the analyst used to test substances police bought from defendant for the presence of drugs, and the trial court erred when it denied defendant's written request for an order requiring the State to provide discovery of data collection procedures. State v. Fair, 164 N.C. App. 770, 596 S.E.2d 871 (2004).

Testimony of Individuals. — A statement pursuant to G.S. 90-95(g1) is not the exclusive method for authenticating a laboratory report. The chain of custody may also be established by the testimony of the individuals in the chain of custody. State v. Lorenzo, 147 N.C. App. 728, 556 S.E.2d 625 (2001).

History of Package Prior to Interception by Postal Authorities. — In defendant's prosecution for trafficking in methamphetamine by possession and by transportation pursuant to G.S. 90-95(h)(3b)(c), the State present adequate evidence of authenticity and chain of custody, as the State not was required to present evidence establishing the history of the drugs and of the package before a postal inspector intercepted the package. State v. Shelman, 159 N.C. App. 300, 584 S.E.2d 88, cert. denied sub nom. State v. Shelman, 357 N.C. 581, 589 S.E.2d 363 (2003).

§ 90-95.1. Continuing criminal enterprise.

(a) Any person who engages in a continuing criminal enterprise shall be punished as a Class C felon and in addition shall be subject to the forfeiture prescribed in subsection (b) of this section.

(b) Any person who is convicted under subsection (a) of engaging in a continuing criminal enterprise shall forfeit to the State of North Carolina:

(1) The profits obtained by him in such enterprise, and
(2) Any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

(c) For purposes of this section, a person is engaged in a continuing criminal enterprise if:

(1) He violates any provision of this Article, the punishment of which is a felony; and
(2) Such violation is a part of a continuing series of violations of this Article;
    a. Which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management; and
    b. From which such person obtains substantial income or resources.

(d) Repealed by Session Laws 1979, c. 760, s. 5. (1971, s. 919, s. 1; 1979, c. 760, s. 5.)

§ 90-95.2. Cooperation between law-enforcement agencies.

(a) The head of any law-enforcement agency may temporarily provide assistance to another agency in enforcing the provisions of this Article if so requested in writing by the head of the other agency. The assistance may comprise allowing officers of the agency to work temporarily with officers of the other agency (including in an undercover capacity) and lending equipment and supplies. While working with another agency under the authority of this section, an officer shall have the same jurisdiction, powers, rights, privileges, and immunities (including those relating to the defense of civil actions and payment of judgments) as the officers of the requesting agency in addition to those he normally possesses. While on duty with the other agency, he shall be subject to the lawful operational commands of his superior officers in the other agency, but he shall for personnel and administrative purposes remain under the control of his own agency, including for purposes of pay. He shall furthermore be entitled to workers' compensation when acting pursuant to this section to the same extent as though he were functioning within the normal scope of his duties.

(b) As used in this section:

(1) "Head" means any director or chief officer of a law-enforcement agency, including the chief of police of a local police department and the sheriff of a county, or an officer of the agency to whom the head of the agency has delegated authority to make or grant requests under this section, but only one officer in the agency shall have this delegated authority at any time.

(2) "Law-enforcement agency" means any State or local agency, force, department, or unit responsible for enforcing criminal laws in this State, including any local police department or sheriff's department.

(c) This section in no way reduces the jurisdiction or authority of State law-enforcement officers. (1975, c. 782, s. 1; 1981, c. 93, s. 1; 1991, c. 636, s. 3.)

CASE NOTES

Seizure by Drug Enforcement Officer Not Improper. — It was not improper for state law enforcement officials to allow a federal Drug Enforcement Agency officer to seize money taken from defendant; the State's failure to present the actual money seized from defendant at trial did not prejudice defendant because the jury was able to consider substitute evidence. State v. Davis, 160 N.C. App. 693, 586 S.E.2d 804 (2003).

Cited in State v. Hill, 153 N.C. App. 716, 570 S.E.2d 768 (2002).

§ 90-95.3. Restitution to law-enforcement agencies for undercover purchases; restitution for drug analyses; restitution for seizure and cleanup of clandestine laboratories.

(a) When any person is convicted of an offense under this Article, the court may order him to make restitution to any law-enforcement agency for reasonable expenditures made in purchasing controlled substances from him or his agent as part of an investigation leading to his conviction.

(b) **(See Editor's Note.)** Repealed by Session Laws 2002-126, s. 29A.8(b), effective October 1, 2002.

(c) When any person is convicted of an offense under this Article involving the manufacture of controlled substances, the court must order the person to make restitution for the actual cost of cleanup to the law enforcement agency that cleaned up any clandestine laboratory used to manufacture the controlled substances, including personnel overtime, equipment, and supplies. (1975, c. 782, s. 2; 1989 (Reg. Sess., 1990), c. 1039, s. 3; 1999-370, s. 2; 2002-126, s. 29A.8(b).)

Local Modification. — Wake County: 1997-450, s. 5.

Editor's Note. — Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capitol Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Session Laws 2002-126, s. 31.6 is a severability clause.

Session Laws 2002-126, s. 29A.8(b), repealed subsection (b) pertaining to restitution costs for controlled substances analysis, effective October 1, 2002, but the provisions of subsection (b) continue to apply to any defendant ordered to make restitution prior to October 1, 2002. For present similar provisions to those repealed, see G.S. 7A-304(a)(7).

Legal Periodicals. — For "Legislative Survey: Criminal Law," see 22 Campbell L. Rev. 253 (2000).

CASE NOTES

Restitution of Amount Paid by State Agent for Drug Purchase. — Where defendant was convicted of possession and delivery of cocaine, and the trial court offered him the option of serving a three-year active sentence or serving six months and paying $600.00 restitution, and where the amount ordered was patently relevant to the pecuniary injury inflicted upon the State by defendant's criminal activities, in that $600.00 was paid by an agent of the State for the purchase of cocaine, the restitution ordered was reasonably related to the rehabilitative objectives of probation, and the condition was reasonable and just under the circumstances of the case. State v. Stallings, 316 N.C. 535, 342 S.E.2d 519 (1986).

Restitution to law enforcement agencies for undercover purchases under G.S. 90-95.3 and G.S. 15A-1343(d) was proper, and non-payment of a fine would not increase the sentence under G.S. 15A-1351(a). State v. Reynolds, 161 N.C. App. 144, 587 S.E.2d 456 (2003).

Constitutionality of Former Subsection (b). — Former subsection (b) of this section, authorizing the court to order the payment of $100 restitution by a defendant for the expenses of analyzing any controlled substance possessed by him or his agent as part of an investigation leading to his conviction, did not contravene the constitutional provision for the separation of powers, and the legislative branch did not improperly control the actions of the judiciary through the enactment of subsection (b). State v. Johnson, 124 N.C. App. 462, 478 S.E.2d 16 (1996).

Construction of Former Subsection (b) with Other Laws. — When the phrase "normal operating cost" in G.S. 15A-1343(d) is interpreted to refer to overhead costs, and not to those incurred in connection with a specific prosecution, former subsection (b) of this section, authorizing the court to order the payment of $100 restitution by a defendant for the expense of analyzing any controlled substance possessed by him or his agent as part of an investigation leading to his conviction, would not conflict with G.S. 15A-1343(d), as the cost of analyzing drugs is incurred by the prosecution only in connection with particular cases. State v. Johnson, 124 N.C. App. 462, 478 S.E.2d 16 (1996).

Costs Generally. — At common law, costs in criminal cases were unknown; therefore, liability for costs in criminal cases is dictated purely by statute. State v. Johnson, 124 N.C. App. 462, 478 S.E.2d 16 (1996).

Cited in Shore v. Edmisten, 290 N.C. 628, 227 S.E.2d 553 (1976).

§ 90-95.4. Employing or intentionally using minor to commit a drug law violation.

(a) A person who is at least 18 years old but less than 21 years old who hires or intentionally uses a minor to violate G.S. 90-95(a)(1) shall be guilty of a felony. An offense under this subsection shall be punishable as follows:

(1) If the minor was more than 13 years of age, then as a felony that is one class more severe than the violation of G.S. 90-95(a)(1) for which the minor was hired or intentionally used.

(2) If the minor was 13 years of age or younger, then as a felony that is two classes more severe than the violation of G.S. 90-95(a)(1) for which the minor was hired or intentionally used.

(b) A person 21 years of age or older who hires or intentionally uses a minor to violate G.S. 90-95(a)(1) shall be guilty of a felony. An offense under this subsection shall be punishable as follows:

(1) If the minor was more than 13 years of age, then as a felony that is three classes more severe than the violation of G.S. 90-95(a)(1) for which the minor was hired or intentionally used.

(2) If the minor was 13 years of age or younger, then as a felony that is four classes more severe than the violation of G.S. 90-95(a)(1) for which the minor was hired or intentionally used.

(c) Mistake of Age. — Mistake of age is not a defense to a prosecution under this section.

(d) The term "minor" as used in this section is defined as an individual who is less than 18 years of age. (1989 (Reg. Sess., 1990), c. 1081, s. 1; 1998-212, s. 17.16(f).)

CASE NOTES

Acquittal Not a Bar To Use of Sentencing Aggravator. — In a case alleging that defendant had used a 13 year old boy to sell drugs, a jury's acquittal of charges of contributing to the delinquency of a minor, G.S. 14-316.1, and employing and using a minor to commit a controlled substance offense, G.S. 90-95.4, did not mean that the jury found there was insufficient evidence that the boy was a minor; by convicting defendant of conspiracy to sell a controlled substance, the jury found that defendant and the boy were conspirators, and the trial court's consideration as an aggravating sentencing factor that defendant involved a person under 16 years of age in the commission of a crime was proper. State v. Boyd, 162 N.C. App. 159, 595 S.E.2d 697 (2004).

§ 90-95.5. Civil liability — employing a minor to commit a drug offense.

A person 21 years of age or older, who hires, employs, or intentionally uses a person under 18 years of age to commit a violation of G.S. 90-95 is liable in a civil action for damages for drug addiction proximately caused by the violation. The doctrines of contributory negligence and assumption of risk are no defense to liability under this section. (1989 (Reg. Sess., 1990), c. 1081, s. 3; 1998-212, s. 17.16(g).)

§ 90-95.6. Promoting drug sales by a minor.

(a) A person who is 21 years of age or older is guilty of promoting drug sales by a minor if the person knowingly:

(1) Entices, forces, encourages, or otherwise facilitates a minor in violating G.S. 90-95(a)(1).

(2) Supervises, supports, advises, or protects the minor in violating G.S. 90-95(a)(1).

(b) Mistake of age is not a defense to a prosecution under this section.

(c) A violation of this section is a Class D felony. (1998-212, s. 17.16(h).)

§ 90-95.7. Participating in a drug violation by a minor.

(a) A person 21 years of age or older who purchases or receives a controlled substance from a minor 13 years of age or younger who possesses, sells, or delivers the controlled substance in violation of G.S. 90-95(a)(1) is guilty of participating in a drug violation of a minor.

(b) Mistake of age is not a defense to a prosecution under this section.

(c) A violation of this section is a Class G felony. (1998-212, s. 17.16(h).)

§ 90-96. Conditional discharge and expunction of records for first offense.

(a) Whenever any person who has not previously been convicted of any offense under this Article or under any statute of the United States or any state relating to those substances included in Article 5 or 5A of Chapter 90 or to that paraphernalia included in Article 5B of Chapter 90 pleads guilty to or is found guilty of (i) a misdemeanor under this Article by possessing a controlled substance included within Schedules II through VI of this Article or by possessing drug paraphernalia as prohibited by G.S. 90-113.21, or (ii) a felony under G.S. 90-95(a)(3) by possessing less than one gram of cocaine, the court may, without entering a judgment of guilt and with the consent of such person, defer further proceedings and place him on probation upon such reasonable terms and conditions as it may require. Notwithstanding the provisions of G.S. 15A-1342(c) or any other statute or law, probation may be imposed under this section for an offense under this Article for which the prescribed punishment includes only a fine. To fulfill the terms and conditions of probation the court may allow the defendant to participate in a drug education program approved for this purpose by the Department of Health and Human Services. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge such person and dismiss the proceedings against him. Discharge and dismissal under this section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime including the additional penalties imposed for second or subsequent convictions under this Article. Discharge and dismissal under this section or G.S. 90-113.14 may occur only once with respect to any person. Disposition of a case to determine discharge and dismissal under this section at the district court division of the General Court of Justice shall be final for the purpose of appeal. Prior to taking any action to discharge and dismiss under this section the court shall make a finding that the defendant has no record of previous convictions under the "North Carolina Controlled Substances Act", Article 5, Chapter 90, the "North Carolina Toxic Vapors Act", Article 5A, Chapter 90, or the "Drug Paraphernalia Act", Article 5B, Chapter 90.

(a1) Upon the first conviction only of any offense included in G.S. 90-95(a)(3) or G.S. 90-113.21 and subject to the provisions of this subsection (a1), the court may place defendant on probation under this section for an offense under this Article including an offense for which the prescribed punishment includes only a fine. The probation, if imposed, shall be for not less than one year and shall contain a minimum condition that the defendant who was found guilty or pleads guilty enroll in and successfully complete, within 150 days of the date of the imposition of said probation, the program of instruction at the drug education school approved by the Department of Health and Human Services pursuant to G.S. 90-96.01. The court may impose probation that does not contain a condition that defendant successfully complete the program of instruction at a drug education school if:

(1) There is no drug education school within a reasonable distance of the defendant's residence; or

(2) There are specific, extenuating circumstances which make it likely that defendant will not benefit from the program of instruction.

The court shall enter such specific findings in the record; provided that in the case of subdivision (2) above, such findings shall include the specific, extenuating circumstances which make it likely that the defendant will not benefit from the program of instruction.

For the purposes of determining whether the conviction is a first conviction or whether a person has already had discharge and dismissal, no prior offense occurring more than seven years before the date of the current offense shall be considered. In addition, convictions for violations of a provision of G.S. 90-95(a)(1) or 90-95(a)(2) or 90-95(a)(3), or 90-113.10, or 90-113.11, or 90-113.12, or 90-113.21 shall be considered previous convictions.

Failure to complete successfully an approved program of instruction at a drug education school shall constitute grounds to revoke probation and deny application for expunction of all recordation of defendant's arrest, indictment, or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. For purposes of this subsection, the phrase "failure to complete successfully the prescribed program of instruction at a drug education school" includes failure to attend scheduled classes without a valid excuse, failure to complete the course within 150 days of imposition of probation, willful failure to pay the required fee for the course, or any other manner in which the person fails to complete the course successfully. The instructor of the course to which a person is assigned shall report any failure of a person to complete successfully the program of instruction to the court which imposed probation. Upon receipt of the instructor's report that the person failed to complete the program successfully, the court shall revoke probation and/or deny application for expunction of all recordation of defendant's arrest, indictment, or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. A person may obtain a hearing before the court of original jurisdiction prior to revocation of probation or denial of application for expunction.

This subsection is supplemental and in addition to existing law and shall not be construed so as to repeal any existing provision contained in the General Statutes of North Carolina.

(b) Upon the dismissal of such person, and discharge of the proceedings against him under subsection (a) of this section, such person, if he were not over 21 years of age at the time of the offense, may apply to the court for an order to expunge from all official records (other than the confidential file to be retained by the Administrative Office of the Courts under subsection (c)) all recordation relating to his arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. The applicant shall attach to the application the following:

(1) An affidavit by the applicant that he has been of good behavior during the period of probation since the decision to defer further proceedings on the offense in question and has not been convicted of any felony, or misdemeanor, other than a traffic violation, under the laws of the United States or the laws of this State or any other state;

(2) Verified affidavits by two persons who are not related to the applicant or to each other by blood or marriage, that they know the character and reputation of the petitioner in the community in which he lives, and that his character and reputation are good;

(3) Affidavits of the clerk of superior court, chief of police, where appropriate, and sheriff of the county in which the petitioner was convicted, and, if different, the county of which the petitioner is a resident, showing that the applicant has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to the conviction for the offense in question or during the period of probation following the decision to defer further proceedings on the offense in question.

The judge to whom the petition is presented is authorized to call upon a probation officer for any additional investigation or verification of the petitioner's conduct during the probationary period deemed desirable.

If the court determines, after hearing, that such person was dismissed and the proceedings against him discharged and that he was not over 21 years of age at the time of the offense, it shall enter such order. The effect of such order shall be to restore such person in the contemplation of the law to the status he occupied before such arrest or indictment or information. No person as to whom such order was entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of him for any purpose.

The court shall also order that said conviction and the records relating thereto be expunged from the records of the court, and direct all law-enforcement agencies bearing records of the same to expunge their records of the conviction. The clerk shall forward a certified copy of the order to the sheriff, chief of police or other arresting agency, as appropriate, and the sheriff, chief of police or other arresting agency, as appropriate, shall forward such order to the State Bureau of Investigation with a form supplied by the State Bureau of Investigation. The State Bureau of Investigation shall forward the court order in like manner to the Federal Bureau of Investigation.

(c) The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the Administrative Office of the Courts the names of those persons granted a conditional discharge under the provisions of this Article, and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons granted conditional discharges. The information contained in the file shall be disclosed only to Judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense under this Article has been previously granted a conditional discharge.

(d) Whenever any person is charged with a misdemeanor under this Article by possessing a controlled substance included within Schedules II through VI of this Article or a felony under G.S. 90-95(a)(3) by possessing less than one gram of cocaine, upon dismissal by the State of the charges against him, upon entry of a nolle prosequi, or upon a finding of not guilty or other adjudication of innocence, such person may apply to the court for an order to expunge from all official records all recordation relating to his arrest, indictment or information, or trial. If the court determines, after hearing that such person was not over 21 years of age at the time any of the proceedings against him occurred, it shall enter such order. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of him for any purpose.

(e) Whenever any person who has not previously been convicted of an offense under this Article or under any statute of the United States or any state relating to controlled substances included in any schedule of this Article or to that paraphernalia included in Article 5B of Chapter 90 pleads guilty to or has been found guilty of (i) a misdemeanor under this Article by possessing a controlled substance included within Schedules II through VI of this Article, or by possessing drug paraphernalia as prohibited by G.S. 90-113.21, or (ii) a felony under G.S. 90-95(a)(3) by possessing less than one gram of cocaine, the court may, upon application of the person not sooner than 12 months after conviction, order cancellation of the judgment of conviction and expunction of the records of his arrest, indictment, or information, trial and conviction. A conviction in which the judgment of conviction has been canceled and the records expunged pursuant to this section shall not be thereafter deemed a conviction for purposes of this section or for purposes of disqualifications or liabilities imposed by law upon conviction of a crime including the additional penalties imposed for second or subsequent convictions of this Article. Cancellation and expunction under this section may occur only once with respect to any person. Disposition of a case under this section at the district court division of the General Court of Justice shall be final for the purpose of appeal.

The granting of an application filed under this section shall cause the issue of an order to expunge from all official records (other than the confidential file to be retained by the Administrative Office of the Courts under subsection (c)) all recordation relating to the petitioner's arrest, indictment, or information, trial, finding of guilty, judgment of conviction, cancellation of the judgment, and expunction of records pursuant to this section.

The judge to whom the petition is presented is authorized to call upon a probation officer for additional investigation or verification of the petitioner's conduct since conviction. If the court determines that the petitioner was convicted of (i) a misdemeanor under this Article for possessing a controlled substance included within Schedules II through VI of this Article, or for possessing drug paraphernalia as prohibited in G.S. 90-113.21, or (ii) a felony under G.S. 90-95(a)(3) for possession of less than one gram of cocaine, that he was not over 21 years of age at the time of the offense, that he has been of good behavior since his conviction, that he has successfully completed a drug education program approved for this purpose by the Department of Health and Human Services, and that he has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to or since the conviction for the offense in question, it shall enter an order of expunction of the petitioner's court record. The effect of such order shall be to restore the petitioner in the contemplation of the law to the status he occupied before arrest or indictment or information or conviction. No person as to whom such order was entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or conviction, or trial in response to any inquiry made of him for any purpose. The judge may waive the condition that the petitioner attend the drug education school if the judge makes a specific finding that there was no drug education school within a reasonable distance of the defendant's residence or that there were specific extenuating circumstances which made it likely that the petitioner would not benefit from the program of instruction.

The court shall also order that all law-enforcement agencies bearing records of the conviction and records relating thereto to expunge their records of the conviction. The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other arresting agency, as appropriate, and the arresting agency shall forward the order to the State Bureau of Investigation with a form supplied by the State Bureau of Investigation. The State Bureau of Investigation shall forward the court order in like manner to the Federal Bureau of Investigation.

The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the Administrative

Office of the Courts the names of those persons whose judgments of convictions have been canceled and expunged under the provisions of this Article, and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons whose judgments of convictions have been canceled and expunged. The information contained in the file shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense under this Article has been previously granted cancellation and expunction of a judgment of conviction pursuant to the terms of this Article.

(f) A person who files a petition for expunction of a criminal record under this section must pay the clerk of superior court a fee of sixty-five dollars ($65.00) at the time the petition is filed. Fees collected under this subsection shall be deposited in the General Fund. This subsection does not apply to petitions filed by an indigent. (1971, c. 919, s. 1; 1973, c. 654, s. 2; c. 1066; 1977, 2nd Sess., c. 1147, s. 11B; 1979, c. 431, ss. 3, 4; c. 550; 1981, c. 922, ss. 1-4; 1994, Ex. Sess., c. 11, s. 1.1; 1997-443, s. 11A.118(a); 2002-126, s. 29A.5(d).)

Editor's Note. — Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capitol Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Legal Periodicals. — For article, "Prior Crimes as Evidence in Present Criminal Trials," see 1 Campbell L. Rev. 1 (1979).

CASE NOTES

Application and Purpose of Section. — This section is applicable only to first offenders and is clearly for the purpose of permitting the trial court to grant probation under conditions favorable to defendant. State v. Cordon, 21 N.C. App. 394, 204 S.E.2d 715, cert. denied, 285 N.C. 592, 206 S.E.2d 864 (1974).

Conviction for Purposes of Structured Sentencing Act. — The defendant's guilty plea followed by probation under the provisions of this section was a "conviction" for the purposes of the Structured Sentencing Act, G.S. 15A-1340.10 et seq., and thus furnished a legitimate basis for the trial court's determination of defendant's sentence. State v. Hasty, 133 N.C. App. 563, 516 S.E.2d 428 (1999).

G.S. 15A-1344(f) requirement applied to G.S. 90-96, and except as provided in G.S. 15A-1344(f), a trial court lacked jurisdiction to revoke a defendant's probation after the expiration of the probationary term; a trial court's revocation of defendant's probation after his probation period expired, without the specific findings of G.S. 15A-1344(f), was error. State v. Burns, 171 N.C. App. 759, 615 S.E.2d 347, 2005 N.C. App. LEXIS 1273 (2005).

When defendant consents to the terms of the probation, he abandons his right to appeal on the issue of guilt or innocence and commits himself to abide by the stipulated conditions. State v. Cordon, 21 N.C. App. 394, 204 S.E.2d 715, cert. denied, 285 N.C. 592, 206 S.E.2d 864 (1974).

The benefit of this provision is limited to those persons who are not over 21 years of age at the time the offense was committed. In re Spencer, 140 N.C. App. 776, 538 S.E.2d 236 (2000).

A defendant on appeal from an order revoking probation may not challenge his adjudication of guilt. State v. Cordon, 21 N.C. App. 394, 204 S.E.2d 715, cert. denied, 285 N.C. 592, 206 S.E.2d 864 (1974).

Cited in Shore v. Edmisten, 290 N.C. 628, 227 S.E.2d 553 (1976); Eury v. North Carolina Emp. Sec. Comm'n, 115 N.C. App. 590, 446 S.E.2d 383, cert. denied, 338 N.C. 309, 451 S.E.2d 635 (1994).

OPINIONS OF ATTORNEY GENERAL

"Not Over 21 Years" Means "Until Twenty-Second Birthday". — See opinion of Attorney General to Mr. Harvey D. Johnson, 42 N.C.A.G. 319 (1973).

§ 90-96.01. Drug education schools; responsibilities of the Department of Health and Human Services; fees.

(a) The Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services shall establish standards and guidelines for the curriculum and operation of local drug education programs. The Department of Health and Human Services shall oversee the development of a statewide system of schools and shall insure that schools are available in all localities of the State as soon as is practicable.

(1) A fee of one hundred fifty dollars ($150.00) shall be paid by all persons enrolling in an accredited drug education school established pursuant to this section. That fee must be paid to an official designated for that purpose and at a time and place specified by the area mental health, developmental disabilities, and substance abuse authority providing the course of instruction in which the person is enrolled. If the clerk of court in the county in which the person is convicted agrees to collect the fees, the clerk shall collect all fees for persons convicted in that county. The clerk shall pay the fees collected to the area mental health, developmental disabilities, and substance abuse authority for the catchment area where the clerk is located regardless of the location where the defendant attends the drug education school and that authority shall distribute the funds in accordance with the rules and regulations of the Department. The fee must be paid in full within two weeks of the date the person is convicted and before he attends any classes, unless the court, upon a showing of reasonable hardship, allows the person additional time to pay the fee or allows him to begin the course of instruction without paying the fee. If the person enrolling in the school demonstrates to the satisfaction of the court that ordered him to enroll in the school that he is unable to pay and his inability to pay is not willful, the court may excuse him from paying the fee. Parents or guardians of persons attending drug education school shall be allowed to audit the drug education school along with their children or wards at no extra expense.

(2) The Department of Health and Human Services shall have the authority to approve programs to be implemented by area mental health, developmental disabilities, and substance abuse authorities. Area mental health, developmental disabilities, and substance abuse authorities may subcontract for the delivery of drug education program services. The Department shall have the authority to approve budgets and contracts with public and private governmental and nongovernmental bodies for the operation of such schools.

(3) Fees collected under this section and retained by the area mental health, developmental disabilities, and substance abuse authority shall be placed in a nonreverting fund. That fund must be used, as necessary, for the operation, evaluation and administration of the drug educational schools; excess funds may only be used to fund other drug or alcohol programs. The area mental health, developmental disabilities, and substance abuse authority shall remit five percent (5%) of each fee collected to the Department of Health and Human Services on a monthly basis. Fees received by the Department as required by this section may only be used in supporting, evaluating, and administering drug education schools, and any excess funds will revert to the General Fund.

(4) All fees collected by any area mental health, developmental disabilities, and substance abuse authority under the authority of this section

may not be used in any manner to match other State funds or be included in any computation for State formula-funded allocations.

(b) Willful failure to pay the fee is one ground for a finding that a person placed on probation or who may make application for expunction of all recordation of his arrest or conviction has not successfully completed the course. If the court determines the person is unable to pay, he shall not be deemed guilty of a willful failure to pay the fee. (1981, c. 922, s. 8; 1991, c. 636, s. 19(b), (c); 1993, c. 395, s. 1; 1997-443, s. 11A.118(a).)

§ 90-96.1. Immunity from prosecution for minors.

Whenever any person who is not more than 18 years of age, who has not previously been convicted of any offense under this Article or under any statute of the United States of any state relating to controlled substances included in any schedule of this Article, is accused with possessing or distributing a controlled substance in violation of G.S. 90-95(a)(1) or 90-95(a)(2) or 90-95(a)(3), the court may, upon recommendation of the district attorney, grant said person immunity from prosecution for said violation(s) if said person shall disclose the identity of the person or persons from whom he obtained the controlled substance(s) for which said person is being accused of possessing or distributing. (1973, c. 47, s. 2; c. 654, s. 3.)

CASE NOTES

Cited in State v. Best, 292 N.C. 294, 233 S.E.2d 544 (1977); State v. Jones, 358 N.C. 473, 598 S.E.2d 125 (2004).

§ 90-97. Other penalties.

Any penalty imposed for violation of this Article shall be in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law. If a violation of this Article is a violation of a federal law or the law of another state, a conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this State. (1971, c. 919, s. 1.)

Legal Periodicals. — For article, "Prior Crimes as Evidence in Present Criminal Trials," see 1 Campbell L. Rev. 1 (1979).

CASE NOTES

Cited in State v. Overton, 60 N.C. App. 1, 298 S.E.2d 695 (1982).

§ 90-98. Attempt and conspiracy; penalties.

Except as otherwise provided in this Article, any person who attempts or conspires to commit any offense defined in this Article is guilty of an offense that is the same class as the offense which was the object of the attempt or conspiracy and is punishable as specified for that class of offense and prior record or conviction level in Article 81B of Chapter 15A of the General Statutes. (1971, c. 919, s. 1; 1979, c. 760, s. 5; 1997-80, s. 9.)

CASE NOTES

Double Jeopardy Violated Where Four Conspiracies Were Actually Single Conspiracy. — Where defendant was convicted of conspiracy to possess cocaine, conspiracy to deliver cocaine, conspiracy to sell cocaine and conspiracy to transport cocaine, since the four separate conspiracies for which defendant was charged were, in fact, only a single conspiracy, his conviction for more than that single conspiracy violated his right to be free from double jeopardy. State v. Kamtsiklis, 94 N.C. App. 250, 380 S.E.2d 400, appeal dismissed and cert. denied, 325 N.C. 711, 388 S.E.2d 466 (1989).

Number of Agreements Dictates Number of Conspiracies. — The number of agreements, not the number of substantive crimes nor the number of overt acts, dictates the number of conspiracies. Sanderson v. Rice, 777 F.2d 902 (4th Cir. 1985), cert. denied, 475 U.S. 1027, 106 S. Ct. 1226, 89 L. Ed. 2d 336 (1986).

Where there existed only one plot or plan, scheme or conspiracy, covering both possessing marijuana and manufacturing marijuana, the defendant could only be sentenced for one count of conspiracy. Sanderson v. Rice, 777 F.2d 902 (4th Cir. 1985), cert. denied, 475 U.S. 1027, 106 S. Ct. 1226, 89 L. Ed. 2d 336 (1986).

Conspiracy to Sell or Deliver. — Where indictment charged defendant with only one offense, namely, conspiracy to sell or deliver, i.e., transfer, cocaine, and it was clear by its verdict that the jury found the defendant guilty of this single offense, the verdict was sufficient to support the judgment. State v. McLamb, 313 N.C. 572, 330 S.E.2d 476 (1985).

Evidence Held to Support Conviction of Attempt. — Evidence that defendant was given a valid medical prescription entitling her to 10 Percocet tablets, a controlled substance under State law, and that she presented an altered prescription for 40 tablets, but that she obtained only one Percocet tablet while possessing the altered prescription, would not support a conviction under G.S. 90-108(a)(10), but would only support a conviction for the attempt to obtain a controlled substance by fraud under this section. State v. McHenry, 83 N.C. App. 58, 348 S.E.2d 825 (1986).

Where the defense of impossibility properly applied to bar a conviction under G.S. 90-95, and constructive possession was inapplicable because there was no evidence as to the actual source of the drugs and, although the defendant had the requisite intent, there was no evidence he ever had the capability to exercise dominion and control over the original shipment of drugs, which contained twelve and one-half pounds of marijuana hidden inside a television set, the court held that an appropriate alternative charge would have been an attempt, pursuant to this section. State v. Clark, 137 N.C. App. 90, 527 S.E.2d 319 (2000).

Evidence Supported Conviction for Conspiracy to Possess with Intent to Sell or Deliver. — Evidence tending to show that defendant had requested acquaintance to provide him with one ounce of cocaine, or 28.3 grams, was sufficient to support the inference that defendant intended to deliver or sell the cocaine to be obtained for him, so as to support a conviction for conspiracy to possess cocaine with intent to sell or deliver. State v. Morgan, 329 N.C. 654, 406 S.E.2d 833 (1991).

Attempted trafficking was the appropriate charge for defendant, who did not have possession of the requisite amount, but clearly intended and attempted to traffic cocaine. State v. Shook, 155 N.C. App. 183, 573 S.E.2d 249 (2002).

Attempt to traffic in marijuana by possession is a lesser-included offense of trafficking in marijuana by possession although the penalty for conviction of an attempted controlled substance offense is the same as the penalty for a conviction of the underlying crime. State v. Clark, 137 N.C. App. 90, 527 S.E.2d 319 (2000).

Applied in State v. Fleming, 52 N.C. App. 563, 279 S.E.2d 29 (1981); State v. Jamerson, 64 N.C. App. 301, 307 S.E.2d 436 (1983); State v. Drakeford, 104 N.C. App. 298, 409 S.E.2d 319 (1991).

Cited in State v. Cunningham, 108 N.C. App. 185, 423 S.E.2d 802 (1992); State v. Williamson, 110 N.C. App. 626, 430 S.E.2d 467 (1993).

§ 90-99. Republishing of schedules.

The North Carolina Department of Health and Human Services shall update and republish the schedules established by this Article on a semiannual basis for two years from January 1, 1972, and thereafter on an annual basis. (1971, c. 919, s. 1; 1977, c. 667, s. 3; 1997-443, s. 11A.118(a).)

§ 90-100. Rules.

The Commission may adopt rules relating to the registration and control of the manufacture, distribution, security, and dispensing of controlled substances within this State. (1971, c. 919, s. 1; 1977, c. 667, s. 3; 1981, c. 51, s. 9; 1991, c. 309, s. 2; 1993, c. 384, s. 1.)

Editor's Note. — Session Laws 2003-398, s. 3, provides: "Pursuant to G.S. 90-100, the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services may adopt temporary and permanent rules relating to the acquisition, possession, and security of controlled substances by persons registered under the provisions of G.S. 90-102.1, as enacted by this act. The Department of Health and Human Services may adopt temporary and permanent rules relating to the training and qualifications for dog handlers and the certification of drug detection dogs subject to the provisions of G.S. 90-102.1, as enacted by this act."

CASE NOTES

Cited in State v. Best, 292 N.C. 294, 233 S.E.2d 544 (1977).

§ 90-101. Annual registration and fee to engage in listed activities with controlled substances; effect of registration; exceptions; waiver; inspection.

(a) Every person who manufactures, distributes, dispenses, or conducts research with any controlled substance within this State or who proposes to engage in any of these activities shall annually register with the North Carolina Department of Health and Human Services, in accordance with rules adopted by the Commission, and shall pay the registration fee set by the Commission for the category to which the applicant belongs. An applicant for registration shall file an application for registration with the Department of Health and Human Services and submit the required fee with the application. The categories of applicants and the maximum fee for each category are as follows:

CATEGORY	MAXIMUM FEE
Clinic	$150.00
Hospital	350.00
Nursing Home	150.00
Teaching Institution	150.00
Researcher	150.00
Analytical Laboratory	150.00
Dog Handler	150.00
Distributor	600.00
Manufacturer	700.00.

(a1) Any physician who prescribes or dispenses Buprenorphine for the treatment of opiate dependence shall annually register with the Department, in accordance with rules adopted by the Commission. In the application for registration under this subsection, the applicant shall document plans to ensure that patients are directly engaged or referred to a qualified provider to receive counseling and case management, as appropriate, and shall acknowledge the application of federal confidentiality regulations to patient information. Applicant plans for referral to appropriate services shall be a written document and may include either an executed memorandum of agreement, contractual arrangement, or linkage agreement with qualified providers. The

Department shall provide assistance upon request to physicians registered under this subsection to identify and establish linkages with qualified providers of counseling and case management. The Department shall provide the North Carolina Medical Board with any evidence of noncompliance with this subsection by a qualified physician prior to taking action to rescind the physician's registration to prescribe or dispense Buprenorphine for the treatment of opiate dependency.

(b) Persons registered by the North Carolina Department of Health and Human Services under this Article (including research facilities) to manufacture, distribute, dispense or conduct research with controlled substances may possess, manufacture, distribute, dispense or conduct research with those substances to the extent authorized by their registration and in conformity with the other provisions of this Article.

(c) The following persons shall not be required to register and may lawfully possess controlled substances under the provisions of this Article:

(1) An agent, or an employee thereof, of any registered manufacturer, distributor, or dispenser of any controlled substance if such agent is acting in the usual course of his business or employment;

(2) The State courier service operated by the Department of Administration, a common or contract carrier, or a public warehouseman, or an employee thereof, whose possession of any controlled substance is in the usual course of his business or employment;

(3) An ultimate user or a person in possession of any controlled substance pursuant to a lawful order of a practitioner;

(4) Repealed by Session Laws 1977, c. 891, s. 4.

(5) Any law-enforcement officer acting within the course and scope of official duties, or any person employed in an official capacity by, or acting as an agent of, any law-enforcement agency or other agency charged with enforcing the provisions of this Article when acting within the course and scope of official duties; and

(6) A practitioner, as defined in G.S. 90-87(22)a., who is required to be licensed in North Carolina by his respective licensing board.

(d) The Commission may, by rule, waive the requirement for registration of certain classes of manufacturers, distributors, or dispensers if it finds it consistent with the public health and safety.

(e) A separate registration shall be required at each principal place of business, research or professional practice where the registrant manufactures, distributes, dispenses or uses controlled substances.

(f) The North Carolina Department of Health and Human Services is authorized to inspect the establishment of a registrant, applicant for registration, or practitioner in accordance with rules adopted by the Commission.

(g) Practitioners licensed in North Carolina by their respective licensing boards may possess, dispense or administer controlled substances to the extent authorized by law and by their boards.

(h) A physician licensed by the North Carolina Medical Board pursuant to Article 1 of this Chapter may possess, dispense or administer tetrahydrocannabinols in duly constituted pharmaceutical form for human administration for treatment purposes pursuant to rules adopted by the Commission.

(i) A physician licensed by the North Carolina Medical Board pursuant to Article 1 of this Chapter may dispense or administer Dronabinol or Nabilone as scheduled in G.S. 90-90(5) only as an antiemetic agent in cancer chemotherapy. (1971, c. 919, s. 1; 1973, c. 1358, s. 12; 1977, c. 667, s. 3; c. 891, s. 4; 1979, c. 781; 1981, c. 51, s. 9; 1983, c. 375, s. 2; 1985, c. 439, s. 2; 1987, c. 412, s. 13; 1989 (Reg. Sess., 1990), c. 1040, s. 4; 1993, c. 384, s. 2; 1995, c. 94, ss. 26, 27; 1997-443, s. 11A.118(a); 1997-456, s. 27; 2003-335, s. 1; 2003-398, s. 1.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

CASE NOTES

Applied in State v. Best, 292 N.C. 294, 233 S.E.2d 544 (1977); State v. Piland, 58 N.C. App. 95, 293 S.E.2d 278 (1982).

Cited in State v. Tillman, 36 N.C. App. 141, 242 S.E.2d 898 (1978); State v. Rosario, 93 N.C. App. 627, 379 S.E.2d 434 (1989).

§ 90-102. Additional provisions as to registration.

(a) The North Carolina Department of Health and Human Services shall register an applicant to manufacture or distribute controlled substances included in Schedules I through VI of this Article unless it determines that the issuance of such registration is inconsistent with the public interest. In determining the public interest, the following factors shall be considered:

(1) Maintenance of effective controls against diversion of any controlled substances and any substance compounded therefrom into other than legitimate medical, scientific, or industrial channels;

(2) Compliance with applicable federal, State and local law;

(3) Prior conviction record of applicant, its agents or employees under federal and State laws relating to the manufacture, distribution, or dispensing of such substances;

(4) Past experience in the manufacture of controlled substances, and the existence in the establishment or facility of effective controls against diversion; and

(5) Any factor relating to revocation, suspension, or denial of past registrations, licenses, or applications under this or any other State or federal law;

(6) Such other factors as may be relevant to and consistent with the public health and safety.

(b) Registration granted under subsection (a) of this section shall not entitle a registrant to manufacture and distribute controlled substances included in Schedule I or II other than those specified in the registration.

(c) Individual practitioners licensed to dispense and authorized to conduct research under federal law with Schedules II through V substances must be registered with the North Carolina Department of Health and Human Services to conduct such research.

(d) Manufacturers and distributors registered or licensed under federal law to manufacture or distribute controlled substances included in Schedules I through VI of this Article are entitled to registration under this Article, but this registration is expressly made subject to the provisions of G.S. 90-103.

(e) The North Carolina Department of Health and Human Services shall initially permit persons to register who own or operate any establishment engaged in the manufacture, distribution, or dispensing of any substances prior to January 1, 1972, and who are registered or licensed by the State. (1971, c. 919, s. 1; 1973, c. 1358, s. 14; 1977, c. 667, s. 3; 1985, c. 439, ss. 3, 4; 1997-443, s. 11A.118(a).)

CASE NOTES

Cited in State v. Best, 292 N.C. 294, 233 S.E.2d 544 (1977).

§ 90-102.1. Registration of persons requiring limited use of controlled substances for training purposes in certain businesses.

(a) Definitions. — As used in this Article:

(1) "Commercial detection service" means any person, firm, association, or corporation contracting with another person, firm, association, or corporation for a fee or other valuable consideration to place, lease, or rent a trained drug detection dog with a dog handler.

(2) "Dog handler" means a person trained in the handling of drug detection dogs, including the care, feeding, and maintenance of drug detection dogs and the procedures necessary to train and control the behavior of drug detection dogs.

(3) "Drug detection dog" means a dog trained to locate controlled substances by scent.

(b) Registration. — A dog handler who is not exempt from registration under G.S. 90-101 who intends to use any controlled substance included in Schedules I through VI for the limited purpose of the initial training and maintenance training of drug detection dogs shall file an application for registration with the Department of Health and Human Services and pay the applicable fee as provided in G.S. 90-101.

(c) Prerequisites for Registration. — Upon receipt of an application, the Department of Health and Human Services shall conduct a background investigation, during the course of which the applicant shall be required to show that the applicant meets all the following requirements and qualifications:

(1) That the applicant is at least 21 years of age.

(2) That the applicant is of good moral character and temperate habits. The following shall be prima facie evidence that the applicant does not have good moral character or temperate habits:

a. Conviction of any crime involving the illegal use, possession, sale, manufacture, distribution, or transportation of a controlled substance, drug, narcotic, or alcoholic beverage;

b. Conviction of a felony or a crime involving an act of violence;

c. Conviction of a crime involving unlawful breaking or entering, burglary, larceny, or any offense involving moral turpitude; or

d. A history of addiction to alcohol or a narcotic drug;

provided that, for purposes of this subsection, conviction means and includes the entry of a plea of guilty or no contest or a verdict rendered in open court by a judge or jury.

(3) That the applicant has not been convicted of any felony involving the illegal use, possession, sale, manufacture, distribution, or transportation of a controlled substance, drug, narcotic, or alcoholic beverage.

(4) That the applicant has the necessary training, qualifications, and experience to demonstrate competency and fitness as a dog handler as the Department of Health and Human Services may determine by rule for all registrations to be approved by the Department.

(5) That the applicant affirms in writing that if the application for registration is approved, the applicant shall report all dog alerts to, or finds of, any controlled substance to a law enforcement agency having jurisdiction in the area where the dog alert occurs or where the controlled substance is found.

(d) Criminal Record Check. — The Department of Justice may provide a criminal record check to the Department of Health and Human Services for a person who has applied for a new or renewal registration. The Department of Health and Human Services shall provide to the Department of Justice, along with the request, the fingerprints of the applicant, any additional information required by the Department of Justice, and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The Department of Health and Human Services shall keep all information pursuant to this subsection privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes. The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this subsection.

(e) Acquisition of Controlled Substances. — If the application for registration is approved, the registrant may lawfully obtain and possess controlled substances in the manner and to the extent authorized by the registration, in conformity with G.S. 90-105, other provisions of this Article, and rules promulgated by the Commission pursuant to G.S. 90-100.

(f) Record Keeping; Physical Security. — Each registrant shall keep records and maintain inventories in the manner specified in G.S. 90-104. Registrants shall provide effective controls and procedures to guard against theft and diversion of controlled substances. Controlled substances shall be stored in a securely locked, substantially constructed cabinet, and the storage area shall be protected by an alarm system that is continuously monitored by an alarm company central station.

(g) Disclosure of Discovery of Controlled Substances. — A dog handler shall, upon a dog alert or finding of a controlled substance, notify the State or local law enforcement agency having jurisdiction over the area where the dog alert occurs or the controlled substance is found. Before leaving the premises where the dog alert occurs or where the controlled substance is found, the dog handler shall inform law enforcement of the dog alert or the finding of a controlled substance and shall provide all relevant information concerning the dog alert or the discovery of the controlled substance.

(h) Commercial Detection Services; Dog Certification and Client Confidentiality. — Any drug detection dog utilized in a commercial detection service in this State shall first be certified by a canine certification association approved by the Department of Health and Human Services. Any person, including a nonresident, engaged in providing a commercial detection service in this State shall comply with the requirements of subsection (g) of this section regarding disclosure of the discovery of controlled substances. Client records of a dog handler who provides a commercial detection service for controlled substances shall be confidential unless the dog handler is required to report a dog alert or finding of a controlled substance in the course of a search, the records are lawfully subpoenaed, or the records are obtained by a law enforcement officer pursuant to a court order, a search warrant, or an exception to the search warrant requirement.

(i) Notice of Disclosure Requirement. — A dog handler shall provide conspicuous written notice to clients at the dog handler's place of business and in the contract for services stating that the dog handler is required by law to notify law enforcement of any dog alert or finding of a controlled substance.

Any person who contracts with a dog handler to provide commercial drug detection services shall provide conspicuous written notice to any person whose person or property may be subject to search stating that the premises is subject to search and that the dog handler is required by law to notify law enforcement of any dog alert or finding of a controlled substance.

(j) The Department of Health and Human Services shall have the power to investigate or cause to be investigated any complaints, allegations, or suspicions of wrongdoing or violations of this section involving individuals registered or applying to be registered under this section. The Department or the Commission may deny, suspend, or revoke a registration issued under this section if it is determined that the applicant or registrant has:

(1) Made any false statement or given any false information in connection with any application for a registration or for the renewal or reinstatement of a registration.
(2) Violated any provision of this Article.
(3) Violated any rule promulgated by the Department of Health and Human Services or the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services pursuant to the authority contained in this Article.

(k) This section does not apply to law enforcement agencies, to dog handlers and drug detection dogs that are employed or under contract to law enforcement agencies, or to other persons who are exempt from registration under G.S. 90- 101(c)(5). (2003-398, s. 2.)

Editor's Note. — Session Laws 2003-398, s. 3, provides: "Pursuant to G.S. 90-100, the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services may adopt temporary and permanent rules relating to the acquisition, possession, and security of controlled substances by persons registered under the provisions of G.S. 90-102.1, as enacted by this act. The Department of Health and Human Services may adopt temporary and permanent rules relating to the training and qualifications for dog handlers and the certification of drug detection dogs subject to the provisions of G.S. 90-102.1, as enacted by this act."

§ 90-103. Revocation or suspension of registration.

(a) A registration under G.S. 90-102 to manufacture, distribute, or dispense a controlled substance, may be suspended or revoked by the Commission upon a finding that the registrant:

(1) Has furnished false or fraudulent material information in any application filed under this Article;
(2) Has been convicted of a felony under any State or federal law relating to any controlled substance; or
(3) Has had his federal registration suspended or revoked to manufacture, distribute, or dispense controlled substances.

(b) The Commission may limit revocation or suspension of a registration to the particular controlled substance with respect to which grounds for revocation or suspension exist.

(c) Before denying, suspending, or revoking a registration or refusing a renewal of registration, the Commission shall serve upon the applicant or registrant an order to show cause why registration should not be denied, revoked, or suspended, or why the renewal should not be refused. The order to show cause shall contain a statement of the basis therefor and shall call upon the applicant or registrant to appear before the Commission at a time and place not less than 30 days after the date of service of the order, but in the case of a denial or renewal of registration, the show cause order shall be served not later than 30 days before the expiration of the registration. These proceedings shall be conducted in accordance with rules and regulations of the Commission required by Chapter 150B of the General Statutes, and subject to judicial review as provided in Chapter 150B of the General Statutes. Such proceedings shall be independent of, and not in lieu of, criminal prosecutions or other proceedings under this Article or any law of the State.

(d) The Commission may suspend, without an order to show cause, any registration simultaneously with the institutions of proceedings under this section, or where renewal of registration is refused if it finds that there is an imminent danger to the public health or safety which warrants this action. The suspension shall continue in effect until the conclusion of the proceedings, including judicial review thereof, unless sooner withdrawn by the Commission or dissolved by a court of competent jurisdiction.

(e) In the event the Commission suspends or revokes a registration granted under G.S. 90-102, all controlled substances owned or possessed by the registrant pursuant to such registration at the time of suspension or the effective date of the revocation order, as the case may be, may in the discretion of the Commission be placed under seal. No disposition may be made of substances under seal until the time for taking an appeal has elapsed or until all appeals have been concluded unless a court, upon application therefor, orders the sale of perishable substances and the deposit of the proceeds of the sale with the court. Upon a revocation order becoming final, all such controlled substances may be ordered forfeited to the State.

(f) The Bureau shall promptly be notified of all orders suspending or revoking registration. (1971, c. 919, s. 1; 1973, c. 1331, s. 3; 1977, c. 667, s. 3; 1981, c. 51, s. 9; 1987, c. 827, s. 1.)

§ 90-104. Records of registrants or practitioners.

Each registrant or practitioner manufacturing, distributing, or dispensing controlled substances under this Article shall keep records and maintain inventories in conformance with the record-keeping and the inventory requirements of the federal law and shall conform to such rules and regulations as may be promulgated by the Commission. (1971, c. 919, s. 1; 1977, c. 667, s. 3; 1981, c. 51, s. 9.)

CASE NOTES

Cited in White v. North Carolina Bd. of Pharmacy, 35 N.C. App. 554, 241 S.E.2d 730 (1978).

§ 90-105. Order forms.

Controlled substances included in Schedules I and II of this Article shall be distributed only by a registrant or practitioner, pursuant to an order form. Compliance with the provisions of the Federal Controlled Substances Act or its successor respecting order forms shall be deemed compliance with this section. (1971, c. 919, s. 1.)

CASE NOTES

Cited in State v. Best, 292 N.C. 294, 233 S.E.2d 544 (1977).

§ 90-106. Prescriptions and labeling.

(a) Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance included in Schedule II of this Article may be dispensed without the written prescription of a practitioner.

(b) In emergency situations, as defined by rule of the Commission, Schedule II drugs may be dispensed upon oral prescription of a practitioner, reduced promptly to writing and filed by the dispensing agent. Prescriptions shall be retained in conformity with the requirements of G.S. 90-104. No prescription for a Schedule II substance may be refilled.

(c) Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance included in Schedules III or IV, except paregoric, U.S.P., as provided in G.S. 90-91(e)1, may be dispensed without a prescription, and oral prescriptions shall be promptly reduced to writing and filed with the dispensing agent. Such prescription may not be filled or refilled more than six months after the date thereof or be refilled more than five times after the date of the prescription.

(d) No controlled substance included in Schedule V of this Article or paregoric, U.S.P., may be distributed or dispensed other than for a medical purpose.

(e) No controlled substance included in Schedule VI of this Article may be distributed or dispensed other than for scientific or research purposes by persons registered under, or permitted by, this Article to engage in scientific or research projects.

(f) No controlled substance shall be dispensed or distributed in this State unless such substance shall be in a container clearly labeled in accord with regulations lawfully adopted and published by the federal government or the Commission.

(g) When a copy of a prescription for a controlled substance under this Article is given as required by G.S. 90-70, such copy shall be plainly marked: "Copy — for information only." Copies of prescriptions for controlled substances shall not be filled or refilled.

(h) A pharmacist dispensing a controlled substance under this Article shall enter the date of dispensing on the prescription order pursuant to which such controlled substance was dispensed.

(i) A manufacturer's sales representative may distribute a controlled substance as a complimentary sample only upon the written request of a practitioner. Such request must be made on each distribution and must contain the names and addresses of the supplier and the requester and the name and quantity of the specific controlled substance requested. The manufacturer shall maintain a record of each such request for a period of two years. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 1358, s. 15; 1975, c. 572; 1977, c. 667, s. 3; 1981, c. 51, s. 9; 2007-248, s. 2.)

Editor's Note. — Section 90-70, referred to in this section, along with certain other sections from Parts 1 and 1A of Article 4 of Chapter 90, has been recodified in Article 4A of Chapter 90. As to the preservation of prescription orders, see now G.S. 90-85.26. As to the availability of pharmacy records, see now G.S. 90-85.36.

Effect of Amendments. — Session Laws 2007-248, s. 2, effective July 20, 2007, substituted "on the prescription order" for "and shall write his own signature on the face of the prescription" in subsection (h).

CASE NOTES

Under subsection (a) a physician may lawfully prescribe drugs only through a written prescription. State v. Best, 292 N.C. 294, 233 S.E.2d 544 (1977).

Where a physician prescribes Schedule II controlled drugs, not in the normal course of professional practice in this State, he is acting unlawfully and in violation of subsection (a). State v. Best, 292 N.C. 294, 233 S.E.2d 544 (1977).

Legitimate Medical Purpose Standard Incorporated into Prescription Requirements of Subsections (a) and (c). — It is inconceivable that the legislature would have imposed tighter strictures on the dispensing of the less dangerous Schedule V drugs than it imposed on the dispensing of the drugs listed in Schedules II, III and IV. It is reasonable to assume that the legislature intended all controlled substances to be dispensed only for legitimate medical purposes and it felt no need specifically to enunciate such a standard for Schedules II, III and IV drugs as it had already incorporated the legitimate medical purpose standard into the prescription requirement of subsections (a) and (c). State v. Best, 292 N.C. 294, 233 S.E.2d 544 (1977).

Cited in State v. Noll, 88 N.C. App. 753, 364 S.E.2d 726 (1988).

§ 90-107. Prescriptions, stocks, etc., open to inspection by officials.

Prescriptions, order forms and records, required by this Article, and stocks of controlled substances included in Schedules I through VI of this Article shall be open for inspection only to federal and State officers, whose duty it is to enforce the laws of this State or of the United States relating to controlled substances included in Schedules I through VI of this Article, and to authorized employees of the North Carolina Department of Health and Human Services. No officer having knowledge by virtue of his office of any such prescription, order, or record shall divulge such knowledge other than to other law-enforcement officials or agencies, except in connection with a prosecution or proceeding in court or before a licensing board or officer to which prosecution or proceeding the person to whom such prescriptions, orders, or records relate is a party. (1971, c. 919, s. 1; 1973, c. 1358, s. 13; 1977, c. 667, s. 3; 1997-443, s. 11A.118(a).)

§ 90-108. Prohibited acts; penalties.

(a) It shall be unlawful for any person:

(1) Other than practitioners licensed under Articles 1, 2, 4, 6, 11, 12A of this Chapter to represent to any registrant or practitioner who manufactures, distributes, or dispenses a controlled substance under the provision of this Article that he is a licensed practitioner in order to secure or attempt to secure any controlled substance as defined in this Article or to in any way impersonate a practitioner for the purpose of securing or attempting to secure any drug requiring a prescription from a practitioner as listed above and who is licensed by this State;

(2) Who is subject to the requirements of G.S. 90-101 or a practitioner to distribute or dispense a controlled substance in violation of G.S. 90-105 or 90-106;

(3) Who is a registrant to manufacture, distribute, or dispense a controlled substance not authorized by his registration to another registrant or other authorized person;

(4) To omit, remove, alter, or obliterate a symbol required by the Federal Controlled Substances Act or its successor;

(5) To refuse or fail to make, keep, or furnish any record, notification, order form, statement, invoice or information required under this Article;

(6) To refuse any entry into any premises or inspection authorized by this Article;

(7) To knowingly keep or maintain any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, which is resorted to by persons using controlled substances in violation of this Article for the purpose of using such substances, or which is used for the keeping or selling of the same in violation of this Article;

(8) Who is a registrant or a practitioner to distribute a controlled substance included in Schedule I or II of this Article in the course of his legitimate business, except pursuant to an order form as required by G.S. 90-105;

(9) To use in the course of the manufacture or distribution of a controlled substance a registration number which is fictitious, revoked, suspended, or issued to another person;

(10) To acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge;

(11) To furnish false or fraudulent material information in, or omit any material information from, any application, report, or other document required to be kept or filed under this Article, or any record required to be kept by this Article;

(12) To make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling thereof so as to render such drug a counterfeit controlled substance;

(13) To obtain controlled substances through the use of legal prescriptions which have been obtained by the knowing and willful misrepresentation to or by the intentional withholding of information from one or more practitioners;

(14) Who is an employee of a registrant or practitioner and who is authorized to possess controlled substances or has access to controlled substances by virtue of his employment, to embezzle or fraudulently or knowingly and willfully misapply or divert to his own use or other unauthorized or illegal use or to take, make away with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or divert to his own use or other unauthorized or illegal use any controlled substance which shall have come into his possession or under his care.

(b) Any person who violates this section shall be guilty of a Class 1 misdemeanor. Provided, that if the criminal pleading alleges that the violation was committed intentionally, and upon trial it is specifically found that the violation was committed intentionally, such violations shall be a Class I felony. A person who violates subdivision (7) of subsection (a) of this section and also fortifies the structure, with the intent to impede law enforcement entry, (by barricading windows and doors) shall be punished as a Class I felon. (1971, c. 919, s. 1; 1973, c. 1358, s. 11; 1979, c. 760, ss. 5, 6; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1983, c. 294, s. 7; c. 773; 1991 (Reg. Sess., 1992), c. 1041, s. 1; 1993, c. 539, s. 622; 1994, Ex. Sess., c. 24, s. 14(c).)

Legal Periodicals. — For note on the punishment of physicians under the Controlled Substances Act, see 56 N.C.L. Rev. 154 (1978).

For note, "My Own (Not So) Private Garbage: the North Carolina Supreme Court Gives the Green Light to Warrantless Police Searches of Trash Placed Behind Your House in State v. Hauser," see 31 Wake Forest L. Rev. 1141 (1996).

CASE NOTES

Constitutionality. — The distinction between "knowing" and "intentional" in this section is not unconstitutionally vague, because this section not only provides adequate warnings as to the conduct it prohibits, but it also gives sufficiently clear guidelines and definitions for judges and juries to interpret and administer it uniformly. State v. Locklear, 84 N.C. App. 637, 353 S.E.2d 666 (1987).

When Writing of Prescription by Physician Violates Section. — Where a licensed physician writes a prescription for a controlled substance listed in Schedules II, III, IV or V, and that prescription is written outside of the normal course of professional practice in North Carolina and not for a legitimate medical purpose, the physician violates this section. State v. Best, 292 N.C. 294, 233 S.E.2d 544 (1977).

G.S. 14-120 is distinguishable from subdivision (a)(10) of this section, as G.S. 14-120 specifically states that the person violates the statute if he publishes or utters a forged instrument "knowing the same to be falsely forged or counterfeited," and no such language appears in subdivision (a)(10). State v. Baynard, 79 N.C. 559, 339 S.E.2d 810 (1986).

Misdemeanor Offense Under Subdivision (a)(10) Does Not Exist. — Because any commission of the offense set out in subdivision (a)(10) of this section is by definition intentional, and because subsection (b) of this section provides that intentional violations are felonies, a misdemeanor offense under subdivision (a)(10) of this section does not exist. State v. Church, 73 N.C. App. 645, 327 S.E.2d 33 (1985).

Intentional Act. — A person acts intentionally if he desires to cause the consequences of his act or believes that the consequences are substantially certain to result. State v. Bright, 78 N.C. App. 239, 337 S.E.2d 87 (1985), cert. denied, 315 N.C. 591, 341 S.E.2d 31 (1986).

Jury, by finding defendant guilty of maintaining a place for keeping controlled substances, inherently found that defendant did so intentionally; thus, the trial court did not err in treating defendant's violation of G.S. 90-108(a) as a felony. State v. Harrington, 171 N.C. App. 17, 614 S.E.2d 337, 2005 N.C. App. LEXIS 1189 (2005), cert. denied, sub nom. State v. Rattis, 360 N.C. 70, 623 S.E.2d 36 (2005).

Knowledge of Activity. — A person knows of an activity if he is aware of a high probability of its existence. State v. Bright, 78 N.C. App. 239, 337 S.E.2d 87 (1985), cert. denied, 315 N.C. 591, 341 S.E.2d 31 (1986).

Knowledge that a prescription is false or forged is an essential element of the offense under subdivision (a)(10) of this section. State v. Baynard, 79 N.C. App. 559, 339 S.E.2d 810 (1986).

"Resorted to." — The General Assembly did not intend the words "resorted to," as used in subdivision (a)(7) of this section, to include persons who live in the dwelling. State v. Rich, 87 N.C. App. 380, 361 S.E.2d 321 (1987).

Maintain means to "bear the expense of' carry on ... hold or keep in an existing state or condition." As this court noted in State v. Alston, subdivision (a)(7) of this section "does not require residence, but permits conviction if a defendant merely keeps or maintains a building for the purpose of keeping or selling controlled substances." State v. Allen, 102 N.C. App. 598, 403 S.E.2d 907 (1991), rev'd on other grounds, 332 N.C. 123, 418 S.E.2d 225 (1992).

Maintaining Dwelling Used for Controlled Substances. — Evidence showing that defendant resided in house in which cocaine was found, that she was cooking dinner there, and that she possessed cocaine and materials related to the use and sale of cocaine was sufficient to allow conviction under subdivision (a)(7) of this section for maintaining a dwelling used for the keeping or selling of controlled substances. State v. Rich, 87 N.C. App. 380, 361 S.E.2d 321 (1987).

Evidence of drug activity at a building during the time defendant was paying rent for the structure was relevant to the charge of maintaining a building for the purpose of keeping or selling a controlled substance. State v. Alston, 91 N.C. App. 707, 373 S.E.2d 306 (1988).

Defendant's payment of rent for the building in which drugs were found, possession of the key to a padlock for the front door of the building, and evidence that defendant did not actually reside at the premises, together with the circumstances supporting defendant's conviction for possession of cocaine, were facts sufficient to sustain a conviction under subsection (a)(7). State v. Alston, 91 N.C. App. 707, 373 S.E.2d 306 (1988).

Evidence was sufficient to support the charge of intentionally maintaining a dwelling for the purpose of keeping and selling a controlled substance where it showed delivery of package of cocaine, discovery of other cocaine, cocaine grinder, and scales, along with witness' testimony concerning defendant's prior drug dealing, and the evidence was clearly sufficient to support a conviction. State v. Rosario, 93 N.C. App. 627, 379 S.E.2d 434, cert. denied, 325 N.C. 275, 384 S.E.2d 527 (1989).

Where evidence showed that defendant provided financing for the business, a game room, operated on the premises in question, an inference could be made that the business was in another person's name only because defendant was ineligible to receive a liquor license, and where clearance had been obtained for defendant to work in the game room, evidence was sufficient to take the issue of whether defendant kept or maintained the establishment in violation of subdivision (a)(7). State v. Thorpe, 94 N.C. App. 270, 380 S.E.2d 777, cert. denied, 325 N.C. 276, 384 S.E.2d 528 (1989).

Where defendant and her husband held title to property on which barn was situated, defendant obtained building permit for the barn, electric power to barn was metered separately and defendant paid electric utility bills on barn during said time period, question for jury was presented as to whether defendant had knowingly "maintained" barn used by her husband in marijuana growing operation. State v. Allen, 102 N.C. App. 598, 403 S.E.2d 907 (1991), rev'd on other grounds, 332 N.C. 123, 418 S.E.2d 225 (1992).

Evidence was sufficient to support charge where defendant possessed a key to a house and used it to go in and out of the house, inside the master bedroom a letter was found addressed to defendant at that address, scales and baking soda were located in the kitchen of the house, a package of cocaine was addressed to defendant and defendant also listed the house address as his address after he was arrested. State v. Kelly, 120 N.C. App. 821, 463 S.E.2d 812 (1995).

Without sufficient evidence that defendant was responsible for the premises, the charge of knowingly maintaining a place to keep a controlled substance in violation of G.S. 90-108(a)(7) should have been dismissed. State v.

Harris, 157 N.C. App. 647, 580 S.E.2d 63 (2003).

Factors which may be taken into consideration in determining whether a person keeps or maintains a dwelling under G.S. 90-108(a)(7) include ownership of the property, occupancy of the property, repairs to the property, payment of utilities, payment of repairs, and payment of rent; since none of the factors is dispositive, the determination will depend on the totality of the circumstances. State v. Baldwin, 161 N.C. App. 382, 588 S.E.2d 497 (2003).

Defendant's motion to dismiss at the close of the state's evidence was properly denied as to the charge of maintaining a dwelling for the keeping and selling of cocaine because the evidence showed that defendant occupied the residence, paid for cable services, and defendant was visited by a probation officer there. State v. Shine, 173 N.C. App. 699, 619 S.E.2d 895, 2005 N.C. App. LEXIS 2306 (2005).

Maintaining Dwelling — Evidence Held Sufficient. — See State v. Mitchell, 104 N.C. App. 514, 410 S.E.2d 211 (1991), cert. granted, 331 N.C. 120, 414 S.E.2d 764 (1992), discretionary review improvidently granted, 336 N.C. 22, 442 S.E.2d 24 (1994).

Sufficient evidence existed to support defendant's conviction pursuant to this section. State v. Frazier, 142 N.C. App. 361, 542 S.E.2d 682 (2001).

Defendant's motion to dismiss a charge of violating G.S. 90-108(a)(7) by knowingly keeping or maintaining a dwelling house for the purpose of keeping or selling a controlled substance, was properly denied because there was sufficient evidence showing more than temporary occupancy where defendant received mail at the address for approximately one year, his driver's license showed the address as his home address, and his car was registered at the address. State v. Baldwin, 161 N.C. App. 382, 588 S.E.2d 497 (2003).

Utility and rent receipts and defendant's presence on the premises were sufficient evidence to survive a motion to dismiss, that defendant kept or maintained premises for the purpose of keeping or selling controlled substances. State v. Hart, 179 N.C. App. 30, 633 S.E.2d 102, 2006 N.C. App. LEXIS 1675 (2006), affirmed in part, reversed in part on other grounds, and remanded, 361 N.C. 309, 644 S.E.2d 201 (2007).

Maintaining Dwelling — Evidence Held Insufficient. — The evidence was insufficient to support a conviction under this section, where defendant was seen in and out of the dwelling eight to ten times over the course of two to three days; nobody else was seen entering the premises during this two to three day period of time; men's clothing was found in one closet in the dwelling; a police officer testified that he believed the defendant lived there, although he offered no basis for that opinion and had not checked to see who the dwelling was rented to or who paid the utilities and telephone bills; but the mother of defendant's three children testified that she rented the apartment, that the lease and utilities were in her name, that she paid for both rent and utilities, and that all the items in the dwelling belonged to her. State v. Bowens, 140 N.C. App. 217, 535 S.E.2d 870 (2000).

Conviction for intentionally maintaining a room for purpose of selling cocaine was reversed where only a small amount of cocaine, 1.9 grams, was found, and no implement to cut the cocaine, no scales to weigh the cocaine, and no containers for selling cocaine doses were found. State v. Battle, 167 N.C. App. 730, 606 S.E.2d 418 (2005).

Conviction of knowingly keeping a dwelling for the keeping of controlled substances was not supported by sufficient evidence, and defendant's motion to dismiss that charge should have been granted, where the state presented no evidence indicating that defendant owned the property, bore any expense for renting or maintaining the property, or took any other responsibility for the residence; the only evidence specifically relating to the maintenance of the property was a utility bill in the name of defendant's brother. State v. Carter, — N.C. App. —, 646 S.E.2d 846, 2007 N.C. App. LEXIS 1629 (2007).

Continuing Offense Precludes Several Violations. — Defendant's conviction of two counts of keeping and maintaining a dwelling for the use of a controlled substance in violation of this section, where no evidence indicated a termination and subsequent resumption of drug trafficking, was erroneous and constituted double jeopardy. State v. Grady, 136 N.C. App. 394, 524 S.E.2d 75 (2000).

Trial court erred in entering judgment on multiple counts of the offense of knowingly keeping a motor vehicle for the purpose of selling a controlled substance because the offense is a continuing offense. State v. Calvino, 179 N.C. App. 219, 632 S.E.2d 839, 2006 N.C. App. LEXIS 1834 (2006).

Maintaining Vehicle — Evidence Held Insufficient. — Where the evidence indicated that defendant possessed marijuana while in his car, and that on the following day drug paraphernalia were found at defendant's home, and authorities found one marijuana cigarette in defendant's car and two marijuana cigarettes at defendant's home, the evidence was insufficient to establish that defendant's vehicle was "used for the keeping or selling of" a controlled substance. State v. Mitchell, 336 N.C. 22, 442 S.E.2d 24 (1994).

Defendant's motion to dismiss the charge of maintaining a vehicle for the purpose of keeping or selling controlled substances should have been granted because the evidence did not indicate possession of cocaine in the vehicle that occurred over a duration of time, nor was there evidence that defendant had used the vehicle on a prior occasion to sell cocaine. State v. Lane, 163 N.C. App. 495, 594 S.E.2d 107 (2004).

Maintaining Vehicle — Evidence Held Sufficient. — Witness' testimony that the witness bought cocaine from defendant while sitting in defendant's van was sufficient to support defendant's conviction for knowingly keeping a motor vehicle for the purpose of selling a controlled substance. State v. Calvino, 179 N.C. App. 219, 632 S.E.2d 839, 2006 N.C. App. LEXIS 1834 (2006).

Constructive Possession in Vehicle. — If a defendant possesses a controlled substance while in a vehicle, he is guilty at least of possession of a controlled substance. If a vehicle contains a controlled substance but the defendant is not in the vehicle, he may be guilty of possession of a controlled substance by operation of the doctrine of constructive possession. State v. Mitchell, 336 N.C. 22, 442 S.E.2d 24 (1994).

Maintaining Vehicle Known to Be Used in Drug Offenses. — Under this section, maintaining a vehicle with knowledge that it is resorted to by persons for the use, keeping or selling of controlled substances is a misdemeanor, and maintaining a vehicle with the intent that it be so used is a Class I felony. State v. Bright, 78 N.C. App. 239, 337 S.E.2d 87 (1985), cert. denied, 315 N.C. 591, 341 S.E.2d 31 (1986).

Entrapment. — For discussion of entrapment as defense to charges brought under this section, see State v. Sanders, 95 N.C. App. 56, 381 S.E.2d 827 (1989).

Presumption of Forgery. — When a defendant in possession of a forged prescription for narcotics endeavors to obtain narcotics with it in violation of this section, a presumption arises that he either forged the prescription or had knowledge that it was a forgery. State v. Fleming, 52 N.C. App. 563, 279 S.E.2d 29 (1981).

Pharmacist's Knowledge of Invalidity of Forged Prescription. — In a prosecution of defendant for feloniously and intentionally acquiring possession of a controlled substance in violation of subdivision (a)(10) of this section, there was no merit to defendant's contention that since pharmacist knew the prescription presented by defendant was invalid before filling it, defendant did not violate the section, since the section prohibits the possession of a controlled substance by "misrepresentation, fraud, forgery, deception or subterfuge"; and, according to the evidence, defendant obtained possession of the controlled substance through the use of a forged prescription. State v. Lee, 51 N.C. App. 344, 276 S.E.2d 501 (1981).

Indictment Held Sufficient. — Where indictment charging an offense under subdivision (a)(10) of this section alleged that the offense was done "intentionally" and used terms implying a specific intent to deceive, it did not need to specifically allege that the defendant presented the false prescription knowing it was false. State v. Baynard, 79 N.C. App. 559, 339 S.E.2d 810 (1986).

Change of Address Allowed on Indictment. — The trial court correctly allowed State's amendment to an indictment for keeping and maintaining a dwelling for the use of a controlled substance to correct the address from "919 Dollard Town Road" to "929 Dollard Town Road." State v. Grady, 136 N.C. App. 394, 524 S.E.2d 75 (2000).

Evidence Held to Support Conviction for Attempt. — Evidence that defendant was given a valid medical prescription entitling her to 10 Percocet tablets, a controlled substance under State law, and that she presented an altered prescription for 40 tablets, but that she obtained only one Percocet tablet while possessing the altered prescription, would not support a conviction under subdivision (a)(10) of this section, but would only support a conviction for the attempt to obtain a controlled substance by fraud under G.S. 90-98. State v. McHenry, 83 N.C. App. 58, 348 S.E.2d 825 (1986).

Evidence Held Insufficient. — Where a motel room was rented by a person other than defendant, who apparently attended a party in the motel room and stayed in the room after the party had ended, the evidence was insufficient to show defendant maintained the room to keep controlled substances that were found in the room. State v. Kraus, 147 N.C. App. 766, 557 S.E.2d 144 (2001).

Conviction for possession of cocaine with intent to sell was reversed where only a small amount of cocaine, 1.9 grams, was found, and no implement to cut the cocaine, no scales to weigh the cocaine, and no containers for selling cocaine doses were found. State v. Battle, 167 N.C. App. 730, 606 S.E.2d 418 (2005).

Where Judgment Is Inconsistent with Verdict. — Where a verdict is returned convicting a defendant of a misdemeanor, but the judgment incorrectly reflects a conviction for a felony, the case must be remanded to correct the judgment and make it consistent with the verdict. State v. Townsend, 99 N.C. App. 534, 393 S.E.2d 551 (1990).

Erroneous Admission of Response to Routine Booking Question Required Reversal of Conviction. — Conviction for maintaining a dwelling place for the purpose of keeping or selling cocaine was reversed because the trial court erred in admitting into evidence defendant's response to a routine booking question about his address; the court found that the officer who presented the question fully expected to produce an incriminating response. The error was not harmless because, without that evidence, it was apparent that the evidence was insufficient to support a conviction for maintaining a dwelling for the purpose of keeping or selling cocaine. State v. Boyd, 177 N.C. App. 165, 628 S.E.2d 796, 2006 N.C. App. LEXIS 854 (2006).

Applied in State v. Booze, 29 N.C. App. 397, 224 S.E.2d 298 (1976); State v. Austin, 31 N.C. App. 20, 228 S.E.2d 507 (1976); State v. Brady, 147 N.C. App. 755, 557 S.E.2d 148 (2001).

Cited in Eury v. North Carolina Emp. Sec. Comm'n, 115 N.C. App. 590, 446 S.E.2d 383, cert. denied, 338 N.C. 309, 451 S.E.2d 635 (1994); State v. Cooper, 304 N.C. 701, 286 S.E.2d 102 (1982); State v. Myrick, 60 N.C. App. 362, 299 S.E.2d 439 (1983); State v. Coffey, 65 N.C. App. 751, 310 S.E.2d 123 (1984); State v. Newcomb, 84 N.C. App. 92, 351 S.E.2d 565 (1987); State v. Noll, 88 N.C. App. 753, 364 S.E.2d 726 (1988); United States v. Alston, 717 F. Supp. 378 (M.D.N.C. 1989), aff'd, 902 F.2d 267 (4th Cir. 1990); State v. Beckham, 105 N.C. App. 214, 412 S.E.2d 114 (1992); State v. Allen, 332 N.C. 123, 418 S.E.2d 225 (1992); State v. McEachern, 114 N.C. App. 218, 441 S.E.2d 574 (1994); State v. Hauser, 115 N.C. App. 431, 445 S.E.2d 73 (1994); State v. Hodge, 118 N.C. App. 655, 456 S.E.2d 855 (1995); State v. Johnson, 143 N.C. App. 307, 547 S.E.2d 445 (2001); State v. Dickerson, 152 N.C. App. 714, 568 S.E.2d 281 (2002); Jacobs v. Physicians Weight Loss Ctr. of Am., Inc., 173 N.C. App. 663, 620 S.E.2d 232, 2005 N.C. App. LEXIS 2280 (2005); State v. Euceda-Valle, — N.C. App. —, 641 S.E.2d 858, 2007 N.C. App. LEXIS 584 (2007).

§ 90-109. Licensing required.

A facility for drug treatment as defined in G.S. 122C-3(14)b. shall obtain the license required by Article 2 of Chapter 122C of the General Statutes permitting operation. Subject to rules governing the operation and licensing of these facilities set by the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services, the Department of Health and Human Services shall be responsible for issuing licenses. These licensing rules shall be consistent with the licensing rules adopted under Article 2 of Chapter 122C of the General Statutes. (1971, c. 919, s. 1; 1973, c. 1361; 1977, c. 667, s. 3; 1981, c. 51, s. 9; 1983, c. 718, s. 2; 1985, c. 589, s. 32; 1995, c. 509, s. 39; 1997-443, s. 11A.118(a).)

§ 90-109.1. Treatment.

(a) A person may request treatment and rehabilitation for drug dependence from a practitioner, and such practitioner or employees thereof shall not disclose the name of such person to any law-enforcement officer or agency; nor shall such information be admissible as evidence in any court, grand jury, or administrative proceeding unless authorized by the person seeking treatment. A practitioner may undertake the treatment and rehabilitation of such person or refer such person to another practitioner for such purpose and under the same requirement of confidentiality.

(b) An individual who requests treatment or rehabilitation for drug dependence in a program where medical services are to be an integral component of his treatment shall be examined and evaluated by a practitioner before receiving treatment and rehabilitation services. If a practitioner performs an initial examination and evaluation, the practitioner shall prescribe a proper course of treatment and medication, if needed. That practitioner may authorize another practitioner to provide the prescribed treatment and rehabilitation services.

(c) Every practitioner that provides treatment or rehabilitation services to a person dependent upon drugs shall periodically as required by the Secretary of the North Carolina Department of Health and Human Services commencing January 1, 1972, make a statistical report to the Secretary of the North Carolina Department of Health and Human Services in such form and manner as the Secretary shall prescribe for each such person treated or to whom rehabilitation services were provided. The form of the report prescribed shall be furnished by the Secretary of the North Carolina Department of Health and Human Services. Such report shall include the number of persons treated or to whom rehabilitation services were provided; the county of such person's legal residence; the age of such person; the number of such persons treated as inpatients and the number treated as outpatients; the number treated who had received previous treatment or rehabilitation services; and any other data required by the Secretary. If treatment or rehabilitation services are provided to a person by a hospital, public agency, or drug treatment facility, such hospital, public agency, or drug treatment facility shall coordinate with the treating medical practitioner so that statistical reports required in this section shall not duplicate one another. The Secretary shall cause all such reports to be compiled into periodical reports which shall be a public record. (1971, c. 919, s. 1; 1977, c. 667, s. 3; 1985, c. 439, s. 5; 1997-443, s. 11A.118(a).)

CASE NOTES

Mental Health Records Previously Admitted Into Evidence In Parental Rights Termination Case. — Trial court did not err by considering mental health records of a mother contained within the underlying file and previously admitted into evidence in proceedings to terminate her parental rights, because the mental health records challenged by the mother were originally admitted into evidence during a permanency planning review hearing and were not challenged by the mother at that time. In re J.B., 172 N.C. App. 1, 616 S.E.2d 264, 2005 N.C. App. LEXIS 1589 (2005).

§ 90-110. Injunctions.

(a) The superior court of North Carolina shall have jurisdiction in proceedings in accordance with the rules of those courts to enjoin violations of this Article.

(b) In case of an alleged violation of an injunction or restraining order issued under this section, trial shall, upon demand of the accused, be by a jury in accordance with the rules of the superior courts of North Carolina. (1971, c. 919, s. 1.)

§ 90-111. Cooperative arrangements.

The North Carolina Department of Health and Human Services and the Attorney General of North Carolina shall cooperate with federal and other State agencies in discharging their responsibilities concerning traffic in controlled substances and in suppressing the abuse of controlled substances. To this end, they are authorized to:

(1) Arrange for the exchange of information between governmental officials concerning the use and abuse of controlled substances;

(2) Coordinate and cooperate in training programs on controlled substances for law enforcement at the local and State levels;

(3) Cooperate with the Bureau by establishing a centralized unit which will accept, catalogue, file, and collect statistics, including records of drug-dependent persons and other controlled substance law offenders within the State, and make such information available for federal, State, and local law-enforcement purposes. Provided that neither the Attorney General of North Carolina, the North Carolina Department of Health and Human Services nor any other State officer or agency shall be authorized to accept or file, or give out the names or other form of personal identification of drug-dependent persons who voluntarily seek treatment or assistance related to their drug dependency. (1971, c. 919, s. 1; 1977, c. 667, s. 3; 1997-443, s. 11A.118(a).)

§ 90-112. Forfeitures.

(a) The following shall be subject to forfeiture:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of the provisions of this Article;

(2) All money, raw material, products, and equipment of any kind which are acquired, used, or intended for use, in selling, purchasing, manufacturing, compounding, processing, delivering, importing, or exporting a controlled substance in violation of the provisions of this Article;

(3) All property which is used, or intended for use, as a container for property described in subdivisions (1) and (2);

(4) All conveyances, including vehicles, vessels, or aircraft, which are used or intended for use to unlawfully conceal, convey, or transport, or in any manner to facilitate the unlawful concealment, conveyance, or transportation of property described in (1) or (2), except that

a. No conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this Article unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this Article;

b. No conveyance shall be forfeited under the provisions of this section by reason of any act or omission, committed or omitted while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any state;

c. No conveyance shall be forfeited unless the violation involved is a felony under this Article;

d. A forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party who had no knowledge of or consented to the act or omission.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this Article.

(b) Any property subject to forfeiture under this Article may be seized by any law-enforcement officer upon process issued by any district or superior court having jurisdiction over the property except that seizure without such process may be made when:

(1) The seizure is incident to an arrest or a search under a search warrant;

(2) The property subject to seizure has been the subject of a prior judgment in favor of the State in a criminal injunction or forfeiture proceeding under this Article.

(c) Property taken or detained under this section shall not be repleviable, but shall be deemed to be in custody of the law-enforcement agency seizing it, which may:

(1) Place the property under seal; or,

(2) Remove the property to a place designated by it; or,

(3) Request that the North Carolina Department of Justice take custody of the property and remove it to an appropriate location for disposition in accordance with law.

Any property seized by a State, local, or county law enforcement officer shall be held in safekeeping as provided in this subsection until an order of disposition is properly entered by the judge.

(d) Whenever property is forfeited under this Article, the law-enforcement agency having custody of it may:

(1) Retain the property for official use; or

(2) Sell any forfeited property which is not required to be destroyed by law and which is not harmful to the public, provided that the proceeds be disposed of for payment of all proper expenses of the proceedings for forfeiture and sale including expense of seizure, maintenance of custody, advertising, and court costs; or

(3) Transfer any conveyance including vehicles, vessels, or aircraft which are forfeited under the provisions of this Article to the North Carolina Department of Justice when, in the discretion of the presiding judge and upon application of the North Carolina Department of Justice, said conveyance may be of official use to the North Carolina Department of Justice;

(4) Upon determination by the director of any law-enforcement agency that a vehicle, vessel or aircraft transferred pursuant to the provisions of this Article is of no further use to said agency for use in official investigations, such vehicle, vessel or aircraft may be sold as surplus property in the same manner as other vehicles owned by the law-enforcement agency and the proceeds from such sale after deducting the cost of sale shall be paid to the treasurer or proper officer authorized to receive fines and forfeitures to be used for the school fund of the county in the county in which said vehicle, vessel or aircraft was seized; provided, that any vehicle transferred to any law-enforcement agency under the provisions of this Article which has been modified to increase speed shall be used in the performance of official duties only and not for resale, transfer or disposition other than as junk.

(d1) Notwithstanding the provisions of subsection (d), the law-enforcement agency having custody of money that is forfeited pursuant to this section shall pay it to the treasurer or proper officer authorized to receive fines and forfeitures to be used for the school fund of the county in which the money was seized.

(e) All substances included in Schedules I through VI that are possessed, transferred, sold, or offered for sale in violation of the provisions of this Article shall be deemed contraband and seized and summarily forfeited to the State. All substances included in Schedules I through VI of this Article which are seized or come into the possession of the State, the owners of which are unknown, shall be deemed contraband and summarily forfeited to the State according to rules and regulations of the North Carolina Department of Justice.

All species of plants from which controlled substances included in Schedules I, II and VI of this Article may be derived, which have been planted or cultivated in violation of this Article, or of which the owners or cultivators are unknown, or which are wild growths, may be seized and summarily forfeited to the State.

The failure, upon demand by the Attorney General of North Carolina, or his duly authorized agent, of the person in occupancy or in control of land or premises upon which such species of plants are growing or being stored, to produce an appropriate registration, or proof that he is the holder thereof, shall constitute authority for the seizure and forfeiture.

(f) All other property subject to forfeiture under the provisions of this Article shall be forfeited as in the case of conveyances used to conceal, convey, or transport intoxicating beverages. (1971, c. 919, s. 1; 1973, cc. 447, 542; c. 1446, s. 6; 1983, c. 528; ss. 1-3; 1989, c. 772, s. 4.)

Legal Periodicals. — For a survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2252 (1997).

CASE NOTES

Intent of 1973 Amendment. — The legislature intended to expand this section to cover all felonies under this Article in which a vehicle was used. State v. Mebane, 101 N.C. App. 119, 398 S.E.2d 672 (1990), overruled on other grounds, State v. Pipkins, 337 N.C. 431, 446 S.E.2d 360 (1994).

Precedence over RICO. — The criminal forfeiture provisions of the Controlled Substances Act take precedence over the civil forfeiture provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO) where the possessor of the items seized and subject to forfeiture has been validly indicted and awaits criminal trial under the Controlled Substances Act. State ex rel. Thornburg v. Currency in Amount of $52,029.00, 324 N.C. 276, 378 S.E.2d 1 (1989).

State Forfeiture Proceeding Is Criminal And in Personam Proceeding. — A state forfeiture proceeding under G.S. 90-112 is criminal in nature and is an in personam proceeding. This is consistent with the traditional rules that unless otherwise provided, criminal forfeitures are in personam, not in rem, proceedings. Federal forfeitures under § 881 are civil in nature and are in rem proceedings. United States v. Winston-Salem/Forsyth County Bd. of Educ., 902 F.2d 267 (4th Cir. 1990).

State Court Did Not Have Jurisdiction to Exclusion of Federal Court. — State court seizing property under this section did not have jurisdiction to the exclusion of the federal district court proceeding under 21 U.S.C. § 881, because state and federal proceedings were not competing in rem proceedings. United States v. Winston-Salem/Forsyth County Bd. of Educ., 902 F.2d 267 (4th Cir. 1990).

Subsection (d1) Refers Only to Forfeitures Pursuant to This Section. — The plain language of N.C. Const., Art. IX, § 7, limits its application to forfeitures resulting from a "breach of the penal laws of the State" and subsection (d1) of the North Carolina Act refers only to forfeitures "pursuant to this section." United States v. Winston-Salem/Forsyth County Bd. of Educ., 902 F.2d 267 (4th Cir. 1990).

Section Does Not Create Right to Jury Trial. — Neither this section nor G.S. 90-112.1 creates a right to trial by jury. State v. Morris, 103 N.C. App. 246, 405 S.E.2d 351 (1991).

When Order of Seizure Must Be Applied for. — The plain effect of subsection (b) of this section is to circumscribe the authority of law-enforcement officers to seize vehicles unless they first obtain "process" from a neutral judicial officer. There is, however, no requirement in this section that the officers must apply for an order of seizure immediately after they have observed the prescribed criminal activity. State v. Hall, 52 N.C. App. 492, 279 S.E.2d 111, appeal dismissed and cert. denied, 304 N.C. 198, 285 S.E.2d 104 (1981).

Time Within Which Vehicle May Be Seized. — This section does not restrict the time within which a vehicle may be seized after a violation of the controlled substances law has been observed. State v. Hall, 52 N.C. App. 492, 279 S.E.2d 111, appeal dismissed and cert. denied, 304 N.C. 198, 285 S.E.2d 104 (1981).

To fix a definite time within which officers must act to seize a vehicle after they have seen an illegal drug transaction might hinder seriously the effectiveness of large-scale undercover drug investigations in which the officers are trying to find the big drug dealers through various smaller operators. If a vehicle must be seized immediately, or very soon, after the commission of a crime, it is likely that the detective's cover would be destroyed, resulting in increased danger to that officer if he continues to work in the investigation or, if he must then drop out of the operation, the waste of his special efforts, requiring much training and planning, whereby he was enabled to make effective contact with those involved in illegal drug trafficking. Thus, though a situation may arise where the length of time elapsing between the commission of a crime and the later issuance of an order of seizure is too unreasonable to be sustained, where process was served within a month after the officer saw a violation occur, the length of time was not unreasonable. State v. Hall, 52 N.C. App. 492, 279 S.E.2d 111, appeal dismissed and cert. denied, 304 N.C. 198, 285 S.E.2d 104 (1981).

United States May Adopt Seizure Although Person Who Seized Property Had No Authority. — Assuming, without deciding, police department violated G.S. 15-11.1(a) by transferring cash seized under this section to the federal DEA rather than to North Carolina Board of Education, the United States may adopt a seizure even when the person who seized the property had no authority to do so. United States v. Winston-Salem/Forsyth County Bd. of Educ., 902 F.2d 267 (4th Cir. 1990).

Scope of Search of Impounded Vehicle. — A search by police officers of a closed medicine bottle found in defendant's car exceeded the permissible scope of a valid inventory search of a lawfully impounded vehicle. State v. Hall, 52 N.C. App. 492, 279 S.E.2d 111, appeal dismissed and cert. denied, 304 N.C. 198, 285 S.E.2d 104 (1981).

Currency was not subject to forfeiture under this section solely by virtue of being found in "close proximity" to the controlled substance which the defendant was convicted of possessing. State v. McKinney, 36 N.C. App. 614, 244 S.E.2d 455 (1978).

Where there was no evidence showing that $5,900.00 in currency was acquired, used or intended for use in violation of subsection (a) of this section, except for the fact that defendant possessed a large quantity of cash at the time that he possessed a large quantity of narcotics, the court erred in ordering the forfeiture of such money under this section. State v. Teasley, 82 N.C. App. 150, 346 S.E.2d 227 (1986), cert. denied and appeal dismissed, 318 N.C. 701, 351 S.E.2d 759 (1987).

Where no evidence was presented at trial to indicate that $1,485 in unmarked money was linked to a drug transaction rather than to defendant's occasional employment as a welder, the portion of an order forfeiting the $1,485 was vacated. State v. Fink, 92 N.C. App. 523, 375 S.E.2d 303 (1989).

Trial court erred in ordering the forfeiture of currency seized as illicit drug money where defendant was not convicted of any crime related to the North Carolina Controlled Substances Act, G.S. 90-86 et seq., and specifically, none of the of the acts described in G.S. 90-112(a)(2). State v. Jones, 158 N.C. App. 465, 581 S.E.2d 107 (2003).

Where defendant was not found guilty of possessing cocaine with the intent to sell or deliver, the trial court was precluded from declaring that money recovered from defendant's person was subject to criminal forfeiture under subdivision (a)(2) of this section. State v. Johnson, 124 N.C. App. 462, 478 S.E.2d 16 (1996).

Defendant's vehicle was subject to forfeiture, where he was found guilty of felonies in which the vehicle was used, although he was only found guilty of a misdemeanor involving violation of using the vehicle. State v. Mebane, 101 N.C. App. 119, 398 S.E.2d 672 (1990), overruled on other grounds, State v. Pipkins, 337 N.C. 431, 446 S.E.2d 360 (1994).

Husband's testimony concerning his guilty pleas and his use of the defendant's vehicle while carrying a backpack containing proceeds from drug transactions were adequate to support a finding that the vehicle was used in the commission of a felony and that it was subject to forfeiture. State v. Honaker, 111 N.C. App. 216, 431 S.E.2d 869 (1993).

There is no requirement in G.S. 90-112, regarding the forfeiture of property incident to its connection to a controlled substance offense, for a state conviction. State v. Woods, 146 N.C. App. 686, 554 S.E.2d 383 (2001), aff'd, 356 N.C. 121, 564 S.E.2d 881 (2002).

North Carolina's forfeiture statute, G.S. 90-112, merely requires that the forfeiting party be convicted of a crime that is a felony under N.C. Gen. Stat. art. 5, ch. 90. State v. Woods, 146 N.C. App. 686, 554 S.E.2d 383 (2001), aff'd, 356 N.C. 121, 564 S.E.2d 881 (2002).

Violation of North Carolina Controlled Substances Act Required. — G.S. 90-112(a)(2) requires that the conviction of the property's owner be related to one of the acts described therein, i.e., selling, purchasing, manufacturing, compounding, processing, delivering, importing, or exporting a controlled substance in violation of the provisions of the North Carolina Controlled Substances Act, G.S. 90-86 et seq., before property is forfeited. State v. Jones, 158 N.C. App. 465, 581 S.E.2d 107 (2003).

Attorney General Did Not Abuse Discretion. — Assuming cash of drug dealer was subject to forfeiture, Attorney General did not abuse his discretion in using the equitable sharing provisions of 19 U.S.C. § 1616(a), since the police department was not required to request the North Carolina Department of Justice to take custody of it for disposition under State law and since at no time did the State seek forfeiture of the cash. United States v. Alston, 717 F. Supp. 378 (M.D.N.C. 1989), aff'd sub nom. United States v. Winston-Salem/Forsyth County Bd. of Educ., 902 F.2d 267 (4th Cir. 1990).

Where state did not seek forfeiture under G.S. 90-112, the U.S. Attorney General did not abuse his discretion by continuing the federal forfeiture proceeding and by following the equitable sharing provisions of 21 U.S.C.S. § 881(e)(1)(A) and 19 U.S.C.S. § 1616a(c)(1)(B)(ii). United States v. Winston-Salem/Forsyth County Bd. of Educ., 902 F.2d 267 (4th Cir. 1990).

Applied in State v. Hill, 153 N.C. App. 716, 570 S.E.2d 768 (2002).

Cited in State v. Rogers, 28 N.C. App. 110, 220 S.E.2d 398 (1975); State v. Meyers, 45 N.C. App. 672, 263 S.E.2d 835 (1980); State v. Triplett, 70 N.C. App. 341, 318 S.E.2d 913 (1984); State v. Reid, 76 N.C. App. 668, 334 S.E.2d 235 (1985); State v. Bonds, 120 N.C. App. 546, 463 S.E.2d 298 (1995); State v. Bishop, 343 N.C. 518, 472 S.E.2d 842 (1996), cert. denied, 519 U.S. 1097, 117 S. Ct. 779, 136 L. Ed. 2d 723 (1997).

OPINIONS OF ATTORNEY GENERAL

Standing of Property Owner to Contest Seizure. — Owner of a motor vehicle seized under the provisions of this section from a legal possessor of such motor vehicle did not have standing to intervene and petition for return of his vehicle as he did under the provisions of former G.S. 18A-21. Opinion of Attorney General to Honorable Robert Rouse, 44 N.C.A.G. 262 (1975).

Release to Department of Revenue for Satisfaction of Excise Taxes. — Money or personal property seized on the grounds it is subject to forfeiture may not be released without a court order to the Department of Revenue for satisfaction of controlled substance excise taxes owed by the property's owner. See opinion of Attorney General to Secretary Janice H. Faulkner, — N.C.A.G. — (July 19, 1994).

When a state or local law enforcement agency seizes money or personal property as evidence of a state controlled substances law violation or on the grounds the property is subject to forfeiture, and subsequently releases it without a court order to the Department of Revenue for satisfaction of controlled substance excise taxes owed by the property's owner, the court may not order the law enforcement agency which releases the property to pay into the court substitute funds of equal value. See opinion of Attorney General to Secretary Janice H. Faulkner, — N.C.A.G. — (July 19, 1994).

If a state or local law enforcement agency deposits funds with the court in substitution for money or personal property seized by the agency as evidence of a state controlled substances law violation or on the grounds it is subject to forfeiture, but subsequently releases it without a court order to the Department of Revenue for satisfaction of controlled substance excise taxes owed by the property's owner, the court may not order the substitute funds turned over to the owner of the original property or forfeit the substitute funds. See opinion of Attorney General to Secretary Janice H. Faulkner, — N.C.A.G. — (July 19, 1994).

§ 90-112.1. Remission or mitigation of forfeitures; possession pending trial.

(a) Whenever, in any proceeding in court for a forfeiture, under G.S. 90-112 of any conveyance seized for a violation of this Article the court shall have exclusive jurisdiction to continue, remit or mitigate the forfeiture.

(b) In any such proceeding the court shall not allow the claim of any claimant for remission or mitigation unless and until he proves (i) that he has an interest in such conveyance, as owner or otherwise, which he acquired in good faith; (ii) that he had no knowledge, or reason to believe, that it was being or would be used in the violation of laws of this State relating to controlled substances; (iii) that his interest is in an amount in excess or equal to the fair market value of such conveyance.

(c) If the court, in its discretion, allows the remission or mitigation the conveyance shall be returned to the claimant; and should there be joint request of any two or more claimants, whose claims are allowed, the court shall order the return of the conveyance to such of the joint requesting claimants as have the prior claim on lien. Such return shall be made only upon payment of all expenses incident to the seizure and forfeiture incurred by the State. In all other cases the court shall order disposition of such conveyance as provided in G.S. 90-112, and after satisfaction of the expenses of the sale, and such claims as may be approved by the court, the funds shall be paid to the treasurer or proper officer authorized to receive fines and forfeitures to be used for the school fund of the county in which said vehicle was seized.

(d) If the court should determine that the conveyance should be held for purposes of evidence, then it may order the vehicle to be held until the case is heard. (1975, c. 601.)

CASE NOTES

No Right to Jury Trial. — Neither G.S. 90-112 nor this section creates a right to trial by jury. State v. Morris, 103 N.C. App. 246, 405 S.E.2d 351 (1991).

Because the statutory right to trial by jury in alcohol-related forfeiture cases has been repealed, there is no right to trial by jury in a proceeding for remission of forfeiture under this section. State v. Morris, 103 N.C. App. 246, 405 S.E.2d 351 (1991).

An action under this section is in the nature of an action for replevin and is in essence a civil action; as such, the right to a jury trial, if any, is governed by N.C. Const., Art. I, § 25, and thus, defendant was not entitled to a trial by jury for her remission action. State v. Honaker, 111 N.C. App. 216, 431 S.E.2d 869 (1993).

This Section Compared with G.S. 18B-504. — A comparison of this section, enacted in 1975, and G.S. 18B-504 discloses that application of the provisions of G.S. 18B-504 to drug-related forfeitures is limited in scope, inasmuch as certain provisions in the two statutes cover the same substantive question. State v. Morris, 103 N.C. App. 246, 405 S.E.2d 351 (1991).

While reference to G.S. 18B-504, pursuant to G.S. 90-112(f), is still necessary in drug-related forfeiture proceedings to determine (i) when forfeiture occurs as to certain drug-related property subject to forfeiture and (ii) when an innocent person must apply for remission of forfeiture, the elements of proof under subsection (b) of this section are different from those specified in G.S. 18B-504(h) for alcohol-related forfeiture. State v. Morris, 103 N.C. App. 246, 405 S.E.2d 351 (1991).

Forfeiture may be defeated if claimant can show the illegal use occurred without his knowledge or consent. State v. Meyers, 45 N.C. App. 672, 263 S.E.2d 835 (1980).

Burden is on the claimant to prove to the fact-finder "that he had no knowledge, or reason to believe, that [the vehicle] was being or would be used in the violation of laws of this State relating to controlled substances." State v. Meyers, 45 N.C. App. 672, 263 S.E.2d 835 (1980).

Claimant is entitled to have fact-finder, whether court or jury, determine the essential issue in a forfeiture proceeding, namely, whether his vehicle was being used illegally to transport controlled substances without his knowledge or consent. State v. Meyers, 45 N.C. App. 672, 263 S.E.2d 835 (1980) (Decided under prior law).

Good Faith Interest. — Where a claimant's evidence showed he paid for a vehicle, which was subsequently seized under drug forfeiture provisions, and transferred title to defendant only upon condition that defendant reimburse him for part of the purchase price and that defendant's failure to make any payments to claimant was the sole reason claimant again took possession of title, the evidence did not support the court's conclusion that at the time of seizure claimant did not have an interest in the conveyance acquired in good faith. State v. Morris, 103 N.C. App. 246, 405 S.E.2d 351 (1991).

History of Forfeiture Laws — Alcohol Control. — For a case discussing the history of legislation providing for forfeiture of conveyances used to violate alcohol control laws and the relation of such laws to drug forfeiture statutes, see State v. Morris, 103 N.C. App. 246, 405 S.E.2d 351 (1991).

Applied in State v. Bass, 65 N.C. App. 801, 310 S.E.2d 150 (1984).

§ 90-113: Repealed by Session Laws 1973, c. 540, s. 7.

§ 90-113.1. Burden of proof; liabilities.

(a) It shall not be necessary for the State to negate any exemption or exception set forth in this Article in any complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under this Article, and the burden of proof of any such exemption or exception shall be upon the person claiming its benefit.

(b) In the absence of proof that a person is the duly authorized holder of an appropriate registration or order form issued under this Article, he shall be presumed not to be the holder of such registration or form, and the burden of proof shall be upon him to rebut such presumption.

(c) No liability shall be imposed by virtue of this Article upon any duly authorized officer, engaged in the lawful enforcement of this Article. (1971, c. 919, s. 1.)

CASE NOTES

Placing the burden of proving an exemption or exception on person claiming its benefit does not run afoul of constitutional standards, and the burden of proving that defendant possessed or sold and delivered a controlled substance is not shifted away from the State. State v. McNeil, 47 N.C. App. 30, 266 S.E.2d 824, cert. denied and appeal dismissed, 301 N.C. 102, 273 S.E.2d 306 (1980), cert. denied, 450 U.S. 915, 101 S. Ct. 1356, 67 L. Ed. 2d 339 (1981).

Exemption Through Authorization. — One may be exempt from State prosecution for the possession or the sale or delivery of controlled substances if that person is authorized by the North Carolina Controlled Substances

Act to so possess or sell or deliver such substances, but proof of such exemption through authorization must be provided by the defendant. State v. McNeil, 47 N.C. App. 30, 266 S.E.2d 824, cert. denied and appeal dismissed, 301 N.C. 102, 273 S.E.2d 306 (1980), cert. denied, 450 U.S. 915, 101 S. Ct. 1356, 67 L. Ed. 2d 339 (1981).

Prosecution of Officer's Agent. — It would violate every precept of fair play and fundamental justice to allow a law-enforcement officer to benefit from this section's protection and at the same time, prosecute his youthful agent, who at his insistence violated the provisions of the act. State v. Stanley, 288 N.C. 19, 215 S.E.2d 589 (1975).

§ 90-113.2. Judicial review.

All final determinations, findings, and conclusions of the Commission under this Article shall be final and conclusive decisions of the matters involved, except that any person aggrieved by such decision may obtain review of the decision as provided in Chapter 150B of the General Statutes. Findings of fact by the Commission, if supported by substantial evidence, shall be conclusive. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 1331, s. 3; 1977, c. 667, s. 3; c. 891, s. 5; 1981, c. 51, s. 9; 1987, c. 827, s. 1.)

§ 90-113.3. Education and research.

(a) The North Carolina Department of Public Instruction and the Board of Governors of the University of North Carolina are authorized and directed to carry out educational programs designed to prevent and deter misuse and abuse of controlled substances. In connection with such programs, they are authorized to:

(1) Promote better recognition of the problems of misuse and abuse of controlled substances within the regulated industry and among interested groups and organizations;

(2) Assist the regulated industry and interested groups and organizations in contributing to the reduction of misuse and abuse of controlled substances; and

(3) Disseminate the results of research on misuse and abuse of controlled substances to promote a better public understanding of what problems exist and what can be done to combat them.

(b) The North Carolina Department of Public Instruction and the Board of Governors of the University of North Carolina or either of them may enter into contracts for educational activities related to controlled substances.

(c) The North Carolina Department of Health and Human Services is authorized and directed to encourage research on misuse and abuse of controlled substances. In connection with such research and in furtherance of the enforcement of this Article, it is authorized to:

(1) Establish methods to assess accurately the effects of controlled substances and to identify and characterize controlled substances with potential for abuse;

(2) Make studies and undertake programs of research to:

  a. Develop new or improved approaches, techniques, systems, equipment, and devices to strengthen the enforcement of this Article;

  b. Determine patterns of misuse and abuse of controlled substances and the social effect thereof; and

  c. Improve methods for preventing, predicting, understanding, and dealing with the misuse and abuse of controlled substances.

(3) Enter into contracts with other public agencies, any district attorney, institutions of higher education, and private organizations or individuals for the purpose of conducting research, demonstrations, or special projects which bear directly on misuse and abuse of controlled substances.

(d) The North Carolina Department of Health and Human Services may enter into contracts for research activities related to controlled substances, and the North Carolina Department of Public Instruction and the Board of Governors of the University of North Carolina or either of them may enter into contracts for educational activities related to controlled substances, without performance bonds.

(e) The North Carolina Department of Health and Human Services may authorize persons engaged in research on the use and effects of controlled substances to withhold the names and other identifying characteristics of persons who are the subjects of such research. Persons who obtain this authorization may not be compelled in any State civil, criminal, administrative, legislative, or other proceeding to identify the subjects of research for which such authorization was obtained.

(f) The North Carolina Department of Health and Human Services may authorize persons engaged in research to possess and distribute controlled substances in accordance with such restrictions as the authorization may impose. Persons who obtain this authorization shall be exempt from State prosecution for possession and distribution of controlled substances to the extent authorized by the North Carolina Department of Health and Human Services. (1971, c. 919, s. 1; c. 1244, s. 14; 1973, c. 476, s. 128; 1977, c. 667, s. 3; 1981, c. 218; 1997-443, s. 11A.118(a).)

CASE NOTES

Defendant Must Prove Exemption Through Authorization. — One may be exempt from State prosecution for the possession or the sale or delivery of controlled substances if that person is authorized by the North Carolina Controlled Substances Act to so possess or sell or deliver such substances, but proof of such exemption through authorization must be provided by the defendant. State v. McNeil, 47 N.C. App. 30, 266 S.E.2d 824, cert. denied and appeal dismissed, 301 N.C. 102, 273 S.E.2d 306 (1980), cert. denied, 450 U.S. 915, 101 S. Ct. 1356, 67 L. Ed. 2d 339 (1981).

§ **90-113.4:** Repealed by Session Laws 1981, c. 500, s. 2.

§ **90-113.4A:** Repealed by Session Laws 1989, c. 784, s. 4, effective with respect to acts committed on or after October 1, 1989.

§ 90-113.5. State Board of Pharmacy, North Carolina Department of Justice and peace officers to enforce Article.

It is hereby made the duty of the State Board of Pharmacy, its officers, agents, inspectors, and representatives, and all peace officers within the State, including agents of the North Carolina Department of Justice, and all State's attorneys, to enforce all provisions of this Article, except those specifically delegated, and to cooperate with all agencies charged with the enforcement of the laws of the United States, of this State, and of all other states, relating to controlled substances. The North Carolina Department of Justice is hereby authorized to make initial investigation of all violations of this Article, and is given original but not exclusive jurisdiction in respect thereto with all other law-enforcement officers of the State. (1971, c. 919, s. 1.)

CASE NOTES

Seizure by Drug Enforcement Agency Officer Not Improper. — It was not improper for state law enforcement officials to allow a federal Drug Enforcement Agency officer to seize money taken from defendant; the State's failure to present the actual money seized from defendant at trial did not prejudice defendant because the jury was able to consider substitute evidence. State v. Davis, 160 N.C. App. 693, 586 S.E.2d 804 (2003).

Applied in State v. Hill, 153 N.C. App. 716, 570 S.E.2d 768 (2002).

§ 90-113.6. Payments and advances.

(a) The Attorney General is authorized to pay any person, from funds appropriated for the North Carolina Department of Justice, for information concerning a violation of this Article, such sum or sums of money as he may find appropriate, without reference to any rewards to which such persons may otherwise be entitled by law.

(b) Moneys expended from appropriations of the North Carolina Department of Justice for the purchase of controlled substances or other substances proscribed by this Article which is subsequently recovered shall be reimbursed to the current appropriation for the Department.

(c) The Attorney General is authorized to direct the advance of funds by the State Treasurer in connection with the enforcement of this Article. (1971, c. 919, s. 1.)

§ 90-113.7. Pending proceedings.

(a) Prosecutions for any violation of law occurring prior to January 1, 1972, shall not be affected by these repealers, or amendments, or abated by reason, thereof.

(b) Civil seizures or forfeitures and injunctive proceedings commenced prior to January 1, 1972, shall not be affected by these repealers, or amendments, or abated by reason, thereof.

(c) All administrative proceedings pending on January 1, 1972, shall be continued and brought to final determination in accord with laws and regulations in effect prior to January 1, 1972. Such drugs placed under control prior to January 1, 1972, which are not included within Schedules I through VI of this Article shall automatically be controlled and listed in the appropriate schedule.

(d) The provisions of this Article shall be applicable to violations of law, seizures and forfeiture, injunctive proceedings, administrative proceedings, and investigations which occur following January 1, 1972. (1971, c. 919, s. 1.)

CASE NOTES

Legislative Intent for Prospective Application of Act. — The expressed intent of the General Assembly that the provisions of the Controlled Substances Act be prospective relates to the entire act. State v. Kelly, 281 N.C. 618, 189 S.E.2d 163 (1972).

The General Assembly intended that the provisions of the Controlled Substances Act be prospective and effective as of Jan. 1, 1972. State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972).

Effect of the Savings Clause. — The savings provision of this section leaves the Narcotic Drug Act, former G.S. 90-86 to 90-113 of this Chapter, continued in full force and effect for any offense committed prior to Jan. 1, 1972. State v. McIntyre, 281 N.C. 304, 188 S.E.2d 304 (1972).

Where the repealing statute contains a savings clause as to crimes committed prior to the repeal, or as to pending prosecutions, the offender may be tried and punished under the old law. In such case, the crime is punishable under the old statute although no prosecution is pending at the time the new statute goes into effect. State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972).

Prior Law Controls as to Prosecution

and Punishment for Offenses Committed Prior to Jan. 1, 1972. — The law as to prosecution and punishment as set forth in former Articles 5 and 5A of this Chapter as written prior to Jan. 1, 1972, remains in full force and effect as to offenses committed prior to Jan. 1, 1972. State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972); State v. Godwin, 13 N.C. App. 700, 187 S.E.2d 400, cert. denied, 281 N.C. 155, 188 S.E.2d 366 (1972); State v. Williams, 14 N.C. App. 431, 188 S.E.2d 717, cert. denied, 281 N.C. 627, 190 S.E.2d 473 (1972); State v. Lindquist, 14 N.C. App. 361, 188 S.E.2d 686 (1972).

For earlier cases indicating that reduction in grade of offenses committed prior to Jan. 1, 1972, inures to the benefit of the defendant, see State v. Smith, 13 N.C. App. 583, 186 S.E.2d 600, cert. denied, 281 N.C. 157, 187 S.E.2d 586 (1972); State v. Guy, 13 N.C. App. 637, 186 S.E.2d 663 (1972).

"Prosecution" Defined. — A prosecution consists of the series of proceedings had in the bringing of an accused person to justice, from the time when the formal accusation is made, by the filing of an affidavit or a bill of indictment or information in the criminal court, until the proceedings are terminated. This is a correct definition of the word "prosecution" and is consistent with the legislative intent expressed in this section. State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972).

"Prosecution" as the word is used in this section includes every step in a criminal action, from its commencement to its final determination by appellate review or until defendant begins to serve his sentence without pursuing an appeal or until the action is dismissed. State v. Godwin, 13 N.C. App. 700, 187 S.E.2d 400, cert. denied, 281 N.C. 155, 188 S.E.2d 366 (1972).

§ 90-113.8. Continuation of regulations.

Any orders, rules, and regulations which have been promulgated under any law affected by this act [c. 919 of the 1971 Session Laws] and which are in effect on the day preceding January 1, 1972, shall continue in effect until modified, superseded, or repealed by proper authority. (1971, c. 919, s. 2.)

Article 5A.

North Carolina Toxic Vapors Act.

§ 90-113.8A. Title.

This Article shall be known and may be cited as the "North Carolina Toxic Vapors Act." (1971, c. 1208, s. 1.)

CASE NOTES

Constitutionality. — It is clear to persons of ordinary intelligence that they are forbidden from smelling, with the intention of getting drunk or high, any vapors with the quality of causing the proscribed conditions. This is all the definition necessary to comply with the Constitution. State v. Futrell, 39 N.C. App. 674, 251 S.E.2d 715 (1979), decided prior to 1979 amendments to Article.

This Article does not create a class so broad that the inhaling of steam in sufficient quantity, the smoking of tobacco, or the smelling of perfume could be covered by the statute. State v. Futrell, 39 N.C. App. 674, 251 S.E.2d 715 (1979), decided prior to 1979 amendments to Article.

§ 90-113.9. Definitions.

For purposes of this Article, unless the context requires otherwise,

(1) "Intoxication" means drunkenness, stupefaction, depression, giddiness, paralysis, irrational behavior, or other change, distortion, or disturbance of the auditory, visual, or mental processes.

(2) "Commission" means the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services, established under Part 4 of Article 3 of Chapter 143B of the General Statutes. (1971, c. 1208, s. 1; 1979, c. 671, s. 1; 1981, c. 51, s. 10; 1995, c. 509, s. 40.)

§ 90-113.10. Inhaling fumes for purpose of causing intoxication.

It is unlawful for any person to knowingly breathe or inhale any compound, liquid, or chemical containing toluol, hexane, trichloroethane, isopropanol, methyl isobutyl ketone, methyl cellosolve acetate, cyclohexanone, ethyl alcohol, or any other substance for the purpose of inducing a condition of intoxication. This section does not apply to any person using as an inhalant any chemical substance pursuant to the direction of a licensed medical provider authorized by law to prescribe the inhalant or chemical substance possessed. (1971, c. 1208, s. 1; 1979, c. 671, s. 2; 2007-134, s. 1.)

Effect of Amendments. — Session Laws 2007-134, s. 1, effective December 1, 2007, and applicable to offenses committed on or after that date, inserted "ethyl alcohol," in the first sentence and substituted "licensed medical provider authorized by law to prescribe the inhalant or chemical substance possessed" for "physician or dentist" in the last sentence.

§ 90-113.10A. Alcohol vaporizing devices prohibited.

It shall be unlawful for any person to knowingly manufacture, sell, give, deliver, possess, or use an alcohol vaporizing device. As used in this section, "alcohol vaporizing device" or "AVD" means a device, machine, apparatus, or appliance that is designed or marketed for the purpose of mixing ethyl alcohol with pure or diluted oxygen, or another gas, to produce an alcoholic vapor that an individual can inhale or snort. An AVD does not include an inhaler, nebulizer, atomizer, or other device that is designed and intended by the manufacturer to dispense either a substance prescribed by a licensed medical provider authorized by law to prescribe the inhalant or chemical substance possessed, or an over-the-counter medication approved by monograph or new drug application under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 301, et seq.), provided the instrument is not used for the purpose of inducing a condition of intoxication through inhalation. Violation of this section is not a lesser included offense of G.S. 90-113.22. (2007-134, s. 2.)

Editor's Note. — Session Laws 2007-134, s. 5, made this section effective December 1, 2007, and applicable to offenses committed on or after that date.

§ 90-113.11. Possession of substances.

It is unlawful for any person to possess any compound, liquid, or chemical containing toluol, hexane, trichloroethane, isopropanol, methyl isobutyl ketone, methyl cellosolve acetate, cyclohexanone, ethyl alcohol, or any other substance which will induce a condition of intoxication through inhalation for the purpose of violating G.S. 90-113.10. (1971, c. 1208, s. 1; 1979, c. 671, s. 3; 2007-134, s. 3.)

Effect of Amendments. — Session Laws 2007-134, s. 3, effective December 1, 2007, and applicable to offenses committed on or after that date, inserted "ethyl alcohol" in the middle of this section.

§ 90-113.12. Sale of substance.

It is unlawful for any person to sell, offer to sell, deliver, give, or possess with the intent to sell, deliver, or give any other person any compound, liquid, or chemical containing toluol, hexane, trichloroethane, isopropanol, methyl isobutyl ketone, methyl cellosolve acetate, cyclohexanone, ethyl alcohol, or any other substance which will induce a condition of intoxication through inhalation if he has reasonable cause to suspect that the product sold, offered for sale, given, delivered, or possessed with the intent to sell, give, or deliver, will be used for the purpose of violating G.S. 90-113.10. (1971, c. 1208, s. 1; 1979, c. 671, s. 4; 2007-134, s. 4.)

Effect of Amendments. — Session Laws 2007-134, s. 4, effective December 1, 2007, and applicable to offenses committed on of after that date, inserted "ethyl alcohol" in the middle of this section.

§ 90-113.13. Violation a misdemeanor.

Violation of this Article is a Class 1 misdemeanor. (1979, c. 671, s. 5; 1993, c. 539, s. 623; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 90-113.14. Conditional discharge and expunction of records for first offenses.

(a) Whenever any person who has not previously been convicted of any offense under this Article or under any statute of the United States or any state relating to those substances included in Article 5 or 5A or 5B of Chapter 90 pleads guilty to or is found guilty of inhaling or possessing any substance having the property of releasing toxic vapors or fumes in violation of Article 5A of Chapter 90, the court may, without entering a judgment of guilt and with the consent of such person, defer further proceedings and place him on probation upon such reasonable terms and conditions as it may require. Notwithstanding the provisions of G.S. 15A-1342(c) or any other statute or law, probation may be imposed under this section for an offense under this Article for which the prescribed punishment includes only a fine. To fulfill the terms and conditions of probation the court may allow the defendant to participate in a drug education program approved for this purpose by the Department of Health and Human Services. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge such person and dismiss the proceedings against him. Discharge and dismissal under this section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime including the additional penalties imposed for second or subsequent convictions. Discharge and dismissal under this section or G.S. 90-96 may occur only once with respect to any person. Disposition of a case to determine discharge and dismissal under this section at the district court division of the General Court of Justice shall be final for the purpose of appeal. Prior to taking any action to discharge or dismiss under this section the court shall make a finding that the defendant has no record of previous convictions under the "North Carolina Toxic Vapors Act", Article 5A, Chapter 90, the "North Carolina Controlled Substances Act", Article 5, Chapter 90, or the "Drug Paraphernalia Act", Article 5B, Chapter 90.

(a1) Upon the first conviction only of any offense included in G.S. 90-113.10 or 90-113.11 and subject to the provisions of this subsection (a1), the court may place defendant on probation under this section for an offense under this Article including an offense for which the prescribed punishment includes only a fine. The probation, if imposed, shall be for not less than one year and shall contain a minimum condition that the defendant who was found guilty or pleads guilty enroll in and successfully complete, within 150 days of the date of the imposition of said probation, the program of instruction at the drug education school approved by the Department of Health and Human Services pursuant to G.S. 90-96.01. The court may impose probation that does not contain a condition that defendant successfully complete the program of instruction at a drug education school if:

(1) There is no drug education school within a reasonable distance of the defendant's residence; or
(2) There are specific, extenuating circumstances which make it likely that defendant will not benefit from the program of instruction.

The court shall enter such specific findings in the record; provided that in the case of subsection (2) above, such findings shall include the specific, extenuating circumstances which make it likely that the defendant will not benefit from the program of instruction.

For the purpose of determining whether the conviction is a first conviction or whether a person has already had discharge and dismissal, no prior offense occurring more than seven years before the date of the current offense shall be considered. In addition, convictions for violations of a provision of G.S. 90-95(a)(1) or 90-95(a)(2) or 90-95(a)(3), or 90-113.10, or 90-113.11, or 90-113.12, or 90-113.21 shall be considered previous convictions.

Failure to complete successfully an approved program of instruction at a drug education school shall constitute grounds to revoke probation and deny application for expunction of all recordation of defendant's arrest, indictment, or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. For purposes of this subsection, the phrase "failure to complete successfully the prescribed program of instruction at a drug education school" includes failure to attend scheduled classes without a valid excuse, failure to complete the course within 150 days of imposition of probation, willful failure to pay the required fee for the course, or any other manner in which the person fails to complete the course successfully. The instructor of the course to which a person is assigned shall report any failure of a person to complete successfully the program of instruction to the court which imposed probation. Upon receipt of the instructor's report that the person failed to complete the program successfully, the court shall revoke probation and/or deny application for expunction of all recordation of defendant's arrest, indictment, or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. A person may obtain a hearing before the court of original jurisdiction prior to revocation of probation or denial of application for expunction.

This subsection is supplemental and in addition to existing law and shall not be construed so as to repeal any existing provision contained in the General Statutes of North Carolina.

(b) Upon the dismissal of such person, and discharge of the proceedings against him under subsection (a) of this section, such person, if he were not over 21 years of age at the time of the offense, may apply to the court for an order to expunge from all official records (other than the confidential file to be retained by the Administrative Office of the Courts under subsection (c)) all recordation relating to his arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. The applicant shall attach to the application the following:

(1) An affidavit by the applicant that he has been of good behavior during the period of probation since the decision to defer further proceedings on the misdemeanor in question and has not been convicted of any felony, or misdemeanor, other than a traffic violation, under the laws of the United States or the laws of this State or any other state;
(2) Verified affidavits by two persons who are not related to the applicant or to each other by blood or marriage, that they know the character and reputation of the petitioner in the community in which he lives, and that his character and reputation are good;
(3) Affidavits of the clerk of superior court, chief of police, where appropriate, and sheriff of the county in which the petitioner was convicted,

and, if different, the county of which the petitioner is a resident, showing that the applicant has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to the conviction for the misdemeanor in question or during the period of probation following the decision to defer further proceedings on the misdemeanor in question.

The judge to whom the petition is presented is authorized to call upon a probation officer for any additional investigation or verification of the petitioner's conduct during the probationary period deemed desirable.

If the court determines, after hearing, that such person was dismissed and the proceedings against him discharged and that he was not over 21 years of age at the time of the offense, it shall enter such order. The effect of such order shall be to restore such person in the contemplation of the law to the status he occupied before such arrest or indictment or information. No person as to whom such order was entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of him for any purpose.

The court shall also order that said conviction and the records relating thereto be expunged from the records of the court, and direct all law-enforcement agencies bearing records of the same to expunge their records of the conviction. The clerk shall forward a certified copy of the order to the sheriff, chief of police or other arresting agency, as appropriate, and the sheriff, chief of police or other arresting agency, as appropriate, shall forward such order to the State Bureau of Investigation with a form supplied by the State Bureau of Investigation. The State Bureau of Investigation shall forward the court order in like manner to the Federal Bureau of Investigation.

(c) The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the Commission, the names of all persons convicted under such Articles, together with the offense or offenses of which such persons were convicted. The clerk shall also file with the Administrative Office of the Courts the names of those persons granted a conditional discharge under the provisions of this Article, and the Administrative Office of the Court shall maintain a confidential file containing the names of persons granted conditional discharges. The information contained in such file shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense under Article 5 or 5A has been previously granted a conditional discharge.

(d) Whenever any person is charged with a misdemeanor under this Article by possessing a controlled substance included within Schedules II through VI of this Article, or by possessing drug paraphernalia as prohibited by G.S. 90-113.21 upon dismissal by the State of the charges against him or upon entry of a nolle prosequi or upon a finding of not guilty or other adjudication of innocence, such person may apply to the court for an order to expunge from all official records all recordation relating to his arrest, indictment, or information, and trial. If the court determines, after hearing that such person was not over 21 years of age at the time any of the proceedings against him occurred, it shall enter such order. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment, or information, or trial in response to any inquiry made of him for any purpose.

(e) Whenever any person who has not previously been convicted of an offense under this Article or under any statute of the United States or any state relating to controlled substances included in any schedule of this Article or to that paraphernalia included in Article 5B of Chapter 90 pleads guilty to or has been found guilty of a misdemeanor under this Article by possessing a controlled substance included within Schedules II through VI of this Article, the court may, upon application of the person not sooner than 12 months after conviction, order cancellation of the judgment of conviction and expunction of the records of his arrest, indictment, or information, trial and conviction. A conviction in which the judgment of conviction has been cancelled and the records expunged pursuant to this section shall not be thereafter deemed a conviction for purposes of this section or for purposes of disqualifications or liabilities imposed by law upon conviction of a crime including the additional penalties imposed for second or subsequent convictions of this Article. Cancellation and expunction under this section may occur only once with respect to any person. Disposition of a case under this section at the district court division of the General Court of Justice shall be final for the purpose of appeal.

The granting of an application filed under this section shall cause the issue of an order to expunge from all official records (other than the confidential file to be retained by the Administrative Office of the Courts under subsection (c)) all recordation relating to his arrest, indictment, or information, trial, finding of guilty, judgment of conviction, cancellation of the judgment, and expunction of records pursuant to this section.

The judge to whom the petition is presented is authorized to call upon a probation officer for additional investigation or verification of the petitioner's conduct since conviction. If the court determines that the petitioner was convicted of a misdemeanor under this Article for possessing a controlled substance included within Schedules II through VI of this Article, or for possessing drug paraphernalia as prohibited by G.S. 90-113.21, that he was not over 21 years of age at the time of the offense, that he has been of good behavior since his conviction, that he has successfully completed a drug education program approved for this purpose by the Department of Health and Human Services, and that he has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to or since the conviction for the misdemeanor in question, it shall enter an order of expunction of the petitioner's court record. The effect of such order shall be to restore the petitioner in the contemplation of the law to the status he occupied before such arrest or indictment or information or conviction. No person as to whom such order was entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or conviction, or trial in response to any inquiry made of him for any purpose. The judge may waive the condition that the petitioner attend the drug education school if the judge makes a specific finding that there was no drug education school within a reasonable distance of the defendant's residence or that there were specific extenuating circumstances which made it likely that the petitioner would not benefit from the program of instruction.

The court shall also order that all law-enforcement agencies bearing records of the conviction and records relating thereto to expunge their records of the conviction. The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other arresting agency, as appropriate, and the arresting agency shall forward the order to the State Bureau of Investigation with a form supplied by the State Bureau of Investigation. The State Bureau of Investigation shall forward the court order in like manner to the Federal Bureau of Investigation.

The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the Administrative Office of the Courts the names of those persons whose judgments of convictions have been cancelled and expunged under the provisions of this Article, and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons whose judgments of convictions have been cancelled and expunged. The information contained in the file shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense under this Article has been previously granted cancellation and expunction of a judgment of conviction pursuant to the terms of this Article. (1971, c. 1078; 1975, c. 650, ss. 3, 4; 1977, c. 642, s. 3; 1979, c. 431, ss. 3, 4; 1981, c. 51, s. 11; c. 922, ss. 5-7; 1997-443, s. 11A.118(a).)

CASE NOTES

Destruction of Police Investigative Files. — Except for the possible application of this section, there is no statutory authority in North Carolina for the destruction of police investigative files containing fingerprints and photographs of an accused. State v. Bellar, 16 N.C. App. 339, 192 S.E.2d 86 (1972).

Should it be conceded that in extraordinary circumstances a remedy is available to have police investigative files destroyed or expunged, it would require notice, an opportunity to be heard, and findings of fact supporting the action taken. State v. Bellar, 16 N.C. App. 339, 192 S.E.2d 86 (1972).

OPINIONS OF ATTORNEY GENERAL

"Not over 21 Years" Means "Until Twenty-Second Birthday". — See opinion of Attorney General to Mr. Harvey D. Johnson, 42 N.C.A.G. 319 (1973).

§§ 90-113.15 through 90-113.19: Reserved for future codification purposes.

ARTICLE 5B.

Drug Paraphernalia.

§ 90-113.20. Title.

This Article shall be known and may be cited as the "North Carolina Drug Paraphernalia Act." (1981, c. 500, s. 1.)

Legal Periodicals. — For survey of 1981 criminal law, see 60 N.C.L. Rev. 1289 (1982).

CASE NOTES

Cited in State v. Hedgecoe, 106 N.C. App. 157, 415 S.E.2d 777 (1992).

§ 90-113.21. General provisions.

(a) As used in this Article, "drug paraphernalia" means all equipment, products and materials of any kind that are used to facilitate, or intended or designed to facilitate, violations of the Controlled Substances Act, including planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, and concealing controlled substances and injecting, ingesting, inhaling, or otherwise introducing controlled substances into the human body. "Drug paraphernalia" includes, but is not limited to, the following:

(1) Kits for planting, propagating, cultivating, growing, or harvesting any species of plant which is a controlled substance or from which a controlled substance can be derived;
(2) Kits for manufacturing, compounding, converting, producing, processing, or preparing controlled substances;
(3) Isomerization devices for increasing the potency of any species of plant which is a controlled substance;
(4) Testing equipment for identifying, or analyzing the strength, effectiveness, or purity of controlled substances;
(5) Scales and balances for weighing or measuring controlled substances;
(6) Diluents and adulterants, such as quinine, hydrochloride, mannitol, mannite, dextrose, and lactose for mixing with controlled substances;
(7) Separation gins and sifters for removing twigs and seeds from, or otherwise cleaning or refining, marijuana;
(8) Blenders, bowls, containers, spoons, and mixing devices for compounding controlled substances;
(9) Capsules, balloons, envelopes and other containers for packaging small quantities of controlled substances;
(10) Containers and other objects for storing or concealing controlled substances;
(11) Hypodermic syringes, needles, and other objects for parenterally injecting controlled substances into the body;
(12) Objects for ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the body, such as:
    a. Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;
    b. Water pipes;
    c. Carburetion tubes and devices;
    d. Smoking and carburetion masks;
    e. Objects, commonly called roach clips, for holding burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;
    f. Miniature cocaine spoons and cocaine vials;
    g. Chamber pipes;
    h. Carburetor pipes;
    i. Electric pipes;
    j. Air-driven pipes;
    k. Chillums;
    l. Bongs;
    m. Ice pipes or chillers.

(b) The following, along with all other relevant evidence, may be considered in determining whether an object is drug paraphernalia:

(1) Statements by the owner or anyone in control of the object concerning its use;
(2) Prior convictions of the owner or other person in control of the object for violations of controlled substances law;
(3) The proximity of the object to a violation of the Controlled Substances Act;
(4) The proximity of the object to a controlled substance;
(5) The existence of any residue of a controlled substance on the object;
(6) The proximity of the object to other drug paraphernalia;
(7) Instructions provided with the object concerning its use;
(8) Descriptive materials accompanying the object explaining or depicting its use;

(9) Advertising concerning its use;
(10) The manner in which the object is displayed for sale;
(11) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a seller of tobacco products or agricultural supplies;
(12) Possible legitimate uses of the object in the community;
(13) Expert testimony concerning its use;
(14) The intent of the owner or other person in control of the object to deliver it to persons whom he knows or reasonably should know intend to use the object to facilitate violations of the Controlled Substances Act. (1981, c. 500, s. 1.)

CASE NOTES

"Drug Paraphernalia" Defined. — Term "drug paraphernalia" included in statute making it illegal to possess drug paraphernalia was not defined in that statute, and, thus, G.S. 90-113.21 had to be consulted because that statutory provision identified items and factors to consider when determining whether an item amounted to drug paraphernalia. Accordingly, defendant had to be apprised of the item that the State was claiming was "drug paraphernalia" and since no evidence was presented that defendant possessed the item the State defined and the State was impermissibly allowed to substantially alter the indictment to allege an item defined as "drug paraphernalia," defendant's motion to dismiss that part of the indictment containing the drug paraphernalia charge was granted. State v. Moore, 162 N.C. App. 268, 592 S.E.2d 562 (2004).

Proof Through Direct and Circumstantial Evidence. — This section provides for proof of "drug paraphernalia" through both types of evidence, direct and circumstantial, in subsections (a) and (b), respectively. State v. Jones, 96 N.C. App. 389, 386 S.E.2d 217 (1989), appeal dismissed and cert. denied, 326 N.C. 366, 389 S.E.2d 809 (1990).

Scales. — Where trooper found scales in defendant's truck beside his suitcase, and the State also qualified a police officer as an expert on drug investigations and introduced his testimony to show expert testimony concerning the scales' use as a common weighing instrument for controlled substances, and offered other relevant evidence, this circumstantial evidence was substantial and supported an inference that the scales were "drug paraphernalia" sufficient for the trial court to submit the issue to the jury. State v. Jones, 96 N.C. App. 389, 386 S.E.2d 217 (1989), appeal dismissed and cert. denied, 326 N.C. 366, 389 S.E.2d 809 (1990).

Police officers had probable cause to arrest defendant based on their plain view observation of cotton balls and glass tubes located in the back seat of her truck, as although legitimate uses exist for cotton balls and glass vials, the experiences of the officers and the proximity of the objects to cocaine demonstrated that the items were being used as drug paraphernalia. United States v. Dixon, 729 F. Supp. 1113 (W.D.N.C. 1990).

Cited in State v. Childers, 66 N.C. App. 464, 311 S.E.2d 384 (1984); State v. Brown, 101 N.C. App. 71, 398 S.E.2d 905 (1990); State v. Holmes, 109 N.C. App. 615, 428 S.E.2d 277 (1993); State v. Harper, 158 N.C. App. 595, 582 S.E.2d 62 (2003), cert. denied, 357 N.C. 509, 588 S.E.2d 372 (2003).

§ 90-113.22. Possession of drug paraphernalia.

(a) It is unlawful for any person to knowingly use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, package, repackage, store, contain, or conceal a controlled substance which it would be unlawful to possess, or to inject, ingest, inhale, or otherwise introduce into the body a controlled substance which it would be unlawful to possess.

(b) Violation of this section is a Class 1 misdemeanor. (1981, c. 500, s. 1; 1993, c. 539, s. 624; 1994, Ex. Sess., c. 24, s. 14(c).)

Legal Periodicals. — For note, "My Own (Not So) Private Garbage: the North Carolina Supreme Court Gives the Green Light to Warrantless Police Searches of Trash Placed Behind Your House in State v. Hauser," see 31 Wake Forest L. Rev. 1141 (1996).

CASE NOTES

"Drug Paraphernalia" Not Defined. — Term "drug paraphernalia" included in statute making it illegal to possess drug paraphernalia was not defined in that statute, and, thus, G.S. 90-113.21 had to be consulted because that statutory provision identified items and factors to consider when determining whether an item amounted to drug paraphernalia. Accordingly, defendant had to be apprised of the item that the State was claiming was "drug paraphernalia" and since no evidence was presented that defendant possessed the item the State defined and the State was impermissibly allowed to substantially alter the indictment to allege an item defined as "drug paraphernalia," defendant's motion to dismiss that part of the indictment containing the drug paraphernalia charge was granted. State v. Moore, 162 N.C. App. 268, 592 S.E.2d 562 (2004).

Actual Possession. — A person has actual possession when he or she has both the power and the intent to control disposition or use. State v. McLaurin, 320 N.C. 143, 357 S.E.2d 636 (1987).

Constructive possession is sufficient for purposes of this section; however, while it is not necessary to show that an accused has exclusive control of the premises where paraphernalia are found, where possession is nonexclusive, constructive possession may not be inferred without other incriminating circumstances. State v. McLaurin, 320 N.C. 143, 357 S.E.2d 636 (1987).

Defendant's Control Was Insufficiently Substantiated. — Where the defendant's control over premises in which paraphernalia were found was nonexclusive, and where there was no evidence of other incriminating circumstances linking her to those items, the defendant's control was insufficiently substantial to support a conclusion of her possession of the seized paraphernalia. State v. McLaurin, 320 N.C. 143, 357 S.E.2d 636 (1987).

Mere possession of a needle and syringe failed to establish the crucial element of possession of drug paraphernalia with the accompanying intent necessary to establish a violation of this section. State v. Hedgecoe, 106 N.C. App. 157, 415 S.E.2d 777 (1992).

Police officers had probable cause to arrest defendant based on their plain view observation of cotton balls and glass tubes located in the back seat of her truck, as although legitimate uses exist for cotton balls and glass vials, the experiences of the officers and the proximity of the objects to cocaine demonstrated that the items were being used as drug paraphernalia. United States v. Dixon, 729 F. Supp. 1113 (W.D.N.C. 1990).

Cited in State v. Childers, 66 N.C. App. 464, 311 S.E.2d 384 (1984); State v. Muncy, 79 N.C. App. 356, 339 S.E.2d 466 (1986); State v. Newcomb, 84 N.C. App. 92, 351 S.E.2d 565 (1987); State v. Hyleman, 89 N.C. App. 424, 366 S.E.2d 530 (1988); In re Sherrill, 328 N.C. 719, 403 S.E.2d 255 (1991); State v. Hudson, 103 N.C. App. 708, 407 S.E.2d 583 (1991); State v. Schirmer, 104 N.C. App. 472, 409 S.E.2d 704 (1991); State v. Beckham, 105 N.C. App. 214, 412 S.E.2d 114 (1992); State v. Sullivan, 110 N.C. App. 779, 431 S.E.2d 502 (1993); State v. Hauser, 115 N.C. App. 431, 445 S.E.2d 73 (1994); State v. Bell, 156 N.C. App. 350, 576 S.E.2d 695 (2003); State v. Oaks, 163 N.C. App. 719, 594 S.E.2d 788 (2004); State v. Shearin, 170 N.C. App. 222, 612 S.E.2d 371, 2005 N.C. App. LEXIS 1002 (2005), appeal dismissed, cert. denied, — N.C. —, 624 S.E.2d 369 (2005).

§ 90-113.23. Manufacture or delivery of drug paraphernalia.

(a) It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia knowing that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, package, repackage, store, contain, or conceal a controlled substance which it would be unlawful to possess, or that it will be used to inject, ingest, inhale, or otherwise introduce into the body a controlled substance which it would be unlawful to possess.

(b) Delivery, possession with intent to deliver, or manufacture with intent to deliver, of each separate and distinct item of drug paraphernalia is a separate offense.

(c) Violation of this section is a Class 1 misdemeanor. However, delivery of drug paraphernalia by a person over 18 years of age to someone under 18 years of age who is at least three years younger than the defendant shall be punishable as a Class I felony. (1981, c. 500, s. 1; c. 903, s. 1; 1993, c. 539, s. 625; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 90-113.24. Advertisement of drug paraphernalia.

(a) It is unlawful for any person to purchase or otherwise procure an advertisement in any newspaper, magazine, handbill, or other publication, or purchase or otherwise procure an advertisement on a billboard, sign, or other outdoor display, when he knows that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia described in this Article.

(b) Violation of this section is a Class 2 misdemeanor. (1981, c. 500, s. 1; c. 903, s. 1; 1993, c. 539, s. 626; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Cited in State v. Hedgecoe, 106 N.C. App. 157, 415 S.E.2d 777 (1992).

§§ 90-113.25 through 90-113.29: Reserved for future codification purposes.

Article 5C.

North Carolina Substance Abuse Professional Practice Act.

§ 90-113.30. Declaration of purpose.

The North Carolina Substance Abuse Professional Practice Board, established by G.S. 90-113.32, is recognized as the registering, certifying, and licensing authority for substance abuse professionals described in this Article in order to safeguard the public health, safety, and welfare, to protect the public from being harmed by unqualified persons, to assure the highest degree of professional care and conduct on the part of credentialed substance abuse professionals, to provide for the establishment of standards for the education of credentialed substance abuse professionals, and to ensure the availability of credentialed substance abuse professional services of high quality to persons in need of these services. It is the purpose of this Article to provide for the regulation of Board-credentialed persons offering substance abuse counseling services, substance abuse prevention services, or any other substance abuse services for which the Board may grant registration, certification, or licensure. (1993 (Reg. Sess., 1994), c. 685, s. 1; 1997-492, s. 1; 2005-431, s. 1.)

Cross References. — As to a civil action remedy for persons who are sexually exploited by their psychotherapists, see the Psychotherapy Patient/Client Sexual Exploitation Act, G.S. 90-21.41 et seq.

Editor's Note. — Session Laws 2005-431, s. 3, provides: "All members serving on the North Carolina Substance Abuse Professional Practice Board on the effective date of this act shall complete their current three-year terms. Upon completion of their terms, newly appointed or elected members of the Board shall serve four-year terms pursuant to G.S. 90-113.33 [G.S. 90-113.32], as enacted in Section 1 of this act."

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 469.

§ 90-113.31: Repealed by Session Laws 2005-431, s. 1, effective September 22, 2005.

Cross References. — For present definitions, see G.S. 90-113.31A.

§ 90-113.31A. Definitions.

The following definitions shall apply in this Article:

(1) Applicant. — A person who has initiated a process to become a substance abuse professional pursuant to this Article.

(2) Applicant supervisor. — A person who provides supervision as required by the Board to persons applying for registration, certification, or licensure as a substance abuse professional pursuant to this Article.

(3) Board. — The North Carolina Substance Abuse Professional Practice Board.

(4) Certified clinical supervisor. — A person certified by the Board to practice as a clinical supervisor in accordance with the provisions of this Article.

(5) Certified criminal justice addictions professional. — A person certified by the Board to practice as a criminal justice addictions professional who, under supervision, provides direct services to clients or offenders exhibiting substance abuse disorders and works in a program determined by the Board to be involved in a criminal justice setting.

(6) Certified substance abuse counselor. — A person certified by the Board to practice under the supervision of a practice supervisor as a substance abuse counselor in accordance with the provisions of this Article.

(7) Certified substance abuse prevention consultant. — A person certified by the Board to practice substance abuse prevention in accordance with the provisions of this Article.

(8) Certified substance abuse residential facility director. — A person certified by the Board to practice as a substance abuse residential facility director in accordance with the provisions of this Article.

(9) Clinical addictions specialist intern. — A person who successfully completes 300 hours of Board-approved supervised practical training and passes a written examination in pursuit of licensure as a clinical addictions specialist.

(10) Clinical supervisor intern. — A person designated by the Board to practice as a clinical supervisor under the supervision of a certified clinical supervisor for a period not to exceed three years without a showing of good cause in accordance with the provisions of this Article.

(11) Counseling. — The utilization of special skills to assist individuals, families, or groups in achieving objectives, including the following:
  a. Exploring a problem and its ramifications.
  b. Examining attitudes and feelings.
  c. Considering alternative solutions.
  d. Decision making.

(12) Credential. — Any registration, certification, or license issued by the Board.

(13) Credentialing body. — A board that licenses, certifies, registers, or otherwise regulates a profession or practice.

(14) Criminal history. — A history of conviction of a State crime, whether a misdemeanor or felony, that bears on an applicant's fitness for licensure to practice substance abuse professional services. The crimes include the criminal offenses set forth in any of the following Articles of Chapter 14 of the General Statutes: Article 5, Counterfeiting and Issuing Monetary Substitutes; Article 5A, Endangering Executive and Legislative Officers; Article 6, Homicide; Article 7A, Rape and Other Sex Offenses; Article 8, Assaults; Article 10, Kidnapping

and Abduction; Article 13, Malicious Injury or Damage by Use of Explosive or Incendiary Device or Material; Article 14, Burglary and Other Housebreakings; Article 15, Arson and Other Burnings; Article 16, Larceny; Article 17, Robbery; Article 18, Embezzlement; Article 19, False Pretenses and Cheats; Article 19A, Obtaining Property or Services by False or Fraudulent Use of Credit Device or Other Means; Article 19B, Financial Transaction Card Crime Act; Article 20, Frauds; Article 21, Forgery; Article 26, Offenses Against Public Morality and Decency; Article 26A, Adult Establishments; Article 27, Prostitution; Article 28, Perjury; Article 29, Bribery; Article 31, Misconduct in Public Office; Article 35, Offenses Against the Public Peace; Article 36A, Riots and Civil Disorders; Article 39, Protection of Minors; Article 40, Protection of the Family; Article 59, Public Intoxication; and Article 60, Computer-Related Crime. The crimes also include possession or sale of drugs in violation of the North Carolina Controlled Substances Act in Article 5 of Chapter 90 of the General Statutes and alcohol-related offenses including sale to underage persons in violation of G.S. 18B-302 or driving while impaired in violation of G.S. 20-138.1 through G.S. 20-138.5.

(15) Deemed status. — Recognition by the Board of the credentials offered by a professional discipline whereby the individuals certified, licensed, or otherwise recognized by the discipline as having met the standards of a clinical addictions specialist may apply individually for licensure as a licensed clinical addictions specialist.

(16) Dual relationship. — A relationship in addition to the professional relationship with a person to whom the substance abuse professional delivers services in the Twelve Core Functions or the performance domains, both as defined in rules adopted by the Board, or as provided in a supervisory capacity. These relationships may result in grounds for disciplinary action.

(17) Human services field. — An area of study that focuses on the biological, psychological, behavioral, and social aspects of human welfare with focus on the direct services designed to improve it.

(18) Independent study. — Any course of study that is not traditional classroom-based that must be preapproved by the Board or any organization that has deemed status with the Board.

(19) Licensed clinical addictions specialist. — A person licensed by the Board to practice as a clinical addictions specialist in accordance with the provisions of this Article.

(20) Practice supervisor. — A certified clinical supervisor, clinical supervisor intern, or licensed clinical addictions specialist who provides oversight and responsibility in a face-to-face capacity for each certified substance abuse counselor or criminal justice addictions professional.

(21) Prevention. — The reduction, delay, or avoidance of alcohol and of other drug use behavior. 'Prevention' includes the promotion of positive environments and individual strengths that contribute to personal health and well-being over an entire life and the development of strategies that encourage individuals, families, and communities to take part in assessing and changing their lifestyles and environments.

(22) Professional discipline. — A field of study characterized by the technical, educational, and ethical standards of a profession.

(23) Registrant. — A person who completes all requirements to be registered with the Board and is supervised by a certified clinical supervisor or clinical supervisor intern.

(24) Substance abuse counseling. — The assessment, evaluation, and provision of counseling and therapeutic service to persons suffering from substance abuse or dependency.

(25) Substance abuse counselor intern. — A person who successfully completes 300 hours of Board-approved supervised practical training and passes a written examination in pursuit of credentialing as a substance abuse counselor.

(26) Substance abuse professional. — A registrant, certified substance abuse counselor, substance abuse counselor intern, certified substance abuse prevention consultant, certified clinical supervisor, clinical addictions specialist intern, licensed clinical addictions specialist, certified substance abuse residential facility director, or certified criminal justice addictions professional. (1993 (Reg. Sess., 1994), c. 685, s. 1; 1997-492, s.2; 1999-164, s. 1; 1999-456, s. 24; 2001-370, s. 1; 2005-431, s. 1.)

§ 90-113.31B. Scope of practice.

The scope of practice is the use by all substance abuse professionals and their ongoing supervisees of principles, methods, and procedures of the Twelve Core Functions or performance domains as prescribed by the International Certification and Reciprocity Consortium/Alcohol and Other Drug Abuse, Incorporated, and as limited by individual credential and supervisory requirements pursuant to this Article. Specifically, the scope of practice for each individual defined as a substance abuse professional under G.S. 90-113.31A is as follows:

(1) The practice of a certified substance abuse counselor consists of the Twelve Core Functions, including screening, intake, orientation, assessment, treatment planning, counseling, case management, crisis intervention, client education, report and record keeping, consultation with other professionals in regard to client treatment and services, and referral to treat addictive disorder or disease and help prevent relapse.

(2) The practice of a certified substance abuse prevention consultant is based on knowledge in the performance domains to prevent or reduce the conditions that place individuals at increased risk of developing addictive disorder or disease and help prevent relapse.

(3) The practice of a certified clinical supervisor is based on knowledge in the performance domains to supervise substance abuse professionals who work to treat, prevent, or reduce the conditions that place individuals at risk of developing addictive disorder or disease and help prevent relapse.

(4) The practice of a licensed clinical addictions specialist may be independent and consists of the Twelve Core Functions, including screening, intake, orientation, assessment, treatment planning, counseling, case management, crisis intervention, client education, report and record keeping, consultation with other professionals in regard to client treatment and services, referral to reduce the conditions that place individuals at risk of developing addictive disorder or disease with co-occurring disorders, and treatment for addictive disorder or disease. The licensed clinical addictions specialist may provide supervision to maintain a professional credential as defined by this Article.

(5) The practice of a certified substance abuse residential facility director is a voluntary credential and consists of the Twelve Core Functions, including screening, intake, orientation, assessment, treatment planning, counseling, case management, crisis intervention, client education, report and record keeping, consultation with professionals in regard to client treatment and services, referral to prevent or reduce the conditions that place individuals at increased risk of developing

addictive disorder or disease, treatment for addictive disorder or disease, and the prevention of relapse as well as academic management training.

(6) The practice of a certified criminal justice addictions professional is based on knowledge in the performance domains of dynamics of addiction in criminal behavior; legal, ethical, and professional responsibility; criminal justice system and processes; screening, intake, and assessment; case management; monitoring; and client supervision and counseling to prevent or reduce the conditions that place individuals at increased risk of developing addictive disorder or disease, treat addictive disorder or disease, and help prevent relapse. (2005-431, s. 1.)

§ 90-113.32. Board; composition; voting.

(a) The Board is created as the authority to credential substance abuse professionals in North Carolina.

(b) Until the full Board is elected or appointed pursuant to subsection (c) of this section, the Board shall consist of 16 members with one member appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121, and one member appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121. The remaining 14 shall be those members of the current North Carolina Substance Abuse Professional Practice Board, Inc., who have terms that are unexpired as of the effective date of this Article. The initial Board shall appoint an initial Nominating and Elections Committee to fill immediate vacancies on the Board, using the process established in subsection (d) of this section. The election and appointment process of the initial Board shall result in a Board of 19 members by April 1, 1995. As these initial members' terms expire, their successors shall be appointed as described in subsection (c) of this section, until the permanent Board is established, as described in subsection (c) of this section. Time spent as an initial member counts in determining the limitation on consecutive terms prescribed in subsection (e) of this section.

(c) After the initial Board members' terms expire, the Board shall consist of the following members, all of whom shall reside in North Carolina, appointed or elected as follows:

(1) Eleven professionals credentialed pursuant to this Article and elected by the credentialed professionals, at least two of whom shall serve each of the four Division of Mental Health, Developmental Disabilities, and Substance Abuse Services regions of the State. Three members shall serve as members at large.

(2) Three members at large chosen from laypersons or other professional disciplines who have shown a special interest in the field of substance abuse, nominated by the Nominating and Elections Committee established by subsection (d) of this section and elected by the Board.

(3) Two members from the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services, Department of Health and Human Services, appointed by the Chief of the North Carolina Substance Abuse Single State Agency, at least one of whom administers substance abuse services.

(4) One member of the public at large appointed by the Governor.

(5) One member of the public at large appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121 and one member of the public at large appointed by the General Assembly upon the recommenda-

tion of the President Pro Tempore of the Senate in accordance with G.S. 120-121.

(6) One member shall represent each of the professional disciplines granted deemed status under G.S. 90-113.41A. The member may be appointed by the professional discipline on or before a date set by the Board. If the professional discipline has at least one association in the State, the member shall be chosen from a list of nominees submitted to the association. The members appointed or elected under this subdivision shall be certified as substance abuse specialists by the professional discipline that the members represent.

No member of the General Assembly shall serve on the Board.

(c1) Every member of the Board shall have the right to vote on all matters before the Board, except for the President who shall vote only in case of a tie or when another member of the Board abstains on the question of whether the professional discipline the member represents shall retain its deemed status.

(d) The Board shall appoint five professionals from the field of substance abuse counseling and substance abuse prevention consulting to serve on the Nominating and Elections Committee. Of these five, at least three shall not be members of the Board. The Board shall appoint a member of the Nominating and Elections Committee to serve as chair. The Committee's purpose is to accept nominations from professionals certified or licensed by the Board to fill vacancies on the Board in membership categories prescribed by subdivisions (1) and (2) of subsection (c) of this section and to conduct the election of Board members. The Committee shall solicit nominations from all professionals it has certified or licensed under this Article when elected members' terms are due to expire. The certified or licensed professionals shall submit to the Committee all nominations beginning 90 days and ending 28 days before the election of new Board members. The Committee shall furnish all certified or licensed professionals with a ballot containing all the nominees for each elected Board member vacancy. In soliciting and making nominations for this process, the Committee shall give consideration to factors that promote representation on the Board by professionals certified or licensed by the Board. The Committee shall serve for a two-year term, its successors to be appointed for the same term by the Board.

(e) Members of the Board shall serve for four-year terms. No Board member shall serve for more than two consecutive terms, but a person who has been a member for two consecutive terms may be reappointed after being off the Board for a period of at least one year. When a vacancy occurs in an unexpired term, the Board shall, as soon as practicable, appoint temporary members to serve until the end of the unexpired terms. Time spent as a temporary member does not count in determining the limitation on consecutive terms.

(f) If a member becomes ineligible to serve on the Board for any reason, except when the member has committed an ethical violation that results in the suspension or revocation of the member's professional credentials, that member may fulfill the remainder of his or her term on the Board. (1993 (Reg. Sess., 1994), c. 685, s. 1; c. 773, s. 15.2(a), (b); 1997-443, s. 11A.118(a); 1997-492, s. 3; 1999-164, ss. 2-4; 2005-431, s. 1.)

Editor's Note. — Session Laws 2005-431, s. 3, provides: "All members serving on the North Carolina Substance Abuse Professional Practice Board on the effective date of this act shall complete their current three-year terms. Upon completion of their terms, newly appointed or elected members of the Board shall serve four-year terms pursuant to G.S. 90-113.33 [G.S. 90-113.32], as enacted in Section 1 of this act."

§ 90-113.33. Board; powers and duties.

The Board shall:

(1) Examine and determine the qualifications and fitness of applicants for certification and licensure to practice in this State.

(1a) Determine the qualifications and fitness of organizations applying for deemed status.

(2) Issue, renew, deny, suspend, or revoke licensure, certification, or registration to practice in this State or reprimand or otherwise discipline a license, certificate, or registration holder in this State.

(3) Deal with issues concerning reciprocity.

(4) Conduct investigations for the purpose of determining whether violations of this Article or grounds for disciplining exists.

(5) Employ and fix the compensation of personnel and legal counsel that the Board determines is necessary to carry out the provisions of this Article. The Board's employment of legal counsel is subject to the provisions of G.S. 114-2.3. The Board may purchase or rent necessary office space, equipment, and supplies.

(6) Conduct administrative hearings in accordance with Chapter 150B of the General Statutes when a "contested case", as defined in Chapter 150B, arises.

(7) Appoint from its own membership one or more members to act as representatives of the Board at any meeting in which it considers this representation is desirable.

(8) Establish fees for applications for examination, registration, certificates of certification, licensure, and renewal, and other services provided by the Board.

(9) Adopt any rules necessary to carry out the purpose of this Article and its duties and responsibilities pursuant to this Article.

(10) Request that the Department of Justice conduct criminal history record checks of applicants for registration, certification, or licensure pursuant to G.S. 114-19.11A.

The powers and duties enumerated in this section are granted for the purposes of enabling the Board to safeguard the public health, safety, and welfare against unqualified or incompetent practitioners and are to be liberally construed to accomplish this objective. When the Board exercises its authority under this Article to discipline a person, it may, as part of the decision imposing the discipline, charge the costs of investigations and the hearing to the person disciplined. (1993 (Reg. Sess., 1994), c. 685, s. 1; 1997-492, s. 4; 1999-164, s. 5; 2001-370, ss. 2, 3; 2005-431, s. 1.)

§ 90-113.33A. Officers may administer oaths, and subpoena witnesses, records, and other materials.

The President or other presiding officer of the Board may administer oaths to all persons appearing before it as the Board may deem necessary to perform its duties, and may summon and issue subpoenas for the appearance of any witnesses deemed necessary to testify concerning any matter to be heard before or inquired into by the Board. The Board may order that any client records, documents, or other materials concerning any matter to be heard before or inquired into by the Board shall be produced before the Board or made available for inspection, notwithstanding any other provisions of law providing for the application of any counselor-client or physician-patient privilege with respect to such records, documents, or other materials. All records, documents, or other materials compiled by the Board are subject to the provisions of G.S. 90-113.34, except that in any proceeding before the Board, record of any hearing before the Board, and notice of charges against any person credentialed by the Board, the Board shall withhold from public disclosure the identity of a client, including information relating to dates and places of treatment, or any other information that tends to identify the client unless the client or the client's representative has expressly consented to the disclosure. Upon written request, the Board shall revoke a subpoena if, upon a hearing, it finds that the evidence sought does not relate to a matter in issue, the subpoena does not describe the evidence with sufficient particularity, or the subpoena is invalid. (1999-164, s. 6; 2005-431, s. 1.)

§ 90-113.34. Records to be kept; copies of records.

(a) The Board shall keep a regular record of its proceedings, together with the names of the members of the Board present, the names of the applicants for registration, certification, and licensure as well as other information relevant to its actions. The Board shall cause a record to be kept that shall show the name, last known place of business, last known place of residence, and date and number of the credential assigned to each substance abuse professional meeting the standards set forth in this Article. Any interested person in the State is entitled to obtain a copy of Board records upon application to the Board and payment of a reasonable charge that is based on the costs involved in providing the copy.

(b) The Board may in a closed session receive evidence regarding the provision of substance abuse counseling or other treatment and services provided to a client who has not expressly or through implication consented to the public disclosure of such treatment as may be necessary for the protection of the rights of the client or of the accused registrant or substance abuse professional and the full presentation of relevant evidence. All records, papers, and other documents containing information collected and compiled by the Board, its members, or employees as a result of investigations, inquiries, or interviews conducted in connection with awarding a credential or a disciplinary matter shall not be considered public records within the meaning of Chapter 132 of the General Statutes, except any notice or statement of charges, or notice of hearing shall be a public record notwithstanding that it may contain information collected and compiled as a result of an investigation, inquiry, or interview. If any record, paper, or other document containing information collected and compiled by the Board as provided in this subsection is received and admitted in evidence in any hearing before the Board, it shall thereupon be a public record.

(c) Notwithstanding any provision to the contrary, the Board may, in any proceeding, record of any hearing, and notice of charges, withhold from public disclosure the identity of a client who has not expressly or through implication consented to such disclosure of treatment by the accused substance abuse professional. (1993 (Reg. Sess., 1994), c. 685, s. 1; 1997-492, s. 5; 1999-164, s. 7; 2005-431, s. 1.)

§ 90-113.35. Disposition of funds.

All fees and other moneys collected and received by the Board shall be used to implement this Article. The financial records of the Board shall be subjected to an annual audit and paid for out of the funds of the Board. (1993 (Reg. Sess., 1994), c. 685, s. 1.)

§ 90-113.36. Credentials.

(a) The Board shall furnish a certificate of certification or licensure to each applicant successfully completing the requirements for his or her credential.

(b) The Board may furnish a certificate of certification or licensure to any person in another state or territory if the individual's qualifications were, at the date of registration, certification, or licensure, substantially equal to the requirements under this Article. However, an out-of-state applicant shall first file application and pay any required fees. (1993 (Reg. Sess., 1994), c. 685, s. 1; 2005-431, s. 1.)

§ 90-113.37: Repealed by Session Laws 2005-431, s. 1, effective September 22, 2005.

Cross References. — For present provisions relating to renewal of credentials, see G.S. 90-113.37A.

§ 90-113.37A. Renewal of credential; lapse.

(a) Every person credentialed pursuant to this Article who desires to maintain his or her credentials shall apply to the Board for a renewal of certification or licensure every other year and pay to the treasurer the prescribed fee.

(b) Renewal of licensure is subject to completion of at least 40 hours of the continuing education requirements established by the Board. Renewal of substance abuse counselor or substance abuse prevention consultant certification is subject to completion of at least 60 hours of the continuing education requirements established by the Board. A certified substance abuse counselor shall submit a Board-approved supervision contract signed by the applicant and a practice supervisor documenting ongoing supervision at a ratio of one hour of supervision to every 40 hours of practice after certification is granted by the Board on a form provided by the Board. Any person certified by the Board as a certified alcoholism counselor or certified drug abuse counselor shall become a certified substance abuse counselor.

A clinical supervisor shall complete at least 15 hours of substance abuse clinical supervision training prior to the certificate being renewed. A substance abuse residential facility director shall complete at least 10 hours of substance abuse training for renewal. A certified criminal justice addictions professional shall complete at least 40 hours of continuing education that must be earned in the certified criminal justice addictions professional performance domains. A certified criminal justice addictions professional shall submit a Board-approved supervision contract signed by the criminal justice addictions professional and a practice supervisor documenting ongoing supervision at a ratio of one hour of supervision to every 40 hours of practice after certification is granted by the Board on a form provided by the Board.

(c) Independent study hours shall compose no more than fifty percent (50%) of the total number of hours required for renewal.

(d) A credential that is not renewed automatically lapses, unless the Board approves the late renewal of a credential upon the payment of a late fee.

(e) No late renewal shall be granted more than five years after a certification or licensure expires.

(f) A suspended credential may be renewed as provided in this section. This renewal does not entitle the credentialed person to engage in conduct or activity in violation of the order or judgment by which the credential was suspended, until the credential is reinstated. If a credential revoked on disciplinary grounds is reinstated and requires renewal, the credentialed person shall pay the renewal fee and any applicable late fee.

(g) The Board shall establish the manner in which lapsed certification or licensure may be revived or extended. (1993 (Reg. Sess., 1994), c. 685, s. 1; 1997-492, s. 6; 1999-164, s. 8; 2005-431, s. 1.)

§ 90-113.38. Maximums for certain fees.

(a) The fee to obtain a certificate of certification as a substance abuse counselor, substance abuse prevention consultant, clinical supervisor, substance abuse residential facility director, or certified criminal justice addictions professional may not exceed four hundred seventy-five dollars ($475.00). The fee to renew a certificate may not exceed one hundred fifty dollars ($150.00).

(b) The fee to obtain a certificate of licensure for a clinical addictions specialist pursuant to deemed status shall not exceed one hundred fifty dollars ($150.00). The fee to renew a license for a clinical addictions specialist pursuant to deemed status shall not exceed one hundred dollars ($100.00). The fee to obtain a license for a clinical addictions specialist pursuant to all other procedures authorized by this Article shall not exceed four hundred seventy-five dollars ($475.00). The fee to renew the license shall not exceed one hundred fifty dollars ($150.00).

(b1) The fee to obtain a registration as a registrant shall not exceed one hundred fifty dollars ($150.00). The fee to renew a registration shall not exceed one hundred fifty dollars ($150.00).

(c) There shall be a reexamination fee of one hundred fifty dollars ($150.00) which shall be paid for each reexamination in addition to the fees authorized pursuant to subsection (a) of this section. There shall be a fee not to exceed twenty-five dollars ($25.00) for rescheduling any examination.

(d) There shall be a fee not to exceed twenty-five dollars ($25.00) to obtain a written verification or additional copy of a credential issued by the Board.

(e) There shall be a late renewal fee not to exceed one hundred twenty-five dollars ($125.00).

(f) In addition to any other prescribed fees, the Board shall charge a fee not to exceed one hundred fifty dollars ($150.00) for each administration of the test an applicant must pass to be credentialed as a United States Department of Transportation substance abuse professional. (1993 (Reg. Sess., 1994), c. 685, s. 1; 1997-492, s. 7; 1998-217, s. 25(a); 2001-370, s. 4; 2005-431, s. 1.)

§ 90-113.39. Standards for credentials.

The Board shall establish standards to credential substance abuse professionals. The credentialing standards of the International Certification and Reciprocity Consortium/Alcohol and Other Drug Abuse, Incorporated and the standards adopted by professional disciplines granted deemed status or their successor organizations may be used as guidelines for the Board's standards. The Board shall publish these required standards. (1993 (Reg. Sess., 1994), c. 685, s. 1; 1997-492, s. 8; 1999-164, s. 9; 2005-431, s. 1.)

§ 90-113.40. Requirements for certification and licensure.

(a) The Board shall issue a certificate certifying an applicant as a "Certified Substance Abuse Counselor" or as a "Certified Substance Abuse Prevention Consultant" if:

(1) The applicant is of good moral character.
(2) The applicant is not and has not engaged in any practice or conduct that would be grounds for disciplinary action under G.S. 90-113.44.
(3) The applicant is qualified for certification pursuant to the requirements of this Article and any rules adopted pursuant to it.
(4) The applicant has, at a minimum, a high school diploma or a high school equivalency certificate.
(5) The applicant has signed a form attesting to the intention to adhere fully to the ethical standards adopted by the Board.

(5a) The applicant submits to a complete criminal history record check pursuant to G.S. 90-113.46A.

(6) The applicant has completed 270 hours of Board-approved education. The Board may prescribe that a certain number of hours be in a course of study for substance abuse counseling and that a certain number of hours be in a course of study for substance abuse prevention consulting. Independent study hours shall not compose more than fifty percent (50%) of the total number of hours required for initial credentialing.

(7) The applicant has documented completion of a minimum of 300 hours of Supervised Practical Training, has provided a Board-approved supervision contract between the applicant and an applicant supervisor, and has been deemed recommended by the applicant supervisor to advance in the credentialing process.

(8) The applicant for substance abuse counselor has completed a total of 6,000 hours of supervised experience in the field, whether paid or volunteer. The applicant for substance abuse prevention consultant has completed a total of 6,000 hours supervised experience in the field, whether paid or volunteer, or 4,000 hours if the applicant has at least a bachelors degree in a human services field from a regionally accredited college or university.

(9) The applicant has obtained a passing score on a written examination. An applicant for certification as a substance abuse counselor must also obtain a passing score on an oral examination promulgated and administered by the Board.

(b) The Board shall issue a certificate certifying an individual as a “Certified Clinical Supervisor” if, in addition to meeting the requirements of subdivisions (a)(1) through (5a) of this section, the applicant:

(1) Submits proof of designation by the Board as a clinical supervisor intern.

(2) Prior to June 30, 1998, the applicant presents proof that the applicant has 12,000 hours experience in alcohol and drug abuse counseling and a bachelors degree or 8,000 hours experience in alcohol and drug abuse counseling and a minimum of a master’s degree. After June 30, 1998, the applicant shall present proof that the applicant has a minimum of a master’s degree in a human services field with a clinical application from a regionally accredited college or university.

(3) Has 6,000 hours experience as a substance abuse clinical supervisor if the applicant has a bachelors degree or 4,000 hours experience if the applicant has a master’s degree in a human services field with a clinical application from a regionally accredited college or university.

(4) Has 30 hours of substance abuse clinical supervision specific education or training. These hours shall be reflective of the Twelve Core Functions in the applicant’s clinical application and practice and may also be counted toward the applicant’s renewal as a substance abuse counselor or a clinical addictions specialist.

(5) Submits a letter of reference from a professional who can attest to the applicant’s supervisory competence and two letters of reference from either counselors who have been supervised by the applicant or professionals who can attest to the applicant’s competence.

(6) Obtains a passing score on a written examination administered by the Board.

A person who practices as a certified clinical supervisor in addition to practicing as a certified substance abuse counselor shall be exempt from the practice supervision contract requirement.

(b1) The Board shall designate an applicant as a “Clinical Supervisor Intern” if, in addition to meeting the requirements of subdivisions (a)(1) through (5a) of this section, the applicant meets the following qualifications:

(1) Submits an application, resume, and official transcript showing that the applicant has obtained a master's degree in a human services field with a clinical application from a regionally accredited college or university.
(2) Submits verification statements.
(3) Submits proof of credentialing as a certified substance abuse counselor, a licensed clinical addictions specialist, or certification or licensure through an organization granted deemed status by the Board.
(4) Submits documentation establishing that the applicant has completed at least fifty percent of the required clinical supervision specific training hours as defined by the Board.

(c) The Board shall issue a license credentialing an applicant as a "Licensed Clinical Addictions Specialist" if, in addition to meeting the requirements of subdivisions (a)(1) through (5a) of this section, the applicant meets one of the following criteria:

(1) Criteria A. — The applicant:
  a. Has a minimum of a master's degree with a clinical application in a human services field from a regionally accredited college or university.
  b. Has two years postgraduate supervised substance abuse counseling experience.
  c. Submits three letters of reference from licensed clinical addictions specialists or certified substance abuse counselors who have obtained master's degrees.
  d. Has achieved a combined score set by the Board on a master's level written and oral examination administered by the Board.
  e. Has attained 180 hours of substance abuse specific training from either a regionally accredited college or university, which may include unlimited independent study, or from training events of which no more than fifty percent (50%) shall be in independent study. All hours shall be credited according to the standards set forth in G.S. 90-113.41A.
  f. The applicant has documented completion of a minimum of 300 hours of supervised practical training and has provided a Board-approved supervision contract between the applicant and an applicant supervisor.
(2) Criteria B. — The applicant:
  a. Has a minimum of a master's degree with a clinical application in a human services field from a regionally accredited college or university.
  b. Has been certified as a substance abuse counselor.
  c. Has one year of postgraduate supervised substance abuse counseling experience.
  d. Has achieved a passing score on a master's level written examination administered by the Board.
  e. Submits three letters of reference from either licensed clinical addictions specialists or certified substance abuse counselors who have obtained master's degrees.
(3) Criteria C. — The applicant:
  a. Has a minimum of a master's degree in a human services field with both a clinical application and a substance abuse specialty from a regionally accredited college or university that includes 180 hours of substance abuse specific education and training pursuant to G.S. 90-113.41A.
  b. Has one year of postgraduate supervised substance abuse counseling experience.

c. Has achieved a passing score on an oral examination administered by the Board.

d. Submits three letters of reference from licensed clinical addictions specialists or certified substance abuse counselors who have obtained master's degrees.

(4) Criteria D. — The applicant has a substance abuse certification from a professional discipline that has been granted deemed status by the Board.

(d) The Board shall issue a certificate certifying an applicant as a "Substance Abuse Residential Facility Director" if the applicant:

(1) Has been credentialed as a substance abuse counselor or a clinical addictions specialist.

(2) Has 50 hours of Board approved academic or didactic management specific training or a combination thereof. Independent study may compose up to fifty percent (50%) of the total number of hours required for initial credentialing.

(3) Submits letters of reference from the applicant's current supervisor and a colleague or coworker.

(d1) The Board shall issue a certificate certifying an applicant as a "Certified Criminal Justice Addictions Professional", with the acronym "CCJP", if in addition to meeting the requirements of subdivisions (a)(1) through (5a) of this section, the applicant:

(1) Has attained 270 hours of Board-approved education or training, unless the applicant has attained a minimum of a masters degree with a clinical application and a substance abuse specialty from a regionally accredited college or university whereby the applicant must only obtain 180 hours. The hours of education shall be specifically related to the knowledge and skills necessary to perform the tasks within the International Certification and Reciprocity Consortium/Alcohol and Other Drug Abuse, Incorporated, "IC&RC/AODA, Inc.," criminal justice addictions professional performance domains as they relate to both adults and juveniles. Independent study may compose up to fifty percent (50%) of the total number of hours obtained for initial certification or renewal.

(2) Has documented 300 hours of Board-approved supervised practical training. This supervision shall mean the administrative, clinical, and evaluative process of monitoring, assessing, and enhancing professional performance. A minimum of 10 hours of supervision in each criminal justice domain established by the IC&RC/AODA, Inc., is required.

(3) Has provided documentation of supervised work experience providing direct service to clients or offenders involved in one of the three branches of the criminal justice system, which include law enforcement, the judiciary, and corrections. The applicant must meet one of the following criteria:

a. Criteria A. — In addition to having a high school degree or GED, the applicant has a minimum of 6,000 hours of documented work experience in direct services in criminal justice or addictions services or any combination of these services that have been obtained during the past 10 years.

b. Criteria B. — In addition to having an associate degree, the applicant has a minimum of 5,000 hours of documented work experience in direct services in criminal justice or addictions services or any combination of these services obtained during the past 10 years.

c. Criteria C. — In addition to having at least a bachelors degree, the applicant has a minimum of 4,000 hours of documented work experience in direct services in criminal justice or addictions services, or any combination of these services, and this experience has been obtained during the past 10 years.

d. Criteria D. — In addition to having at least a masters degree in a human services field, the applicant has a minimum of 2,000 hours of documented work experience in direct services in criminal justice or addictions services or any combination of these services that has been obtained during the past 10 years.

e. Criteria E. — In addition to having at least a masters degree in a human services field with a specialty from a regionally accredited college or university that includes 180 hours of substance abuse specific education or training, the applicant has a minimum of 2,000 hours of postgraduate supervised substance abuse counseling experience.

f. Criteria F. — In addition to having obtained the credential of a certified clinical addictions specialist or other advanced credential in a human services field from an organization that has obtained deemed status with the Board, the applicant has a minimum of 1,000 hours of documented work experience in direct services in criminal justice or addictions services that has been obtained during the past 10 years.

(4) Has passed the IC&RC/AODA, Inc., certified criminal justice addictions professional written examination.

(e) The Board shall publish from time to time information in order to provide specifics for potential applicants of an acceptable educational curriculum and the terms of acceptable supervised fieldwork experience.

(f) Effective January 1, 2003, only a person who is certified as a certified clinical supervisor or a clinical supervisor intern shall be qualified to supervise applicants for certified clinical supervisor and certified substance abuse counselor and applicants for licensed clinical addictions specialist who meet the qualifications of their credential other than through deemed status as provided in G.S. 90-113.40(c)(4). (1993 (Reg. Sess., 1994), c. 685, s. 1; 1997-492, s. 9; 1998-217, s. 10; 1999-164, s. 10; 2005-431, s. 1.)

Editor's Note. — Session Laws 2005-431, s. 4, provides: "Notwithstanding G.S. 90-113.40(d1), as enacted by Section 1 of this act, the North Carolina Substance Abuse Professional Practice Board may certify a person as a certified criminal justice addictions professional during a limited period of 90 days from the date this act becomes effective and the credential is approved by the IC&RC/AODA, Inc., if the applicant qualifies based on experience providing services to clients or offenders exhibiting substance abuse disorders and is working in a program determined by the Board to be integrally involved in at least one of the three branches of the criminal justice system, which include law enforcement, the judiciary, and corrections. In addition to meeting the requirements of G.S. 90-113.40(a)(1) through (5a), the person shall do the following:

"(1) Provide two letters recommending certification from a current or former peer who functions in substantially the same professional capacity as determined by the Board.

"(2) Provide one letter recommending certification from a person currently supervising or who has supervised the applicant within the previous five years attesting to the applicant's competency in the fields of substance abuse and criminal justice.

"(3) Pay the criminal justice addictions professional certification fee for certification not to exceed one hundred fifty dollars ($150.00).

"(4) Provide one of the following:

"a. A high school diploma or a high school equivalency certificate, documentation of eight years or 16,000 hours of supervised work experience providing direct service to clients or offenders determined by the Board to be integrally involved in at least one of the three branches of the criminal justice system, which include law enforcement, the judiciary, and corrections.

"b. An associate degree and documentation of six years or 12,000 hours of supervised work experience providing direct service to clients or offenders determined by the Board to be integrally involved in the three branches of the criminal justice system, which include law enforcement, the judiciary, and corrections.

"c. A bachelors degree in the human services field with four years or 8,000 hours of supervised work experience providing direct service to clients or offenders determined by the Board to be integrally involved in at least one of the three branches of the criminal justice system, which include law enforcement, the judiciary, and corrections.

"d. A masters degree or above in the human services field with two years or 4,000 hours of supervised work experience providing direct service to clients or offenders determined by the Board to be integrally involved in the three branches of the criminal justice system, which include law enforcement, the judiciary, and corrections.

"(5) Provide documentation of at least 270 clock hours of Board-approved education and 300 hours of Board-approved supervised practical training, both in the International Certification & Reciprocity Consortium/Alcohol and Other Drug Abuse, Incorporated, criminal justice addiction professional performance domains."

§ 90-113.40A. Requirements for registration.

(a) Upon application and payment of the required fee, the Board shall issue a registration designating an applicant as a registrant if the applicant:

(1) Provides documentation that he or she has received a high school diploma, or the equivalent, and evidence of any baccalaureate or advanced degrees the applicant has received.

(2) Completes a registration application on a form provided by the Board.

(3) Provides documentation of three hours of educational training in ethics.

(4) Signs a form attesting to the applicant's commitment to adhere to the ethical standards adopted by the Board.

(4a) Submits to a complete criminal history record check pursuant to G.S. 90-113.46A.

(5) Signs a supervision contract provided by the Board that documents the proposed supervision process by an applicant supervisor.

(b) Registrant status shall be maintained for a period of up to five years while the registrant is in the process of completing his or her requirements for credentials pursuant to this Article. If at the end of a five-year period a registrant has not obtained a credential under this Article, the Board shall renew the registration for up to an additional five-year period after the registrant pays the required fee and complies with all requirements for registration pursuant to G.S. 90-113.40A. The Board shall terminate the registration of any registrant who fails to renew his or her registration.

(c) The registrant shall notify the Board of any criminal conviction imposed during the period of registration. (2001-370, s. 5; 2005-431, s. 1.)

§ 90-113.40B. Applicant supervision.

The Board shall designate a person as an applicant supervisor of individuals applying for registration, certification, or licensure as a substance abuse professional as follows:

(1) A certified clinical supervisor shall supervise a clinical supervisor intern.

(2) A certified clinical supervisor or a clinical supervisor intern shall supervise a substance abuse residential facility director applicant, a clinical addictions specialist applicant, or a substance abuse counselor applicant.

(3) Repealed by Session Laws 2005-431, s. 1, effective September 22, 2005.

(4) A certified substance abuse prevention consultant with a minimum of three years of professional experience, a certified clinical supervisor, or a clinical supervisor intern shall supervise a registrant applying for certification as a prevention consultant.

(5) Pursuant to the deemed status procedure under G.S. 90-113.41A, the supervision requirements described in subdivisions (1) through (4) of

this section shall not apply to persons applying for licensure as a licensed clinical addictions specialist.

(6) A criminal justice addictions professional applicant shall be supervised by a certified clinical supervisor or clinical supervisor intern. (2001-370, s. 6; 2005-431, s. 1.)

§ 90-113.41. Examination.

(a) Except for those individuals applying for licensure under G.S. 90-113.41A, applicants for certification or licensure under this Article shall file an application at least 60 days prior to the date of examination and upon the forms and in the manner prescribed by the Board. The application shall be accompanied by the appropriate fee. No portion of this fee is refundable. Applicants who fail an examination may apply for reexamination upon the payment of another examination fee.

(b) Each applicant for certification or licensure under this Article shall be tested in an examination developed by the International Certification and Reciprocity Consortium/Alcohol and Other Drug Abuse, Incorporated and the standards adopted by professional disciplines granted deemed status or their successor organizations.

(c) Applicants for certification or licensure shall be examined at a time and place and under the supervision that the Board determines. Examinations shall be given in this State at least twice each year.

(d) Applicants may obtain their examination scores and may review their examination papers in accordance with rules the Board adopts and agreements between Board-authorized test development companies. (1993 (Reg. Sess., 1994), c. 685, s. 1; 1997-492, s. 10; 1999-164, s. 11; 2005-431, s. 1.)

§ 90-113.41A. Deemed status.

(a) To be granted deemed status by the Board, a credentialing body of a professional discipline or its designee shall demonstrate that its substance abuse credentialing program substantially meets the following:

(1) Each person to whom the credentialing body awards credentials following the effective date of this act meets and maintains minimum requirements in substance abuse specific content areas. Each person also has a minimum of a master's degree with a clinical application in a human services field.

(2) The body requires 180 hours, or the equivalent thereof, of substance abuse specific education and training that covers the following content areas:

a. Basic addiction and cross addiction Physiology and Pharmacology of Psychoactive drugs that are abused.
b. Screening, assessment, and intake of clients.
c. Individual, group, and family counseling.
d. Treatment, planning, reporting, and record keeping.
e. Crisis intervention.
f. Case management and treatment resources.
g. Ethics, legal issues, and confidentiality.
h. Psychological, emotional, personality, and developmental issues.
i. Co-occurring physical and mental disabilities.
j. Special population issues, including age, gender, race, ethnicity, and health status.
k. Traditions and philosophies of recovery treatment models and support groups.

(3) The program requires one year or its equivalent of post-degree supervised clinical substance abuse practice. At least fifty percent

(50%) of the practice shall consist of direct substance abuse clinical care.

(b) The professional discipline seeking deemed status shall require its members to adhere to a code of ethical conduct and shall enforce that code with disciplinary action.

(c) The Board may grant deemed status to any professional discipline that substantially meets the standards in this section. Once such status has been granted, an individual within the professional discipline may apply to the Board for the credential of licensed clinical addictions specialist.

(d) The Standards Committee of the Board shall review the standards of each professional discipline every third year from the date it was granted deemed status to determine if the discipline continues to substantially meet the requirements of this section. If the Committee finds that a professional discipline no longer meets the requirements of this section, it shall report its findings to the Board at the Board's next regularly scheduled meeting. The deemed status standing of a professional discipline's credential may be discontinued by a two-thirds vote of the Board. (1997-492, s. 11; 2005-431, s. 1.)

§ 90-113.41B. Change of name or address.

Every person licensed, certified, or registered under the provisions of this Article shall give written notice to the Board of any change in his or her name or address within 60 business days after the change takes place. (2001-370, s. 8; 2005-431, s. 1.)

§ 90-113.42. Violations; exemptions.

(a) It shall be unlawful for any person not licensed or otherwise credentialed as a substance abuse professional pursuant to this Article to engage in those activities set forth in the scope of practice of a substance abuse professional under G.S. 90-113.31B, unless that person is regulated by another profession or is a registrant or intern as defined by this Article.

(b) It is not the intent of this Article to regulate members of other regulated professions who provide substance abuse services or consultation in the normal course of the practice of their profession.

(c) This Article does not apply to any person registered, certified, or licensed by the State or federal government to practice any other occupation or profession while rendering substance abuse services or consultation in the performance of the occupation or profession for which the person is registered, certified, or licensed.

(d) Only individuals registered, certified, or licensed under this Article may use the title "Certified Substance Abuse Counselor", "Certified Substance Abuse Prevention Consultant", "Certified Clinical Supervisor", "Licensed Clinical Addictions Specialist", "Certified Substance Abuse Residential Facility Director", "Certified Criminal Justice Addictions Professional", "Substance Abuse Counselor Intern", "Clinical Addictions Specialist Intern", "Clinical Supervisor Intern", or "Registrant". (1993 (Reg. Sess., 1994), c. 685, s. 1; 1997-492, s. 12; 2005-431, s. 1.)

§ 90-113.43. Illegal practice; misdemeanor penalty.

Except as otherwise authorized in this Article, no person shall:

(1) Offer substance abuse professional services, practice, attempt to practice, or supervise while holding himself or herself out to be a certified substance abuse counselor, certified substance abuse prevention consultant, certified clinical supervisor, certified or licensed

clinical addictions specialist, clinical addictions specialist intern, substance abuse residential facility director, certified criminal justice addictions professional, clinical supervisor intern, substance abuse prevention consultant, or registrant without first having obtained a certificate of registration, certification, or licensure from the Board.

(2) Use in connection with any name any letters, words, numerical codes, or insignia indicating or implying that this person is a registrant, substance abuse counselor, substance abuse prevention consultant, certified clinical supervisor, clinical addictions specialist, certified substance abuse residential facility director, substance abuse counselor intern, or clinical addictions specialist intern unless this person is registered, certified, or licensed pursuant to this Article.

(3) Practice or attempt to practice as a certified substance abuse counselor, certified substance abuse prevention consultant, certified clinical supervisor, licensed clinical addictions specialist, certified criminal justice addictions professional, or certified substance abuse residential facility director with a revoked, lapsed, or suspended certification or license.

(4) Aid, abet, or assist any person to practice as a certified substance abuse counselor, certified substance abuse prevention consultant, certified clinical supervisor, licensed clinical addictions specialist, certified substance abuse residential facility director, registrant, substance abuse counselor intern, clinical addictions specialist, or clinical supervisor intern in violation of this Article.

(5) Knowingly serve in a position required by State law or rule or federal law or regulation to be filled by a registrant, certified substance abuse counselor, certified substance abuse prevention consultant, certified clinical supervisor, licensed clinical addictions specialist, certified substance abuse residential facility director, substance abuse counselor intern, clinical addictions specialist intern, or clinical supervisor intern unless that person is registered, certified, or licensed under this Article.

(6) Repealed by S.L. 1997-492, s. 13.

(7) Practice, supervise, or attempt to practice or supervise or knowingly serve in a position required by State law or rule or federal law or regulation to be filled by a designated substance abuse intern without being designated as such by the Board.

A person who engages in any of the illegal practices enumerated by this section is guilty of a Class 1 misdemeanor. Each act of unlawful practice constitutes a distinct and separate offense. (1993 (Reg. Sess., 1994), c. 685, s. 1; 1997-492, s. 13; 2005-431, s. 1.)

§ 90-113.44. Grounds for disciplinary action.

(a) Grounds for disciplinary action for an applicant or credentialed professional include:

(1) The employment of fraud, deceit, or misrepresentation in obtaining or attempting to obtain licensure, certification, or registration or renewal of licensure, certification, or registration.

(2) The use of drugs or alcoholic beverages to the extent that professional competency is affected.

(2a) The use of drugs or alcoholic beverages to the extent that a substance abuse professional suffers impairment.

(3) Conviction of an offense under any municipal, State, or federal law other than traffic laws as prescribed by Chapter 20 of the General Statutes.

(4) Conviction of a felony or other public offense involving moral turpitude. Conviction of a Class A-E felony shall result in an immediate suspension of licensure, certification, or registration for a minimum of one year.

(5) An adjudication of insanity or incompetency, until proof of recovery from this condition can be established by a licensed psychologist or psychiatrist.

(6) Engaging in any act or practice in violation of any of the provisions of this Article or any of the rules adopted pursuant to it, or aiding, abetting, or assisting any other person in such a violation.

(7) The commission of an act of malpractice, gross negligence, or incompetence while serving as a substance abuse professional, intern, or registrant.

(8) Repealed by Session Laws 2005-431, s. 1, effective September 22, 2005.

(9) Engaging in conduct that could result in harm or injury to the public.

(10) Entering into a dual relationship that impairs professional judgment or increases the risk of exploitation with a client or supervisee.

(11) Practicing as a credentialed substance abuse professional outside of his or her scope of practice pursuant to G.S. 90-113.31B.

(b) Denial of an applicant's licensure, certification, or registration or the granting of licensure, certification, or registration on a probationary or other conditional status shall be subject to substantially the same rules and procedures prescribed by the Board for review and disciplinary actions against any person holding a license, certificate, or registration. A suspension of a credential resulting from impairment due to substance use, mental health, or medical disorder shall be imposed for at least six months beginning from the date of successful discharge from a residential substance abuse treatment program or other appropriate treatment modality determined as a result of an assessment by a Board-approved assessor. Disciplinary actions involving a clinical addictions specialist whose licensure is achieved through deemed status shall be initially heard by the specialist's credentialing body. The specialist may appeal the body's decision to the Board. The Board shall, however, have the discretionary authority to hear the initial disciplinary action involving a credentialed professional. (1993 (Reg. Sess., 1994), c. 685, s. 1; 1997-492, s. 14; 2001-370, s. 7; 2005-431, s. 1.)

§ 90-113.45. Enjoining illegal practices.

(a) The Board may, if it finds that any person is violating any of the provisions of this Article or of the rules adopted pursuant to it, apply in its own name to the superior court for a temporary or permanent restraining order or injunction to restrain that person from continuing these illegal practices. The court may grant injunctive relief regardless of whether criminal prosecution or other action has been or may be instituted as a result of the violation. In the court's consideration of the issue of whether to grant or continue an injunction sought by the Board, a showing of conduct in violation of the terms of this Article shall be sufficient to meet any requirement of general North Carolina injunction law for irreparable damage.

(b) The venue for actions brought under this section is the superior court of any county in which the illegal acts are alleged to have been committed or in the county where the defendant resides. (1993 (Reg. Sess., 1994), c. 685, s. 1.)

§ 90-113.46. Application of requirements of Article.

All persons credentialed by the North Carolina Substance Abuse Professional Practice Board, Inc., as of July 1, 1994, shall be credentialed by the

Board pursuant to this Article. All these persons are subject to all the other requirements of this Article and of the rules adopted pursuant to it. (1993 (Reg. Sess., 1994), c. 685, s. 1; 1997-492, s. 15; 2005-431, s. 1.)

§ 90-113.46A. Criminal history record checks of applicants for registration, certification, or licensure.

(a) All applicants for registration, certification, or licensure shall consent to a criminal history record check. Refusal to consent to a criminal history record check may constitute grounds for the Board to deny registration, certification, or licensure to an applicant. The Board shall ensure that the State and national criminal history of an applicant is checked. The Board shall be responsible for providing to the North Carolina Department of Justice the fingerprints of the applicant to be checked, a form signed by the applicant consenting to the criminal history record check and the use of fingerprints and other identifying information required by the State or National Repositories, the fee required by the Department of Justice for providing this service, and any additional information required by the Department of Justice. The Board shall keep all information obtained pursuant to this section confidential.

(b) If an applicant's criminal history record check reveals one or more convictions as defined in G.S. 90-113.31A(14), the conviction shall not automatically bar issuance of a credential by the Board to the applicant. The Board shall consider all of the following factors regarding the conviction:

(1) The level of seriousness of the crime.
(2) The date of the crime.
(3) The age of the person at the time of the conviction.
(4) The circumstances surrounding the commission of the crime, if known.
(5) The nexus between the criminal conduct of the person and the job duties of the position to be filled.
(6) The person's prison, jail, probation, parole, rehabilitation, and employment records since the date the crime was committed.
(7) The subsequent commission by the person of a crime as defined in G.S. 90-113.31A(14).

If, after reviewing the factors, the Board determines that the grounds set forth in G.S. 90-113.44 exist, the Board may deny registration, certification, or licensure of the applicant. The Board may disclose to the applicant information contained in the criminal history record check that is relevant to the denial. The Board shall not provide a copy of the criminal history record check to the applicant. The applicant shall have the right to appear before the Board to appeal the Board's decision. However, an appearance before the full Board shall constitute an exhaustion of administrative remedies in accordance with Chapter 150B of the General Statutes.

(c) Limited Immunity. — The Board, its officers and employees, acting in good faith and in compliance with this section, shall be immune from civil liability for denying registration, certification, or licensure to an applicant based on information provided in the applicant's criminal history record check. (2005-431, s. 1.)

§ 90-113.47: Repealed by Session Laws 1999-199, s. 3.1, effective October 1, 1999.

§§ 90-113.48, 90-113.49: Reserved for future codification purposes.

ARTICLE 5D.

Control of Methamphetamine Precursors.

§ 90-113.50. Title.

This Article shall be known and may be cited as the "Methamphetamine Lab Prevention Act of 2005." (2005-434, s. 1.)

Legislative Commission on Methamphetamine Abuse Established. — For Legislative Commission on Methamphetamine Abuse see G.S. 120-226. For study and report on use of pseudoephedrine products to make methamphetamine, see G.S. 114-19.01.

Editor's Note. — Session Laws 2005-434, s. 10, made this Article, except G.S. 90-113.58 and G.S. 90-113.59 which are effective September 27, 2005, effective January 15, 2006.

Session Laws 2005-434, s. 9, is a severability clause.

§ 90-113.51. Definitions.

(a) For purposes of this Article, "pseudoephedrine product" means a product containing any detectable quantity of pseudoephedrine or ephedrine base, their salts or isomers, or salts of their isomers.

(b) For purposes of this Article, a "retailer" means an individual or entity that is the general owner of an establishment where pseudoephedrine products are available for sale.

(c) For purposes of this Article, the "Commission" means the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services. (2005-434, s. 1.)

§ 90-113.52. Pseudoephedrine: restrictions on sales.

(a) A pseudoephedrine product in the form of a tablet, caplet, or gel cap shall not be offered for retail sale loose in bottles but shall be sold only in blister packages.

(b) Pseudoephedrine products shall not be offered for retail sale by self-service, but shall be stored and sold in the following manner: Any pseudoephedrine product in the form of a tablet or caplet containing pseudoephedrine as the sole active ingredient or in combination with other active ingredients shall be stored and sold behind a pharmacy counter.

(c) A pseudoephedrine product may be sold at retail without a prescription only to a person at least 18 years of age. The retailer shall require every retail purchaser of a pseudoephedrine product to furnish photo identification. If the retailer has reasonable grounds to believe that the prospective purchaser is under 18 years of age, the retailer shall require the prospective purchaser to furnish photo identification showing the date of birth of the person. The name and address of every purchaser shall be entered in a record of disposition of pseudoephedrine products to the consumer on a form approved by the Commission. The record of disposition shall also identify each pseudoephedrine product purchased, including the number of grams the product contains and the purchase date of the transaction. The retailer shall require that every purchaser sign the form attesting to the validity of the information. The form approved by the Commission shall be constructed so that it allows for entry of information in electronic format, including electronic signature. The form shall also be constructed and maintained so as to minimize disclosure of personal information to unauthorized persons and shall contain a statement in at least 10-point boldface type at the top of every page substantially similar to the following: "NORTH CAROLINA LAW STRICTLY PROHIBITS THE PUR-

CHASE OF MORE THAN TWO PACKAGES OF CERTAIN PRODUCTS CONTAINING PSEUDOEPHEDRINE (3.6 GRAMS TOTAL) PER DAY, AND MORE THAN THREE PACKAGES (9 GRAMS TOTAL) OF CERTAIN PRODUCTS CONTAINING PSEUDOEPHEDRINE WITHIN A 30-DAY PERIOD. BY MY SIGNATURE, I ATTEST THAT THE INFORMATION I HAVE PROVIDED IN CONNECTION WITH THIS TRANSACTION IS TRUE AND CORRECT AND THAT THIS TRANSACTION DOES NOT EXCEED THE PURCHASE RESTRICTIONS. I ACKNOWLEDGE THAT KNOWING AND WILLFUL VIOLATION OF THE PURCHASE RESTRICTIONS OR THE FURNISHING OF FALSE INFORMATION IN CONNECTION THEREWITH MAY SUBJECT ME TO CRIMINAL PENALTIES." If the form attesting to the validity of this information is to be signed by the purchaser in electronic format, the retailer may choose to display in a clear and conspicuous manner the statement on a sign to be placed immediately adjacent to the device on which the electronic signature will be obtained, in lieu of including the full statement in electronic format. If the retailer chooses to display the statement on a sign rather than in electronic format, the retailer shall: (i) instruct the purchaser prior to signing to read the statement; and (ii) include on the form for signature contained in the electronic device a statement substantially similar to the following: "I have read, understand, and agree with the statement just shown to me concerning the requirements under State law pertaining to pseudoephedrine purchases." Display of the sign in this manner shall satisfy the signage requirements of G.S. 90-113.54.

(d) A retailer shall maintain a record of disposition of pseudoephedrine products to the consumer for a period of two years from the date of each transaction. A record shall be readily available within 48 hours of the time of the transaction for inspection by an authorized official of a federal, State, or local law enforcement agency. The records maintained by a retailer are privileged information and are not public records but are for the exclusive use of the retailer and law enforcement. The retailer may destroy the information after two years from the date of the transactions.

(e) This section does not apply to any pseudoephedrine product that is in the form of a liquid, liquid capsule, gel capsule, or pediatric product labeled pursuant to federal regulation primarily intended for administration to children under 12 years of age according to label instruction, except as to those specific products for which the Commission issues an order pursuant to G.S. 90-113.58 subjecting the product to requirements under this Article. (2005-434, s. 1; 2006-186, s. 1.)

Effect of Amendments. — Session Laws 2006-186, s. 1, effective August 3, 2006, in subsection (a), inserted "pseudoephedrine" at the beginning, and substituted "in the form of a tablet, caplet, or gel cap" for "whose sole active ingredient is pseudoephedrine in strength of 30 milligrams or more per tablet or caplet"; and in subsection (c), substituted "THE" for "A SINGLE TRANSACTION", substituted "(3.6 GRAMS TOTAL) PER DAY" for "(SIX GRAMS TOTAL),", deleted "NO" preceding "MORE THAN THREE PACKAGES" near the middle, substituted "(9 GRAMS TOTAL" for "(NINE GRAMS TOTAL", and added language "If the form attesting to the validity...the signage requirements of G.S. 90-113.54" to the end.

§ 90-113.53. Pseudoephedrine transaction limits.

(a) No person shall deliver to any one person, attempt to deliver to any one person, purchase, or attempt to purchase at retail more than two packages containing a combined total of more than 3.6 grams of any pseudoephedrine products per calendar day. This limit does not apply if the product is dispensed under a valid prescription.

(b) No person shall purchase at retail more than three packages containing a combined total of more than 9 grams of pseudoephedrine products within any

30-day period. This limit does not apply if the product is dispensed under a valid prescription.

(c) This section does not apply to any pseudoephedrine products that are in the form of liquids, liquid capsules, gel capsules, or pediatric products labeled pursuant to federal regulation primarily intended for administration to children under 12 years of age according to label instruction, except as to those specific products for which the Commission issues an order pursuant to G.S. 90-113.58 subjecting the product to requirements under this Article. (2005-434, s. 1; 2006-186, s. 2.)

Effect of Amendments. — Session Laws 2006-186, s. 2, effective August 3, 2006, rewrote the first sentence in subsection (a); and substituted "9 grams" for "nine grams" in subsection (b).

§ 90-113.54. Posting of signs.

(a) A retailer shall post a sign or placard in a clear and conspicuous manner in the area of the premises where the pseudoephedrine products are offered for sale substantially similar to the following: "North Carolina law strictly prohibits the purchase of more than two packages (3.6 grams total) of certain products containing pseudoephedrine per day, and more than three packages (9 grams total) of certain products containing pseudoephedrine within a 30-day period. This store will maintain a record of all sales of these products which may be accessible to law enforcement officers.

(b) This section does not apply to any pseudoephedrine products that are in the form of liquids, liquid capsules, gel capsules, or pediatric products labeled pursuant to federal regulation primarily intended for administration to children under 12 years of age according to label instruction, except as to those specific products for which the Commission issues an order pursuant to G.S. 90-113.58 subjecting the product to requirements under this Article. (2005-434, s. 1; 2006-186, s. 3.)

Effect of Amendments. — Session Laws 2006-186, s. 3, effective August 3, 2006, in subsection (a), substituted "substantially similar to the following" for "stating", substituted "the purchase" for "a single transaction purchase", substituted "3.6 grams total" for "six grams total", inserted "certain" preceding "products containing", inserted "per day" following "pseudoephedrine", deleted "no" preceding "more than three grams total", and substituted "9 grams total" for "nine grams total"; and added subsection (b).

§ 90-113.55. Training of employees.

A retailer shall require that employees of the establishment involved in the sale of pseudoephedrine products in the form of tablets or caplets, and any other pseudoephedrine product for which the Commission issues an order pursuant to G.S. 90-113.58 to subject the product to requirements under this Article, be trained in a program conducted by or approved by the Commission pursuant to G.S. 90-113.59. (2005-434, s. 1.)

§ 90-113.56. Penalties.

(a) If a retailer willfully and knowingly violates the provisions of G.S. 90-113.52, 90-113.53, or 90-113.54, the retailer shall be guilty of a Class A1 misdemeanor for the first offense and a Class I felony for a second or subsequent offense. A retailer convicted of a third offense occurring on the premises of a single establishment shall be prohibited from making pseudoephedrine products available for sale at that establishment.

(b) Any purchaser or employee who willfully and knowingly violates G.S. 90-113.52(c) or G.S. 90-113.53 shall be guilty of a Class 1 misdemeanor for the first offense, a Class A1 misdemeanor for a second offense, and a Class I felony for a third or subsequent offense. This subsection shall not be construed to apply to bona fide innocent purchasers.

(c) A retailer who fails to train employees in accordance with G.S. 90-113.55, adequately supervise employees in transactions involving pseudoephedrine products, or reasonably discipline employees for violations of this Article shall be fined up to five hundred dollars ($500.00) for the first violation, up to seven hundred fifty dollars ($750.00) for the second violation, and up to one thousand dollars ($1,000) for a third or subsequent violation of this section. (2005-434, s. 1.)

§ 90-113.57. Immunity.

A retailer or an employee of the retailer who, reasonably and in good faith, reports to any law enforcement agency any alleged criminal activity related to the sale or purchase of pseudoephedrine products, or who refuses to sell a pseudoephedrine product to a person reasonably believed to be ineligible to purchase a pseudoephedrine product pursuant to this Article, is immune from civil liability for that conduct except in cases of willful misconduct. No retailer shall retaliate in any manner against any employee of the establishment for a report made in good faith to any law enforcement agency concerning alleged criminal activity related to the sale or purchase of pseudoephedrine products. (2005-434, s. 1.)

§ 90-113.58. Commission authority to control pseudoephedrine products.

(a) The Commission may add or delete a specific pseudoephedrine product from requirements of this Article on the petition of any interested party, or its own motion. In addition, the Commission may modify the specific storage, security, transaction limit, and record-keeping requirements applicable to a particular product upon such terms and conditions as they deem appropriate. In every case, the Commission shall give notice of and hold a public hearing pursuant to Chapter 150B of the General Statutes prior to adding or deleting a product. A petition by the Commission or the North Carolina Department of Justice to add or delete a specific product from requirements of this Article shall be placed on the agenda for consideration at the next regularly scheduled meeting of the Commission, as a matter of right. In making a determination regarding a specific product, the Commission shall consider whether or not there is substantial evidence that the specific product would be used to manufacture methamphetamine in the State.

(b) In making a determination, the Commission shall make findings with respect thereto and shall issue an order adding or deleting the specific product from requirements of this Article. The order shall be published in the North Carolina Register at least 60 days prior to the time that the addition or deletion of a specific product from the requirements of this Article becomes effective.

(c) The Commission may adopt temporary and permanent rules in accordance with this section. (2005-434, s. 1.)

§ 90-113.59. Commission development of employee training programs.

The Commission shall develop training and education programs targeted for employees of establishments where pseudoephedrine products are available for sale and shall approve such programs for implementation by retailers. The Commission may also conduct employee training programs for retail establishments. The Commission may adopt temporary and permanent rules in this regard. (2005-434, s. 1.)

§ 90-113.60. Preemption.

This Article shall preempt all local ordinances or regulations governing the sale by a retailer of over-the-counter products containing pseudoephedrine. (2005-434, s. 1.)

§ 90-113.61. Regulation of pseudoephedrine products in the form of liquids, liquid capsules, gel capsules, and pediatric products.

Except as to those specific products for which the Commission issues an order pursuant to G.S. 90-113.58 subjecting the product to requirements under this Article, any pseudoephedrine products that are in the form of liquids, liquid capsules, gel capsules, or pediatric products labeled pursuant to federal regulation primarily intended for administration to children under 12 years of age according to label instruction shall not be subject to requirements under this Article, but such products shall be subject to the requirements of the Combat Methamphetamine Act of 2005, Title VII of the USA PATRIOT Improvement and Reauthorization Act of 2005, P.L. 109-177. (2006-186, s. 4.)

Editor's Note. — Session Laws 2006-186, s. 5, made this section effective September 30, 2006.

§§ 90-113.62 through 90-113.69: Reserved for future codification purposes.

Article 5E.

North Carolina Controlled Substances Reporting System Act.

§ 90-113.70. Short title.

This Article shall be known and may be cited as the "North Carolina Controlled Substances Reporting System Act." (2005-276, s. 10.36(a).)

Editor's Note. — Session Laws 2005-276, s. 10.36(a), originally enacted this Article as Article 5D, G. S. 90-113.60 through 90-113.66. It has been renumbered as Article 5E, G.S. 90-113.70 through 90-113.76, at the direction of the Revisor of Statutes.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 10.36(c), made this Article effective January 1, 2006.

Session Laws 2005-276, s. 46.5 is a severability clause.

§ 90-113.71. Legislative findings and purpose.

(a) The General Assembly makes the following findings:

(1) North Carolina is experiencing an epidemic of poisoning deaths from unintentional drug overdoses.

(2) Since 1997, the number of deaths from unintentional drug overdoses has increased threefold, from 228 deaths in 1997 to 690 deaths in 2003.
(3) The number of unintentional deaths from illicit drugs in North Carolina has decreased since 1992 while unintentional deaths from licit drugs, primarily prescriptions, have increased.
(4) Licit drugs are now responsible for over half of the fatal unintentional poisonings in North Carolina.
(5) Over half of the prescription drugs associated with unintentional deaths are narcotics (opioids).
(6) Of these licit drugs, deaths from methadone, usually prescribed as an analgesic for severe pain, have increased sevenfold since 1997.
(7) Methadone from opioid treatment program clinics is a negligible source of the methadone that has contributed to the dramatic increase in unintentional methadone-related deaths in North Carolina.
(8) Review of the experience of the 19 states that have active controlled substances reporting systems clearly documents that implementation of these reporting systems do not create a "chilling" effect on prescribing.
(9) Review of data from controlled substances reporting systems help:
  a. Support the legitimate medical use of controlled substances.
  b. Identify and prevent diversion of prescribed controlled substances.
  c. Reduce morbidity and mortality from unintentional drug overdoses.
  d. Reduce the costs associated with the misuse and abuse of controlled substances.
  e. Assist clinicians in identifying and referring for treatment patients misusing controlled substances.
  f. Reduce the cost for law enforcement of investigating cases of diversion and misuse.
  g. Inform the public, including health care professionals, of the use and abuse trends related to prescription drugs.

(b) This Article is intended to improve the State's ability to identify controlled substance abusers or misusers and refer them for treatment, and to identify and stop diversion of prescription drugs in an efficient and cost-effective manner that will not impede the appropriate medical utilization of licit controlled substances. (2005-276, s. 10.36(a).)

§ 90-113.72. Definitions.

The following definitions apply in this Article:
(1) "Commission" means the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services established under Part 4 of Article 3 of Chapter 143B of the General Statutes.
(2) "Controlled substance" means a controlled substance as defined in G.S. 90-87(5).
(3) "Department" means the Department of Health and Human Services.
(4) "Dispenser" means a person who delivers a Schedule II through V controlled substance to an ultimate user in North Carolina, but does not include any of the following:
  a. A licensed hospital or long-term care pharmacy that dispenses such substances for the purpose of inpatient administration.
  b. A person authorized to administer such a substance pursuant to Chapter 90 of the General Statutes.
  c. A wholesale distributor of a Schedule II through V controlled substance.

(5) "Ultimate user" means a person who has lawfully obtained, and who possesses, a Schedule II through V controlled substance for the person's own use, for the use of a member of the person's household, or for the use of an animal owned or controlled by the person or by a member of the person's household. (2005-276, s. 10.36(a).)

§ 90-113.73. Requirements for controlled substances reporting system.

(a) The Department shall establish and maintain a reporting system of prescriptions for all Schedule II through V controlled substances. Each dispenser shall submit the information in accordance with transmission methods and frequency established by rule by the Commission. The Department may issue a waiver to a dispenser that is unable to submit prescription information by electronic means. The waiver may permit the dispenser to submit prescription information by paper form or other means, provided all information required of electronically submitted data is submitted. The dispenser shall report the information required under this section on a monthly basis for the first 12 months of the Controlled Substances Reporting System's operation, and twice monthly thereafter.

(b) The Commission shall adopt rules requiring dispensers to report the following information. The Commission may modify these requirements as necessary to carry out the purposes of this Article. The dispenser shall report:

(1) The dispenser's DEA number.
(2) The name of the patient for whom the controlled substance is being dispensed, and the patient's:
  a. Full address, including city, state, and zip code,
  b. Telephone number, and
  c. Date of birth.
(3) The date the prescription was written.
(4) The date the prescription was filled.
(5) The prescription number.
(6) Whether the prescription is new or a refill.
(7) Metric quantity of the dispensed drug.
(8) Estimated days of supply of dispensed drug, if provided to the dispenser.
(9) National Drug Code of dispensed drug.
(10) Prescriber's DEA number. (2005-276, s. 10.36(a); 2005-345, s. 17.)

§ 90-113.74. Confidentiality.

(a) Prescription information submitted to the Department is privileged and confidential, is not a public record pursuant to G.S. 132-1, is not subject to subpoena or discovery or any other use in civil proceedings, and except as otherwise provided below may only be used for investigative or evidentiary purposes related to violations of State or federal law and regulatory activities. Except as otherwise provided by this section, prescription information shall not be disclosed or disseminated to any person or entity by any person or entity authorized to review prescription information.

(b) The Department may use prescription information data in the controlled substances reporting system only for purposes of implementing this Article in accordance with its provisions.

(c) The Department shall release data in the controlled substances reporting system to the following persons only:

(1) Persons authorized to prescribe or dispense controlled substances for the purpose of providing medical or pharmaceutical care for their patients.

(2) An individual who requests the individual's own controlled substances reporting system information.

(3) Special agents of the North Carolina State Bureau of Investigation who are assigned to the Diversion & Environmental Crimes Unit and whose primary duties involve the investigation of diversion and illegal use of prescription medication and who are engaged in a bona fide specific investigation related to enforcement of laws governing licit drugs. The SBI shall notify the Office of the Attorney General of North Carolina of each request for inspection of records maintained by the Department.

(4) Primary monitoring authorities for other states pursuant to a specific ongoing investigation involving a designated person, if information concerns the dispensing of a Schedule II through V controlled substance to an ultimate user who resides in the other state or the dispensing of a Schedule II through V controlled substance prescribed by a licensed health care practitioner whose principal place of business is located in the other state.

(5) To a court pursuant to a lawful court order in a criminal action.

(6) The Division of Medical Assistance for purposes of administering the State Medical Assistance Plan.

(7) Licensing boards with jurisdiction over health care disciplines pursuant to an ongoing investigation by the licensing board of a specific individual licensed by the board.

(d) The Department may provide data to public or private entities for statistical, research, or educational purposes only after removing information that could be used to identify individual patients who received prescription medications from dispensers.

(e) In the event that the Department finds patterns of prescribing medications that are unusual, the Department shall inform the Attorney General's Office of its findings. The Office of the Attorney General shall review the Department's findings to determine if the findings should be reported to the SBI for investigation of possible violations of State or federal law relating to controlled substances.

(f) The Department shall purge from the controlled substances reporting system database all information more than six years old. (2005-276, s. 10.36(a).)

§ 90-113.75. Civil penalties; other remedies; immunity from liability.

(a) A person who intentionally, knowingly, or negligently releases, obtains, or attempts to obtain information from the system in violation of a provision of this section or a rule adopted pursuant to this section shall be assessed a civil penalty not to exceed five thousand dollars ($5,000) per violation. The clear proceeds of penalties assessed under this section shall be deposited to the Civil Penalty and Forfeiture Fund in accordance with Article 31A of Chapter 115C of the General Statutes.

(b) In addition to any other remedies available at law, an individual whose prescription information has been disclosed in violation of this section may bring an action against any person or entity who has intentionally, knowingly, or negligently released confidential information or records concerning the individual for either or both of the following:

(1) Nominal damages of one thousand dollars ($1,000). In order to recover damages under this subdivision, it shall not be necessary that the plaintiff suffered or was threatened with actual damages.

(2) The amount of actual damages, if any, sustained by the individual.

(c) A health care provider licensed, or an entity permitted under this Chapter that, in good faith, makes a report or transmits data required by this Article is immune from civil or criminal liability that might otherwise be incurred or imposed as a result of making the report or transmitting the data. (2005-276, s. 10.36(a).)

§ 90-113.76. Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services to adopt rules.

The Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services shall adopt rules necessary to implement this Article. (2005-276, s. 10.36(a).)

ARTICLE 6.

Optometry.

§ 90-114. Optometry defined.

Any one or any combination of the following practices shall constitute the practice of optometry:

(1) The examination of the human eye by any method, other than surgery, to diagnose, to treat, or to refer for consultation or treatment any abnormal condition of the human eye and its adnexa; or

(2) The employment of instruments, devices, pharmaceutical agents and procedures, other than surgery, intended for the purposes of investigating, examining, treating, diagnosing or correcting visual defects or abnormal conditions of the human eye or its adnexa; or

(3) The prescribing and application of lenses, devices containing lenses, prisms, contact lenses, orthoptics, vision training, pharmaceutical agents, and prosthetic devices to correct, relieve, or treat defects or abnormal conditions of the human eye or its adnexa. (1909, c. 444, s. 1; C.S., s. 6687; 1923, c. 42, s. 1; 1977, c. 482, s. 1; 1997-75, s. 1.)

Cross References. — As to limited liability companies and their powers, see G.S. 57C-2-01 et seq. As to optometrist/patient privilege, see G.S. 8-53.9.

Legal Periodicals. — For comment on this Article, see 1 N.C.L. Rev. 300 (1923).

CASE NOTES

Editor's Note. — *Some of the following cases were decided under this section as it stood prior to the 1977 amendment.*

This Article was intended to regulate the practice of optometry, and not the optical trade. Palmer v. Smith, 229 N.C. 612, 51 S.E.2d 8 (1948).

This section is in substantial accord with the definitions given in other jurisdictions. Palmer v. Smith, 229 N.C. 612, 51 S.E.2d 8 (1948).

The duplication of an ophthalmic lens, or the duplication or replacement of a frame or mounting for such lenses, does not constitute the practice of optometry as defined in this section. Palmer v. Smith, 229 N.C. 612, 51 S.E.2d 8 (1948). See note to § 90-115.

Neither an optician nor an optometrist is permitted to use any medicine to treat the eye in order to relieve irritation or for any other trouble which requires the use of drugs. High v. Ridgeway's Opticians, 258 N.C. 626, 129 S.E.2d 301 (1963).

The physician-patient privilege against disclosure of confidential communications and information does not extend to optometrists.

(But see now G.S. 8-53.9, enacted in 1997) State v. Shaw, 305 N.C. 327, 289 S.E.2d 325 (1982).

OPINIONS OF ATTORNEY GENERAL

Post-operative care of cataract surgery patients falls within the definition of optometry when performed by a licensed optometrist, and does not constitute the unauthorized practice of medicine where there are no complications as a result of the surgery. See opinion of Attorney General to Mr. Bryant D. Paris, Jr., Executive Director, Board of Medical Examiners, 56 N.C.A.G. 5 (1986).

§ 90-115. Practice without registration unlawful.

After the passage of this Article it shall be unlawful for any person to practice optometry in the State unless he has first obtained a certificate of registration as hereinafter provided. Within the meaning of this Article, a person shall be deemed as practicing optometry who does, or attempts to, sell, furnish, replace, or duplicate, a lens, frame, or mounting, or furnishes any kind of material or apparatus for ophthalmic use, without a written prescription from a person authorized under the laws of the State of North Carolina to practice optometry, or from a person authorized under the laws of North Carolina to practice medicine: Provided, however, that the provisions of this section shall not prohibit persons or corporations from selling completely assembled spectacles, without advice or aid as to the selection thereof, as merchandise from permanently located or established places of business, nor shall it prohibit persons or corporations from making mechanical repairs to frames for spectacles; nor shall it prohibit any person, firm, or corporation engaged in grinding lenses and filling prescriptions from replacing or duplicating lenses on original prescriptions issued by a duly licensed optometrist, and oculist. (1909, c. 444, s. 2; C.S., s. 6688; 1935, c. 63; 1967, c. 691, s. 43.)

CASE NOTES

Section Is Invalid in Part. — This section is invalid insofar as it declares that a person is practicing optometry when he replaces or duplicates an ophthalmic lens, or replaces or duplicates the frame or mounting for such lens, for these acts do not constitute the practice of optometry as defined by G.S. 90-114, and the proscription has no reasonable relation to the public health, safety or welfare. Palmer v. Smith, 229 N.C. 612, 51 S.E.2d 8 (1948). See N.C. Const., Art. I, §§ 1, 19, and 34.

Effect of Definition in G.S. 90-114. — The mere fact that this section provides that a person shall be deemed to be practicing optometry if he duplicates a lens or replaces or duplicates a frame or mounting, without a prescription, does not make it so, unless such duplication or replacement constitutes the practice of optometry within the definition thereof in G.S. 90-114. Palmer v. Smith, 229 N.C. 612, 51 S.E.2d 8 (1948), decided prior to 1977 amendment of G.S. 90-114.

What Optician May Do. — So long as an optician confines his work to the mere mechanical process of duplicating lenses, replacing or duplicating frames and mountings, "making mechanical repairs to frames for spectacles," and filling prescriptions issued by a duly licensed optometrist or oculist, and does not in any manner undertake "the measurement of the powers of vision and the adaptation of lenses for the aid thereof," he is not practicing optometry. Palmer v. Smith, 229 N.C. 612, 51 S.E.2d 8 (1948), decided prior to 1977 amendment of § 90-114.

Cited in High v. Ridgeway's Opticians, 258 N.C. 626, 129 S.E.2d 301 (1963).

§ 90-115.1. Acts not constituting the unlawful practice of optometry.

In addition to the exemptions from this Article otherwise existing the following acts or practices shall not constitute the unlawful practice of optometry:

(1) The practice of optometry, in the discharge of their official duties, by optometrists in any branch of the military service of the United States or in the full employ of any agency of the United States.

(2) The teaching of optometry, in optometry schools or colleges operated and conducted in this State and approved by the North Carolina State Board of Examiners in Optometry, by any person or persons licensed to practice optometry anywhere in the United States or in any country, territory or other recognized jurisdiction; provided, however, that such teaching of optometry by any person or persons licensed in any jurisdiction other than a place in the United States must first be approved by the North Carolina State Board of Examiners in Optometry.

(3) The practice of optometry by students enrolled in optometry schools or colleges approved by the North Carolina State Board of Examiners in Optometry when such practice is performed as a part of the student's course of instruction, is under the direct supervision of an optometrist who is either duly licensed in North Carolina or qualified under subdivision (2) above as a teacher, and is conducted in accordance with such rules as may be established for such practice by the North Carolina State Board of Examiners in Optometry. Additionally, the practice of optometry by such students at any location upon patients or inmates of institutions wholly owned or operated by the State of North Carolina or any political subdivision or subdivisions thereof when, in the opinion of the dean of such optometry school or college or his designee, the student's optometric education and experience is adequate therefor, subject to review and approval by the said Board of Examiners in Optometry, and such practice is a part of the course of instruction of such students, is performed under the supervision of a duly licensed optometrist acting as a teacher or instructor and is without remuneration except for expenses and subsistence as defined and permitted by the rules and regulations of said Board of Examiners in Optometry.

(4) The temporary practice of optometry by licensed optometrists of another state or of any territory or country when the same is performed, as clinicians, at meetings or organized optometric societies, associations, colleges or similar optometric organizations, or when such optometrists appear in emergency cases upon the specific call of and in consultation with an optometrist duly licensed to practice in this State.

(5) The practice of optometry by a person who is a graduate of an optometric school or college approved by the North Carolina State Board of Examiners in Optometry and who is not licensed to practice optometry in this State, when such person is the holder of a valid intern permit, or provisional license, issued to him by the North Carolina State Board of Examiners in Optometry pursuant to the terms and provisions of this Article, and when such practice of optometry complies with the conditions of said intern permit, or provisional license.

(6) Any act or acts performed by an optometric assistant or technician to an optometrist licensed to practice in this State when said act or acts

are authorized and permitted by and performed in accordance with rules and regulations promulgated by the Board.

(7) Optometric assisting and related functions as a part of their instructions by optometric assistant students enrolled in a course conducted in this State and approved by the Board, when such functions are performed under the supervision of an optometrist acting as a teacher or instructor who is either duly licensed in North Carolina or qualified for the teaching of optometry pursuant to the provisions of subdivision (2) above. (1975, c. 733; 1989, c. 321.)

Editor's Note. — The sections relating to intern permits and provisional licenses, G.S. 90-118.8 and 90-118.9, were repealed by Session Laws 1981, c. 811, ss. 4 and 5.

§ 90-116. Board of Examiners in Optometry.

In order to properly regulate the practice of optometry, there is established a North Carolina State Board of Examiners in Optometry, which shall consist of five regularly graduated optometrists who have been engaged in the practice of optometry in this State for at least five years and two members to represent the public at large.

No public member shall at any time be a health care provider, be related to or be the spouse of a health care provider, or have any pecuniary interest in the profitability of a health care provider. For purposes of this section, the term "health care provider" shall have the same meaning as provided in G.S. 58-47-5(4). The Governor shall appoint the two public members not later than July 1, 1981.

The optometric members of the Board shall be appointed by the Governor from a list provided by the North Carolina State Optometric Society. For each vacancy, the society must submit at least three names to the Governor. The society shall establish procedures for the nomination and election of optometrist members of the Board. These procedures shall be adopted under the rule-making procedures described in Article 2A, Chapter 150B of the General Statutes, and notice of the proposed procedures shall be given to all licensed optometrists residing in North Carolina. Such procedures shall not conflict with the provisions of this section. Every optometrist with a current North Carolina license residing in the State shall be eligible to vote in all such elections, and the list of licensed optometrists shall constitute the registration list for elections. Any decision of the society relative to the conduct of such elections may be challenged by civil action in the Wake County Superior Court. A challenge must be filed not later than 30 days after the society has rendered the decision in controversy, and all such cases shall be heard de novo.

All Board members serving on June 30, 1981, shall be eligible to complete their respective terms. No member appointed to a term on or after July 1, 1981, shall serve more than two complete consecutive five-year terms, except that each member shall serve until his successor is chosen and qualifies.

The Governor may remove any member for good cause shown. Any vacancy in the optometrist membership of the Board shall be filled for the period of the unexpired term by the Governor from a list of at least three names submitted by the North Carolina State Optometric Society Executive Council. Any vacancy in the public membership of the Board shall be filled by the Governor for the unexpired term. (1909, c. 444, s. 3; 1915, c. 21, s. 1; C.S., s. 6689; 1935, c. 63; 1981, c. 496, s. 1; 1987, c. 827, s. 1; 2000-189, s. 5.)

Editor's Note. — Section 58-47-5, referred to in the second paragraph, has been repealed.

§ 90-117. Officers; common seal.

The North Carolina State Board of Examiners in Optometry shall, at each annual meeting thereof, elect one of its members president and one secretary-treasurer. The common seal which has already been adopted by said Board, pursuant to law, shall be continued as the seal of said Board. (1909, c. 444, s. 4; C.S., s. 6690; 1935, c. 63; 1953, c. 1041, s. 11; 1973, c. 800, s. 1.)

§ 90-117.1. Quorum; adjourned meetings.

A majority of the members of said Board shall constitute a quorum for the transaction of business. If a majority of members are not present at the time and the place appointed for a Board meeting, those members of the Board in attendance may adjourn from day to day until a quorum is present, and the action of the Board taken at any adjourned meeting thus had shall have the same force and effect as if had upon the day and at the hour of the meeting called and adjourned from day to day. (1973, c. 800, s. 2; 1981, c. 496, s. 2.)

§ 90-117.2. Records and transcripts.

The said Board shall keep a record of its transactions at all annual or special meetings and shall provide a record book in which shall be entered the names and proficiency of all persons to whom licenses may be granted under the provisions of law. The said book shall show, also, the license number and the date upon which such license was issued and shall show such other matters as in the opinion of the Board may be necessary or proper. Said book shall be deemed a book of record of said Board and a transcript of any entry therein or a certification that there is not entered therein the name, proficiency and license number or date of granting such license, certified under the hand of the secretary-treasurer, attested by the seal of the North Carolina State Board of Examiners in Optometry, shall be admitted as evidence in any court of this State when the same shall otherwise be competent. (1973, c. 800, s. 3.)

§ 90-117.3. Annual and special meetings.

The North Carolina State Board of Examiners in Optometry shall meet annually in June of each year at such place as may be determined by the Board, and at such other times and places as may be determined by action of the Board or by a majority of the members thereof. Notice of the place of the annual meeting and of the time and place of any special or called meeting shall be given in writing, by registered or certified mail or personally, to each member of the Board at least 10 days prior to said meeting; provided the requirements of notice may be waived by any member of the Board. At the annual meeting or at any special or called meeting, the said Board shall have the power to conduct examination of applicants and to transact such other business as may come before it, provided that in case of a special meeting, the purpose for which said meeting is called shall be stated in the notice. (1973, c. 800, s. 4; 1981, c. 496, s. 3.)

§ 90-117.4. Judicial powers; additional data for records.

The president of the North Carolina State Board of Examiners in Optometry, and/or the secretary-treasurer of said Board, shall have the power to administer oaths, issue subpoenas requiring the attendance of persons and the production of papers and records before said Board in any hearing, investigation or proceeding conducted by it. The sheriff or other proper official of any county of the State shall serve the process issued by said president or secretary-treasurer of said Board pursuant to its requirements and in the same manner as process issued by any court of record. The said Board shall pay for the service of all process, such fees as are provided by law for the service of like process in other cases.

Any person who shall neglect or refuse to obey any subpoena requiring him to attend and testify before said Board or to produce books, records or documents shall be guilty of a Class 1 misdemeanor.

The Board shall have the power, upon the production of any papers, records or data, to authorize certified copies thereof to be substituted in the permanent record of the matter in which such books, records or data shall have been introduced in evidence. (1973, c. 800, s. 5; 1993, c. 539, s. 627; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Subpoena Power of Board. — This section clearly gives the Board the power, in a proper case, to issue subpoenas requiring the attendance of persons and the production of papers and records. The subpoena authority of the Board is limited to any hearing, investigation or proceeding conducted by it. Bullington v. North Carolina State Bd. of Exmrs., 79 N.C. App. 750, 340 S.E.2d 770 (1986).

The authority of the Board to enforce its subpoena power necessarily must be decided on a case-by-case basis. Bullington v. North Carolina State Bd. of Exmrs., 79 N.C. App. 750, 340 S.E.2d 770 (1986).

§ 90-117.5. Bylaws and regulations.

The North Carolina State Board of Examiners in Optometry shall have the power to make necessary bylaws and regulations, not inconsistent with the provisions of this Article, regarding any matter referred to in this Article and for the purpose of facilitating the transaction of business by the said Board. (1973, c. 800, s. 6.)

§ 90-118. Examination and licensing of applicants; qualifications; causes for refusal to grant license; void licenses; educational requirements for prescription and use of pharmaceutical agents.

(a) The North Carolina State Board of Examiners in Optometry shall grant licenses to practice optometry to such applicants who are graduates of an accredited optometric institution, who, in the opinion of a majority of the Board, shall undergo a satisfactory examination of proficiency in the knowledge and practice of optometry, subject, however, to the further provisions of this section and to the provisions of this Article.

(b) The applicant shall be of good moral character and at least 18 years of age at the time the application for examination is filed. The application shall be made to the said Board in writing and shall be accompanied by evidence satisfactory to said Board that the applicant is a person of good moral character; has an academic education, the standard of which shall be determined by the said Board; and that he is a graduate of and has a diploma from an accredited optometric college or the optometric department of an accredited university or college recognized and approved as such by the said Board.

(c) The North Carolina State Board of Examiners in Optometry is authorized to conduct both written or oral and clinical examinations of such character as to thoroughly test the qualifications of the applicant, and may refuse to grant a license to any person who, in its discretion, is found deficient in said examination, or to any person guilty of cheating, deception, or fraud during such examination, or whose examination discloses, to the satisfaction of the Board, a deficiency in academic education. The Board may employ such optometrists found qualified therefor by the Board in examining applicants for licenses as it deems appropriate.

(d) Any license obtained through fraud or by any false representation shall be void ab initio and of no effect.

(e) The Board shall not license any person to practice optometry in the State of North Carolina beyond the scope of the person's educational training as determined by the Board. No optometrist presently licensed in this State shall prescribe and use pharmaceutical agents in the practice of optometry unless and until he (i) has submitted to the Board evidence of satisfactory completion of all educational requirements established by the Board to prescribe and use pharmaceutical agents in the practice of optometry and (ii) has been certified by the Board as educationally qualified to prescribe and use pharmaceutical agents.

Provided, however, that no course or courses in pharmacology shall be approved by the Board unless (i) taught by an institution having facilities for both the didactic and clinical instruction in pharmacology and which is accredited by a regional or professional accrediting organization that is recognized and approved by the Council on Postsecondary Accreditation or the United States Office of Education and (ii) transcript credit for the course or courses is certified to the Board by the institution as being equivalent in both hours and content to those courses in pharmacology required by the other licensing boards in this Chapter whose licensees or registrants are permitted the use of pharmaceutical agents in the course of their professional practice. (1909, c. 444, s. 5; 1915, c. 21, ss. 2, 3, 4; C.S., s. 6691; 1923, c. 42, ss. 2, 3; 1935, c. 63; 1949, c. 357; 1959, c. 464; 1973, c. 800, s. 7; 1975, c. 19, s. 23; 1977, c. 482, s. 2; 1981, c. 496, ss. 4, 5; 1997-75, s. 4.1.)

CASE NOTES

Discontinuing Practice of Optometry for 18 Years Will Not Constitute Abandonment of License. — See Mann v. North Carolina State Bd. of Exmrs., 206 N.C. 853, 175 S.E. 281 (1934), decided prior to the 1973 amendment of this section.

§ 90-118.1. Contents of original license.

The original license granted by the North Carolina State Board of Examiners in Optometry shall bear a serial number, the full name of the applicant, the date of issuance and shall be signed by the president and a majority of the members of the said Board and attested by the seal of said Board and the secretary thereof. The certificate of renewal of license shall bear a serial number which need not be the serial number of the original license issued, the full name of the applicant and the date of issuance. (1973, c. 800, s. 8.)

§ 90-118.2. Displaying license and current certificate of renewal.

The license and the current certificate of renewal of license to practice optometry issued, as herein provided, shall at all times be displayed in a conspicuous place in the office of the holder thereof and whenever requested the license and the current certificate of renewal shall be exhibited to or produced before the North Carolina State Board of Examiners in Optometry or to its authorized agents.

A licensee who practices in more than one office location shall make application to the Board for a duplicate license for each branch office for display as required by this section. In issuing a duplicate license, the address of the branch office location and the original certificate number shall be included. At the time of the annual renewal of licenses, those optometrists who have been issued a duplicate license for a branch office, shall make application to the North Carolina Board of Examiners in Optometry on a form provided by the Board for the renewal of the license in the same manner as provided for in G.S. 90-118.10 for the renewal of his license. The holder of a certificate for a branch office may cancel it by returning the certificate to the Secretary of the Board. (1973, c. 800, s. 9; 1981, c. 811, s. 1.)

Cross References. — As to duplicate license fees for branch offices, see G.S. 90-123.

§ 90-118.3. Refusal to grant renewal of license.

For nonpayment of fee or fees required by this Article, or for violation of any of the terms or provisions of G.S. 90-121.2, the North Carolina State Board of Examiners in Optometry may refuse to issue a certificate of renewal of license. (1973, c. 800, s. 10; 1981, c. 811, s. 2.)

§ 90-118.4. Duplicate licenses.

When a person is a holder of a license to practice optometry in North Carolina or the holder of a certificate of renewal of license, he may make application to the North Carolina State Board of Examiners in Optometry for the issuance of a copy or a duplicate thereof accompanied by a reasonable fee set by the Board. Upon the filing of the application and the payment of the fee, the said Board shall issue a copy or duplicate. (1973, c. 800, s. 11.)

§ 90-118.5. Licensing practitioners of other states.

(a) If an applicant for licensure is already licensed in another state in optometry, the North Carolina State Board of Examiners in Optometry shall issue a license to practice optometry to the applicant without examination other than a clinical practicum examination upon evidence that:

(1) The applicant is currently an active, competent practitioner in good standing, and

(2) The applicant has practiced at least three out of the five years immediately preceding his or her application, and

(3) The applicant currently holds a valid license in another state, and

(4) No disciplinary proceeding or unresolved complaint is pending anywhere at the time a license is to be issued by this State, and

(5) The licensure requirements in the other state are equivalent to or higher than those required by this State.

(b) Application for license to be issued under the provisions of this section shall be accompanied by a certificate from the optometry board or like board of the state from which said applicant removed, certifying that the applicant is the legal holder of a license to practice optometry in that state, and for a period of at least three out of five years immediately preceding the application has engaged in the practice of optometry; is of good moral character and that during the period of his practice no charges have been filed with said board against the applicant for the violation of the criminal laws of the state or the United States, or for the violation of the ethics of the profession of optometry.

(c) Application for a license under this section shall be made to the North Carolina State Board of Examiners in Optometry within six months of the date of the issuance of the certificate hereinbefore required, and said certificate shall be accompanied by the diploma or other evidence of the graduation from an accredited, recognized and approved optometry college, school or optometry department of a college or university.

(d) Any license issued upon the application of any optometrist from any other state or territory shall be subject to all of the provisions of this Article with reference to the license issued by the North Carolina State Board of Examiners in Optometry upon examination of applicants and the rights and privileges to practice the profession of optometry under any license so issued shall be subject to the same duties, obligations, restrictions and the conditions as imposed by this Article on optometrists originally examined by the North Carolina State Board of Examiners in Optometry. (1973, c. 800, s. 12; 1981, c. 496, ss. 6, 7.)

§ 90-118.6. Certificate issued to optometrist moving out of State.

Any optometrist duly licensed by the North Carolina State Board of Examiners in Optometry, desiring to move from North Carolina to another state, territory or foreign country, if a holder of a certificate of renewal of license from said Board, upon application to said Board and the payment to it of the fee in this Article provided, shall be issued a certificate showing his full name and address, the date of license originally issued to him, the date and number of his renewal of license, and whether any charges have been filed with the Board against him. The Board may provide forms for such certificate, requiring such additional information as it may determine proper. (1973, c. 800, s. 13.)

§ 90-118.7. Licensing former optometrists who have moved back into State or resumed practice.

Any person who shall have been licensed by the North Carolina State Board of Examiners in Optometry to practice optometry in this State who shall have retired from practice or who shall have moved from the State and shall have returned to the State, may, upon a satisfactory showing to said Board of his proficiency in the profession of optometry and his good moral character during the period of his retirement, or absence from the State, be granted by said Board a license to resume the practice of optometry upon making application to the said Board in such form as it may require. The license to resume practice, after issuance thereof, shall be subject to all the provisions of this Article. (1973, c. 800, s. 14.)

§§ 90-118.8, 90-118.9: Repealed by Session Laws 1981, c. 811, ss. 4, 5.

§ 90-118.10. Annual renewal of licenses.

Since the laws of North Carolina now in force provided for the annual renewal of any license issued by the North Carolina State Board of Examiners in Optometry, it is hereby declared to be the policy of this State that all licenses heretofore issued by the North Carolina State Board of Examiners in Optometry, or hereafter issued by said Board are subject to annual renewal and the exercise of any privilege granted by any license heretofore issued or hereafter issued by the North Carolina State Board of Examiners in Optometry is subject to the issuance on or before the first day of January of each year of a certificate of renewal of license.

On or before the first day of January of each year, each optometrist engaged in the practice of optometry in North Carolina shall make application to the

North Carolina State Board of Examiners in Optometry and receive from said Board, subject to the further provisions of this section and of this Article, a certificate of renewal of said license.

The application shall show the serial number of the applicant's license, his full name, address and the county in which he has practiced during the preceding year, the date of the original issuance of license to said applicant and such other information as the said Board from time to time may prescribe by regulation.

If the application for such renewal certificate, accompanied by the fee required by this Article, is not received by the Board before January 31 of each year, an additional fee of fifty dollars ($50.00) shall be charged for renewal certificate. If such application accompanied by the renewal fee is not received by the Board before March 31 of each year, every person thereafter continuing to practice optometry without having applied for a certificate of renewal shall be guilty of the unauthorized practice of optometry and shall be subject to the penalties prescribed by G.S. 90-118.11.

In issuing a certificate of renewal, the Board shall expressly state whether such person, otherwise licensed in the practice of optometry, has been certified to prescribe and use pharmaceutical agents. (1973, c. 800, s. 17; c. 1092, s. 1; 1977, c. 482, s. 3; 1987, c. 645, s. 3.)

§ 90-118.11. Unauthorized practice; penalty for violation of Article.

If any person shall practice or attempt to practice optometry in this State without first having passed the examination and obtained a license from the North Carolina State Board of Examiners in Optometry; or without having obtained a provisional license from said Board; or if he shall practice optometry after March 31 of each year without applying for a certificate of renewal of license, as provided in G.S. 90-118.10; or shall practice or attempt to practice optometry while his license is revoked, or suspended, or when a certificate of renewal of license has been refused; or shall practice or attempt to practice optometry by means or methods that the Board has determined is beyond the scope of the person's educational training; or shall violate any of the provisions of this Article for which no specific penalty has been provided; or shall practice, or attempt to practice, optometry in violation of the provisions of this Article; or shall practice optometry under any name other than his own name, said person shall be guilty of a Class 1 misdemeanor. Each day's violation of this Article shall constitute a separate offense. (1973, c. 800, s. 18; 1977, c. 482, s. 4; 1981, c. 496, s. 10; 1993, c. 539, s. 628; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — The section relating to provisional licenses, G.S. 90-116, was repealed by Session Laws 1981, c. 811, s. 5.

§ 90-119. Persons in practice before passage of statute.

Every person who had been engaged in the practice of optometry in the State for two years prior to the date of the passage of this Article shall hereafter file an affidavit as proof thereof with the Board. The secretary shall keep a record of such persons who shall be exempt from the provisions of the preceding section [G.S. 90-118]. Upon payment of three dollars ($3.00) he shall issue to each of them certificates of registration without the necessity of an examination. Failure on the part of a person so entitled within six months of the enactment of this Article to make written application to the Board for the certificate of registration accompanied by a written statement, signed by him and duly verified before an officer authorized to administer oaths within this State, fully setting forth the grounds upon which he claims such certificate, shall be deemed a waiver of his right to a certificate under the provisions of this section. A person who has thus waived his right may obtain a certificate thereafter by successfully passing examination and paying a fee as provided herein. (1909, c. 444, ss. 6, 7, 9; C.S., s. 6692.)

§§ 90-120, 90-121: Repealed by Session Laws 1973, c. 800, ss. 19, 20.

§ 90-121.1. Board may enjoin illegal practices.

In view of the fact that the illegal practice of optometry imminently endangers the public health and welfare, and is a public nuisance, the North Carolina State Board of Examiners in Optometry may, if it shall find that any person is violating any of the provisions of this Article, apply to the superior court for a temporary or permanent restraining order or injunction to restrain such person from continuing such illegal practices. If upon such application, it shall appear to the court that such person has violated, or is violating, the provisions of this Article, the court shall issue an order restraining any further violating thereof. All such actions by the Board for injunctive relief shall be governed by the provisions of Article 37 of Chapter 1 of the General Statutes: provided, such injunctive relief may be granted regardless of whether criminal prosecution has been or may be instituted under the provisions of G.S. 90-124. Actions under this section shall be commenced in the superior court district or set of districts as defined in G.S. 7A-41.1 in which the respondent resides or has his principal place of business. (1973, c. 800, s. 19; 1981, c. 496, s. 11; 1987 (Reg. Sess., 1988), c. 1037, s. 101.)

§ 90-121.2. Rules and regulations; discipline, suspension, revocation and regrant of certificate.

(a) The Board shall have the power to make, adopt, and promulgate such rules and regulations, including rules of ethics, as may be necessary and proper for the regulation of the practice of the profession of optometry and for the performance of its duties. The Board shall have jurisdiction and power to hear and determine all complaints, allegations, charges of malpractice, corrupt or unprofessional conduct, and of the violation of the rules and regulations, including rules of ethics, made against any optometrist licensed to practice in North Carolina. The Board shall also have the power and authority to: (i) refuse to issue a license to practice optometry; (ii) refuse to issue a certificate of renewal of a license to practice optometry; (iii) revoke or suspend a license to practice optometry; and (iv) invoke such other disciplinary measures, censure, or probative terms against a licensee as it deems fit and proper; in any instance or instances in which the Board is satisfied that such applicant or licensee:

(1) Has engaged in any act or acts of fraud, deceit or misrepresentation in obtaining or attempting to obtain a license or the renewal thereof;
(2) Is a chronic or persistent user of intoxicants, drugs or narcotics to the extent that the same impairs his ability to practice optometry;
(3) Has been convicted of any of the criminal provisions of this Article or has entered a plea of guilty or nolo contendere to any charge or charges arising therefrom;
(4) Has been convicted of or entered a plea of guilty or nolo contendere to any felony charge or to any misdemeanor charge involving moral turpitude;

(5) Has been convicted of or entered a plea of guilty or nolo contendere to any charge of violation of any State or federal narcotic or barbiturate law;

(6) Has engaged in any act or practice violative of any of the provisions of this Article or violative of any of the rules and regulations promulgated and adopted by the Board, or has aided, abetted or assisted any other person or entity in the violation of the same;

(7) Is mentally, emotionally, or physically unfit to practice optometry or is afflicted with such a physical or mental disability as to be deemed dangerous to the health and welfare of his patients. An adjudication of mental incompetency in a court of competent jurisdiction or a determination thereof by other lawful means shall be conclusive proof of unfitness to practice optometry unless or until such person shall have been subsequently lawfully declared to be mentally competent;

(8) Repealed by Session Laws 1981, c. 496, s. 12.

(9) Has permitted the use of his name, diploma or license by another person either in the illegal practice of optometry or in attempting to fraudulently obtain a license to practice optometry;

(10) Has engaged in such immoral conduct as to discredit the optometry profession;

(11) Has obtained or collected or attempted to obtain or collect any fee through fraud, misrepresentation, or deceit;

(12) Has been negligent in the practice of optometry;

(13) Has employed a person not licensed in this State to do or perform any act of service, or has aided, abetted or assisted any such unlicensed person to do or perform any act or service which under this Article can lawfully be done or performed only by an optometrist licensed in this State;

(14) Is incompetent in the practice of optometry;

(15) Has practiced any fraud, deceit or misrepresentation upon the public or upon any individual in an effort to acquire or retain any patient or patients, including false or misleading advertising;

(16) Has made fraudulent or misleading statements pertaining to his skill, knowledge, or method of treatment or practice;

(17) Has committed any fraudulent or misleading acts in the practice of optometry;

(18) Repealed by Session Laws 1981, c. 496, s. 12.

(19) Has, in the practice of optometry, committed an act or acts constituting malpractice;

(20) Repealed by Session Laws 1981, c. 496, s. 12.

(21) Has permitted an optometric assistant in his employ or under his supervision to do or perform any act or acts violative to this Article or of the rules and regulations promulgated by the Board;

(22) Has wrongfully or fraudulently or falsely held himself out to be or represented himself to be qualified as a specialist in any branch of optometry;

(23) Has persistently maintained, in the practice of optometry, unsanitary offices, practices, or techniques;

(24) Is a menace to the public health by reason of having a serious communicable disease;

(25) Has engaged in any unprofessional conduct as the same may be from time to time defined by the rules and regulations of the Board.

In addition to and in conjunction with the actions described above, the Board may make a finding adverse to a licensee or applicant but withhold imposition of judgment and penalty or it may impose judgment and penalty but suspend enforcement thereof and place the licensee on probation, which probation may be vacated upon noncompliance with such reasonable terms as the Board may impose. The Board may administer a public or private reprimand or a private letter of concern, and the private reprimand and private letter of concern shall not require a hearing in accordance with G.S. 90-121.3 and shall not be disclosed to any person except the licensee. The Board may require a licensee to: (i) make specific redress or monetary redress; (ii) provide free public or charity service; (iii) complete educational, remedial training, or treatment programs; (iv) pay a fine; and (v) reimburse the Board for disciplinary costs.

(b) If any person engages in or attempts to engage in the practice of optometry while his license is suspended, his license to practice optometry in the State of North Carolina may be permanently revoked.

(c) The Board may, on its own motion, initiate the appropriate legal proceedings against any person, firm or corporation when it is made to appear to the Board that such person, firm or corporation has violated any of the provisions of this Article.

(d) The Board may appoint, employ or retain an investigator or investigators for the purpose of examining or inquiring into any practices committed in this State that might violate any of the provisions of this Article or any of the rules and regulations promulgated by the Board.

(e) The Board may employ or retain legal counsel for such matters and purposes as may seem fit and proper to said Board.

(f) As used in this section the term "licensee" includes licensees, provisional licensees and holders of intern permits, and the term "license" includes license, provisional license and intern permit.

(g) A person, partnership, firm, corporation, association, authority, or other entity acting in good faith without fraud or malice shall be immune from civil liability for (i) reporting or investigating the acts or omissions of a licensee or applicant that violate the provisions of subsection (a) of this section or any other provision of law relating to the fitness of a licensee or applicant to practice optometry and (ii) initiating or conducting proceedings against a licensee or applicant if a complaint is made or action is taken in good faith without fraud or malice. A person shall not be held liable in any civil proceeding for testifying before the Board in good faith and without fraud or malice in any proceeding involving a violation of subsection (a) of this section or any other law relating to the fitness of an applicant or licensee to practice optometry, or for making a recommendation to the Board in the nature of peer review, in good faith and without fraud and malice. (1973, c. 800, s. 20; 1981, c. 496, ss. 12, 13; 2000-184, s. 6.)

CASE NOTES

Cited in Dailey v. North Carolina State Bd. of Dental Exmrs., 309 N.C. 710, 309 S.E.2d 219 (1983).

§ 90-121.3. Hearings.

(a) The Board shall grant any person whose license is affected the right to be heard before the Board, before any of the following action is finally taken, the effect of which would be:

(1) To deny permission to take an examination for licensing for which application has been duly made; or

(2) To deny a license after examination for any cause other than failure to pass an examination; or

(3) To withhold the renewal of a license for any cause other than failure to pay a statutory renewal fee; or

(4) To suspend a license; or
(5) To revoke a license; or
(6) To revoke or suspend a provisional license or an intern permit; or
(7) To invoke any other disciplinary measures, censure, or probative terms against a licensee, a provisional licensee, or an intern.

(b) Proceedings under this section shall be conducted in accordance with the provisions of Chapter 150B of the General Statutes of North Carolina.

(c) In lieu of or as a part of such hearings and subsequent proceedings the Board is authorized and empowered to enter any consent order relative to the discipline, censure, or probation of a licensee, an intern, or an applicant for a license, or relative to the revocation or suspension of a license, provisional license, or intern permit.

(d) Following the service of the notice of hearing as required by Chapter 150B of the General Statutes, the Board and the person upon whom such notice is served shall have the right to conduct adverse examinations, take depositions, and engage in such further discovery proceedings as are permitted by the laws of this State in civil matters. The Board is hereby authorized and empowered to issue such orders, commissions, notices, subpoenas, or other process as might be necessary or proper to effect the purposes of this subsection; provided, however, that no member of the Board shall be subject to examination hereunder. (1973, c. 800, s. 21; c. 1331, s. 3; 1987, c. 827, s. 1.)

§ 90-121.4. Restoration of revoked license.

Whenever any optometrist has been deprived of his license, the North Carolina State Board of Examiners in Optometry in its discretion may restore said license upon due notice being given and hearing had, and satisfactory evidence produced or proper reformation of the licentiate, before restoration. (1973, c. 800, s. 22.)

§ 90-122. Compensation and expenses of Board.

Notwithstanding G.S. 93B-5(a), each member of the North Carolina State Board of Examiners in Optometry shall receive as compensation for his services in the performance of his duties under this Article two hundred dollars ($200.00) for each day actually engaged in the performance of the duties of his office, and all legitimate and necessary expenses incurred in attending meetings of the said Board.

All per diem allowances and all expenses paid as provided in this section shall be paid upon vouchers drawn by the Executive Director of the Board in accordance with Board policy.

The Board is authorized and empowered to expend from funds collected such sum or sums as it may determine necessary in the administration and enforcement of this Article, and employ such personnel as it may deem requisite to assist in carrying out the administrative functions required by this Article and by the Board. (1909, c. 444, s. 11; C.S., s. 6695; 1923, c. 42, s. 4; 1935, c. 63; 1959, c. 574; 1973, c. 800, s. 23; 1979, c. 771, s. 3; 1987, c. 645, s. 2; 2001-493, s. 1.)

§ 90-123. Fees.

In order to provide the means of carrying out and enforcing the provisions of this Article and the duties of devolving upon the North Carolina State Board of Examiners in Optometry, the Board is authorized to charge and collect the following fees:

(1) Each application for general optometry examination	$800.00

(2) Each general optometry license renewal, which fee shall be annually fixed by the Board, and not later than December 15 of each year written notice of the amount of the renewal fee shall be given to each optometrist licensed to practice in this State by mailing the notice to the last address of record with the Board of each such optometrist	300.00
(3) Each certificate of license to a resident optometrist desiring to change to another state or territory	300.00
(4) Each license issued to a practitioner of another state or territory to practice in this State	350.00
(5) Each license to resume practice issued to an optometrist who has retired from the practice of optometry or who has removed from and returned to this State	350.00
(6) Each application for registration as an optometric assistant or renewal thereof	100.00
(7) Each application for registration as an optometric technician or renewal thereof	100.00
(8) Each duplicate license or renewal thereof for each branch office	100.00.

(1909, c. 444, s. 12; C.S., s. 6696; 1923, c. 42, s. 5; 1933, c. 492; 1937, c. 362, s. 1; 1959, c. 477; 1969, c. 624; 1973, c. 1092, s. 2; 1979, c. 771, ss. 1, 2; 1981, c. 909; 1987, c. 645, s. 1; 2001-493, s. 2.)

§ 90-123.1. Continuing education courses required.

All registered optometrists now or hereafter licensed in the State of North Carolina are and shall be required to take annual courses of study in subjects relating to the practice of the profession of optometry to the end that the utilization and application of new techniques, scientific and clinical advances, and the achievements of research will assure expansive and comprehensive care to the public. The length of study shall be prescribed by the Board but shall not exceed 25 hours in any calendar year. Attendance must be at a course or courses approved by the Board. Attendance at any course or courses of study are to be certified to the Board upon a form approved by the Board and shall be submitted by each registered optometrist at the time he makes application to the Board for the renewal of his license and payment of his renewal fee. The Board is authorized to use up to one half of its annual renewal fees for the purposes of contracting with institutions of higher learning, professional organizations, or qualified individuals for the providing of educational programs that meet this requirement. The Board is further authorized to treat funds set aside for the purpose of continuing education as State funds for the purpose of accepting any funds made available under federal law on a matching basis for the promulgation and maintenance of programs of continuing education. In no instance may the Board require a greater number of hours of study than are available at approved courses held within the State, and shall be allowed to waive this requirement in cases of certified illness or undue hardship. (1969, c. 354; 1981, c. 811, s. 3.)

§ 90-124. Rules and regulations of Board; violation a misdemeanor.

Rules and regulations adopted by the Board shall become effective 30 days after passage, and the same may be proven, as evidence, by the president and/or the secretary-treasurer of the Board, and/or by certified copy under the hand and seal of the secretary-treasurer. A certified copy of any rule or regulation shall be receivable in all courts as prima facie evidence thereof if otherwise competent, and any person, firm, or corporation violating any such rule or regulation shall be guilty of a Class 2 misdemeanor, and each day that this section is violated shall be considered a separate offense.

The Board shall issue every two years to each licensed optometrist a compilation or supplement of the Optometric Practice Act and the Board Rules and Regulations, and upon written request by such licensed optometrist, a directory of optometrists. (1909, c. 444, s. 13; C.S., s. 6697; 1935, c. 63; 1953, c. 189; c. 1041, s. 12; 1955, c. 996; 1973, c. 800, s. 24; 1993, c. 539, s. 629; 1994, Ex. Sess., c. 24, s. 14(c).)

Legal Periodicals. — For comment on the 1955 amendment, see 33 N.C.L. Rev. 519 (1955).

CASE NOTES

Cited in Head v. New Mexico Bd. of Exmrs., 374 U.S. 424, 83 S. Ct. 1759, 10 L. Ed. 2d 983 (1963).

§ 90-125. Practicing under other than own name or as a salaried or commissioned employee.

Except as provided for in Chapter 55B of the General Statutes of North Carolina, it shall be unlawful for any person licensed to practice optometry under the provisions of this Article to advertise, practice, or attempt to practice under a name other than his own, except as an associate of or assistant to an optometrist licensed under the laws of the State of North Carolina; and it shall be likewise unlawful for any corporation, lay body, organization, group, or lay individuals to engage, or undertake to engage, in the practice of optometry through means of engaging the services, upon a salary or commission basis, of one licensed to practice optometry or medicine in any of its branches in this State. Likewise, it shall be unlawful for any optometrist licensed under the provisions of this Article to undertake to engage in the practice of optometry as a salaried or commissioned employee of any corporation, lay body, organization, group, or lay individual. (1935, c. 63; 1937, c. 362, s. 2; 1969, c. 718, s. 16.)

CASE NOTES

Cited in High v. Ridgeway's Opticians, 258 N.C. 626, 129 S.E.2d 301 (1963).

§§ 90-126, 90-126.1: Repealed by Session Laws 1973, c. 800, s. 26.

§ 90-127. Application of Article.

Nothing in this Article shall be construed to apply to physicians and surgeons authorized to practice under the laws of North Carolina, except the provisions contained in G.S. 90-125, or prohibit persons to sell spectacles, eyeglasses, or lenses as merchandise from permanently located and established places of business. (1909, c. 444, s. 15; C.S., s. 6699; 1937, c. 362, s. 3.)

§ 90-127.1. Free choice by patient guaranteed.

No agency of the State, county or municipality, nor any commission or clinic, nor any board administering relief, social security, health insurance or health service under the laws of the State of North Carolina shall deny to the recipients or beneficiaries of their aid or services the freedom to choose a duly licensed optometrist or duly licensed physician as the provider of care or services which are within the scope of practice of the profession of optometry as defined in this Chapter. (1965, c. 396, s. 3; 1973, c. 800, s. 25.)

§ 90-127.2. Filling prescriptions.

Legally licensed druggists of this State may fill prescriptions of optometrists duly licensed by the North Carolina State Board of Examiners in Optometry to prescribe, apply or use pharmaceutical agents. (1977, c. 482, s. 5.)

§ 90-127.3. Copy of prescription furnished on request.

All persons licensed or registered under this Chapter shall upon request give each patient having received an eye examination a copy of his spectacle prescription. No person, firm or corporation licensed or registered under Article 17 of this Chapter shall fill a prescription or dispense lenses, other than spectacle lenses, unless the prescription specifically states on its face that the prescriber intends it to be for contact lenses and includes the type and specifications of the contact lenses being prescribed. The prescriber shall state the expiration date on the face of every prescription, and the expiration date shall be no earlier than 365 days after the examination date.

Any person, firm or corporation that dispenses contact lenses on the prescription of a practitioner licensed under Articles 1 or 6 of this Chapter shall, at the time of delivery of the lenses, inform the recipient both orally and in writing that he return to the prescriber for insertion of the lens, instruction on lens insertion and care, and to ascertain the accuracy and suitability of the prescribed lens. The statement shall also state that if the recipient does not return to the prescriber after delivery of the lens for the purposes stated above, the prescriber shall not be responsible for any damages or injury resulting from the prescribed lens, except that this sentence does not apply if the dispenser and the prescriber are the same person.

Prescriptions filled pursuant to this section shall be kept on file by the prescriber and the person filling the prescription for at least 24 months after the prescription is filled. (1981, c. 496, s. 14.)

§ 90-128: Repealed by Session Laws 1973, c. 800, s. 26.

Article 6A.

Optometry Peer Review.

§ 90-128.1. Peer review agreements.

(a) The North Carolina State Board of Examiners in Optometry may, under rules adopted by the Board in compliance with Chapter 150B of the General Statutes, enter into agreements with the North Carolina State Optometric Society (Society), for the purpose of conducting peer review activities. Peer review activities to be covered by such agreements shall be limited in peer review proceedings to review of clinical outcomes as they relate to the quality of health care delivered by optometrists licensed by the Board.

(b) Peer review agreements shall include provisions for the Society to receive relevant information from the Board and other sources, provide assurance of confidentiality of nonpublic information and of the review process, and make reports to the Board. Peer review agreements shall include provisions assuring due process.

(c) Any confidential patient information and other nonpublic information acquired, created, or used in good faith by the Society pursuant to this section shall remain confidential and shall not be subject to discovery or subpoena in a civil case.

(d) Peer review activities conducted in good faith pursuant to any agreement under this section are deemed to be State directed and sanctioned and shall constitute State action for the purposes of application of antitrust laws. The Board shall be responsible for legal fees arising from peer review activities. (1997-75, s. 3.)

Editor's Note. — Session Laws 1997-75, s. 3, enacted this section as G.S. 90-127.4. The section has been recodified as G.S. 90-128.1 at the direction of the Revisor of Statutes.

§§ 90-128.2 through 90-128.6: Reserved for future codification purposes.

ARTICLE 7.

Osteopathy.

§ 90-129. Osteopathy defined.

For the purpose of this Article osteopathy is defined to be the science of healing without the use of drugs, as taught by the various colleges of osteopathy recognized by the North Carolina Osteopathic Society, Incorporated. (1907, c. 764, s. 8; 1913, c. 92, s. 3; C.S., s. 6700.)

Cross References. — As to limited liability companies and their powers, see G.S. 57C-2-01 et seq. As to what constitutes illegal practice of medicine by licensed osteopath, see G.S. 90-18 and note thereto.

CASE NOTES

Purpose of Article. — In all probability, the General Assembly enacted the statutes relating to the practice of osteopathy now embodied in this Article because of the decision in State v. McKnight, 131 N.C. 717 42 S.E. 580, 59 L.R.A. 187 (1902), which recognized that osteopathy is a "mode of treatment which absolutely excludes medicines and surgery from its pathology" and held that for this reason the statutes requiring examination and license "before beginning the practice of medicine or surgery" did not apply to osteopaths. State v. Baker, 229 N.C. 73, 48 S.E.2d 61 (1948).

The distinction between the practice of osteopathy and the practice of medicine and surgery is recognized by Articles 1 and 7 of this Chapter. State v. Baker, 229 N.C. 73, 48 S.E.2d 61 (1948).

"Osteopathy" Does Not Involve Use of Drugs. — "Osteopathy" is the very antithesis of any science of medicine involving the use of drugs. It is a system of treating diseases of the human body without drugs or surgery. State v. Baker, 229 N.C. 73, 48 S.E.2d 61 (1948).

The words "as taught by the various colleges of osteopathy" do not set at large the signification of "osteopathy," permitting the colleges to give it any meaning they choose. The legislature merely authorizes the colleges to determine, select, and teach the most desirable methods of doing what is comprehended within the term "osteopathy." The colleges cannot widen the scope of the osteopath's certificate so as to permit him to practice other systems of healing by the simple expedient of varying their curricula. State v. Baker, 229 N.C. 73, 48 S.E.2d 61 (1948).

In a prosecution of an osteopath for practicing medicine without a license, the State does not have the burden of showing that the administration or prescription of medicines with which defendant is charged was not taught in the recognized colleges of osteopathy. State v. Baker, 229 N.C. 73, 48 S.E.2d 61 (1948).

§ 90-130. Board of Examiners; membership; officers; meeting.

There shall be a State Board of Osteopathic Examination and Registration consisting of three members appointed by the Governor, whose duty it shall be to administer the provisions of this Article. The members of the Board shall be reputable practitioners of osteopathy and appointed by the Governor from a list provided by the North Carolina Osteopathic Society. For each vacancy, the Society must submit at least three names to the Governor, the recommendation of the president and secretary being sufficient proof of the appointees' standing in the profession. Their term of office shall be for three years and so designated by the Governor that the term of one member shall expire each year. Thereafter annually the Governor shall in like manner appoint one person to fill the vacancy in the Board thus created.

All Board members serving on June 30, 1983, shall be eligible to complete their respective terms. In order to reduce the membership of the Board from five to three, the Governor shall make no appointments to fill the first two vacancies occurring on the Board after June 30, 1983. A vacancy occurring from any other cause shall be filled by the Governor for the unexpired term in the same manner as stated above.

The Board shall meet annually and elect a president, secretary, and treasurer, each to serve one year. The Board shall have a common seal, and shall adopt rules to govern its actions; and the president and secretary shall be empowered to administer oaths. The Board shall meet annually upon the call of the president. Two members of the Board shall constitute a quorum, and no certificate to practice osteopathy shall be granted on an affirmative vote of less than two. The Board shall keep a record of its proceedings and a register of all applicants for certificates giving the name and location of the institution granting the applicant the degree of doctor of or diploma in osteopathy, the date of his or her diploma, and whether the applicant was rejected or a certificate granted. The record and registers shall be prima facie evidence of all matters recorded therein. (1907, c. 764, s. 1; 1913, c. 92, s. 1; C.S., s. 6701; 1937, c. 301, s. 1; 1981, c. 884, s. 8; 1983, c. 107, s. 1.)

§ 90-131. Educational requirements, examination and certification of applicants.

Any person, before engaging in the practice of osteopathy in this State, after June 3, 1959, shall, upon the payment of a fee of twenty-five dollars ($25.00), make application for a certificate to practice osteopathy to the Board of Osteopathic Examination and Registration on a form prescribed by the Board, giving, first, his name, age (which shall not be less than 21 years), and residence; second, evidence that such applicant is of good character and shall have, previous to the beginning of his course in osteopathy, obtained a diploma from a high school, or academy, or its equivalent, and evidence of having completed not less than two years if he matriculated in an osteopathic college before October 1, 1952, and if thereafter three years preosteopathic education in an accredited college or university approved by the Board; third, the date of his diploma, and evidence that such diploma was granted on personal attendance and completion of a course of not less than four academic years conforming to the minimum standards for osteopathic colleges established by the American Osteopathic Association. The Board may require the applicant to file an affidavit as to any facts pertaining to his application for a license to practice osteopathy and shall, except as otherwise provided, give to applicants a written examination in the subjects of anatomy, physiology, biochemistry, toxicology, chemistry, osteopathic pathology, bacteriology, histology, diagnosis, hygiene, osteopathic obstetrics and gynecology, minor surgery, principles and practice of osteopathy, and such other like subjects as the Board may require. An applicant passing said examination with a minimum grade in each subject of seventy percent (70%) and a minimum general average of seventy-five percent (75%) in all subjects and who otherwise meets the requirements of this Article shall be licensed to practice osteopathy as defined in G.S. 90-129. The Board is authorized to promulgate rules and regulations to carry out the provisions of this Article; and to employ qualified personnel including persons or organizations specially qualified in preparing, giving and grading examinations to assist or advise the Board. The Board may refuse to grant a certificate to any person convicted of a felony, or a crime involving moral turpitude or who engages in gross unprofessional or immoral conduct, or who is addicted to any vice to such a degree as to render him unfit to practice osteopathy, and may, after due notice and hearing, revoke such certificate for like cause. (1907, c. 764, s. 2; 1913, c. 92, s. 1; C.S., s. 6702; 1959, c. 705, s. 1.)

CASE NOTES

Necessity for Examination. — Those who practice and receive pay for the treatment of human diseases without the use of drugs, and who are not licensed osteopaths, are required to take the examination and receive the license provided for by statute. State v. Siler, 169 N.C. 314, 84 S.E. 1015 (1915).

§ 90-132. When examination dispensed with; temporary permit; annual registration.

The Board may, in its discretion, dispense with an examination in the case of an osteopathic physician duly authorized to practice osteopathy in any other state or territory, or the District of Columbia, who presents a certificate of license issued after an examination by the legally constituted board of such state, territory, or District of Columbia, accorded only to applicants of equal grade with those required in this State or who presents a certificate issued by the National Board of Examiners for Osteopathic Physicians and Surgeons, and who makes application on a form to be prescribed by the Board, accompanied by a fee of seventy-five dollars ($75.00).

The secretary of the Board may grant a temporary permit until a regular meeting of the Board, or to such time as the Board can conveniently meet, to one whom he considers eligible to practice in the State, and who may desire to commence the practice immediately. Such permit shall only be valid until legal action of the Board can be taken. In all the above cases the fee shall be the same as charged to applicants for examination.

Every person licensed to practice osteopathy by the Board of Osteopathic Examination and Registration shall, during January of each year, register his name, office and residence addresses, and such other information as the Board may deem necessary with the Board secretary and shall pay a registration fee fixed by the Board not exceeding fifty dollars ($50.00). An annual registration receipt shall be issued and mailed to each license holder, upon payment of the registration fee, which shall be placed in a conspicuous position in the licensee's office, if he practices in this State. In the event an osteopath fails to register as herein provided he shall pay an additional amount of ten dollars ($10.00) to the Board. Should an osteopath fail to register and pay the fees imposed, and should such failure continue for a period of 30 days, the license of such osteopath may be suspended by the Board, after notice and hearing at the next regular meeting of the Board. Upon payment of all fees and penalties which may be due, the license of such osteopath shall be reinstated. (1907, c. 764, s. 2; C.S., s. 6703; 1959, c. 705, s. 2; 1983, c. 107, s. 2.)

§ 90-133. Fees held by Board; salaries; payment of expenses.

All fees shall be paid in advance to the treasurer of the Board, to be by him held as a fund for the use of the State Board of Osteopathic Examination and Registration. The compensation and expenses of the members and officers of said Board, and all expenses proper and necessary, in the opinion of said Board, to discharge its duties under and to enforce the law, shall be in accordance with G.S. 93B-5, shall be paid out of such fund, upon the warrant of the president and secretary of said Board, and no expense shall be created to exceed the income of fees or fines as herein provided. (1907, c. 764, s. 3; C.S., s. 6705; 1991 (Reg. Sess., 1992), c. 1011, s. 2.)

§ 90-134. Subject to State and municipal regulations.

Osteopathic physicians shall observe and be subject to all State and municipal regulations relating to the control of contagious diseases, the reporting and certifying of births and deaths, and all matters pertaining to public health, the same as physicians of other schools of medicine, and such reports shall be accepted by the officers or department to whom the same are made. (1907, c. 764, s. 4; C.S., s. 6706.)

§ 90-135: Repealed by Session Laws 1967, c. 691, s. 59.

§ 90-136. Refusal, revocation or suspension of license; misdemeanors.

(a) The North Carolina State Board of Osteopathic Examination and Registration may refuse to issue a license to anyone otherwise qualified, and may suspend or revoke any license issued by it to any osteopathic physician, who is not of good moral character, and/or for any one or any combination of the following causes:

(1) Conviction of a felony, as shown by a certified copy of the record of the court of conviction;
(2) The obtaining of or an attempt to obtain a license, or practice in the profession, or money, or any other thing of value, by fraudulent misrepresentations;
(3) Gross malpractice;
(4) Advertising by means of knowingly false or deceptive statements;
(5) Advertising, practicing, or attempting to practice under a name other than one's own;
(6) Habitual drunkenness or habitual addiction to the use of morphine, cocaine, or other habit-forming drugs.

(b) Each of the following acts constitutes a Class 1 misdemeanor:

(1) The practice of osteopathy or an attempt to practice osteopathy, or professing to do so without a license;
(2) The obtaining of or an attempt to obtain a license, or practice in the profession, or money, or any other thing of value by fraudulent misrepresentation;
(3) The making of any willfully false oath or affirmation whenever an oath or affirmation is required by this Article;
(4) Advertising, practicing or attempting to practice osteopathy under a name other than one's own.

(c) The Board may neither suspend nor revoke any license, however, for any of the causes hereinabove set forth except in accordance with the provisions of Chapter 150B of the General Statutes. (1937, c. 301, s. 3; 1953, c. 1041, s. 13;

1973, c. 1331, s. 3; 1987, c. 827, s. 1; 1993, c. 539, s. 630; 1994, Ex. Sess., c. 24, s. 14(c); 1997-456, s. 27.)

CASE NOTES

Cited in Dailey v. North Carolina State Bd. of Dental Exmrs., 309 N.C. 710, 309 S.E.2d 219 (1983).

§ 90-137. Restoration of revoked license.

Whenever any osteopath has been deprived of his license, the North Carolina State Board of Osteopathic Examination and Registration, in its discretion, may restore said license upon due notice being given and hearing had, and satisfactory evidence produced of proper reformation of the licentiate before restoration. (1937, c. 301, s. 3.)

§ 90-138. Objects of North Carolina Osteopathic Society.

The objects of the North Carolina Osteopathic Society shall be to unite the osteopaths of this State for mutual aid, encouragement, and improvements; to encourage scientific research in the laws of health and treatment of diseases of the human family; to elevate the standard of professional thought and conduct in the practice of osteopathy and to restrict the practice of osteopathy to persons educated and trained in the science and possessing a diploma from a reputable college of osteopathy. (1907, c. 764, s. 7; C.S., s. 6709.)

ARTICLE 8.

Chiropractic.

§ 90-139. Creation and membership of Board of Examiners.

(a) The State Board of Chiropractic Examiners is created to consist of eight members appointed by the Governor and General Assembly. Six of the members shall be practicing doctors of chiropractic, who are residents of this State and who have actively practiced chiropractic in the State for at least eight consecutive years immediately preceding their appointments; four of these six members shall be appointed by the Governor, and two by the General Assembly in accordance with G.S. 120-121, one each upon the recommendation of the President Pro Tempore of the Senate and the Speaker of the House of Representatives. No more than three members of the Board may be graduates of the same college or school of chiropractic. The other two members shall be persons chosen by the Governor to represent the public at large. The public members shall not be health care providers nor the spouses of health care providers. For purposes of Board membership, "health care provider" means any licensed health care professional and any agent or employee of any health care institution, health care insurer, health care professional school, or a member of any allied health profession. For purposes of this section, a person enrolled in a program to prepare him to be a licensed health care professional or an allied health professional shall be deemed a health care provider. For purposes of this section, any person with significant financial interest in a health service or profession is not a public member.

(b) All Board members serving on June 30, 1981, shall be eligible to complete their respective terms. No member appointed to the Board on or after

July 1, 1981, shall serve more than two complete consecutive terms, except that each member shall serve until his successor is chosen and qualifies. The initial appointment of the General Assembly upon the recommendation of the President of the Senate shall be for a term to expire June 30, 1986, and the initial appointment of the General Assembly upon the recommendation of the Speaker of the House of Representatives shall be for a term to expire June 30, 1985, subsequent appointments upon the recommendation of the President Pro Tempore of the Senate shall be for terms of three years, subsequent appointments upon the recommendation of the Speaker of the House of Representatives shall be for terms of two years.

(c) The Governor and General Assembly, respectively, may remove any member appointed by them for good cause shown. In addition, upon the request of the Speaker of the House of Representatives or the President Pro Tempore of the Senate concerning a person appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives or the President Pro Tempore of the Senate, respectively, the Governor may remove such appointee for good cause shown, if the request is made and removal occurs either (i) when the General Assembly has adjourned to a date certain, which date is more than 10 days after the date of adjournment, or (ii) after sine die adjournment of the regular session. The Governor may appoint persons to fill vacancies of persons appointed by him to fill unexpired terms. Vacancies in appointments made by the General Assembly shall be in accordance with G.S. 120-122. (1917, c. 73, s. 1; C.S., s. 6710; 1979, c. 108, s. 1; 1981, c. 766, s. 1; 1983, c. 717, ss. 100-104; 1995, c. 490, s. 11; 1999-405, s. 3; 1999-431, s. 3.9; 2000-181, s. 2.7(a); 2005-421, s. 2.7(b).)

Cross References. — As to limited liability companies and their powers, see G.S. 57C-2-01 et seq.

Editor's Note. — Session Laws 2007-525, s. 14, provides: "The Revenue Laws Study Committee may study whether to continue the sales tax exemption for nutritional supplements sold by a chiropractic physician at a chiropractic office to a patient as part of the patient's plan of treatment."

Legal Periodicals. — For brief comment on the 1949 amendments to this Article, see 27 N.C.L. Rev. 406 (1949).

§ 90-140. Selection of chiropractic members of Board.

The Governor and the General Assembly upon the recommendation of the President Pro Tempore of the Senate shall appoint chiropractic members of the Board for terms of three years from a list provided by the Board, and the General Assembly upon the recommendation of the Speaker of the House of Representatives shall appoint a chiropractic member of the Board for a term of two years from a list provided by the Board. For each vacancy, the Board must submit at least three names to the Governor, President Pro Tempore of the Senate and Speaker of the House.

The Board shall establish procedures for the nomination and election of chiropractic members. These procedures shall be adopted under Article 2A of Chapter 150B of the General Statutes, and notice of the proposed procedures shall be given to all licensed chiropractors residing in North Carolina. These procedures shall not conflict with the provisions of this section. Every chiropractor with a current North Carolina license residing in this State shall be eligible to vote in all such elections, and the list of licensed chiropractors shall constitute the registration list for elections. Any decision of the Board relative to the conduct of such elections may be challenged by civil action in the Wake County Superior Court. A challenge must be filed not later than 30 days after the Board has rendered the decision in controversy, and all such cases shall be heard de novo. (1917, c. 73, s. 2; C.S., s. 6711; 1933, c. 442, s. 1; 1963, c. 646, s.

1; 1979, c. 108, s. 2; 1981, c. 766, s. 2; 1983, c. 717, s. 106; 1987, c. 827, s. 1; 1995, c. 490, s. 11.1; 2000-189, s. 6.)

§ 90-141. Organization; quorum.

The Board of Chiropractic Examiners shall elect such officers as they may deem necessary. Four members of the Board shall constitute a quorum for the transaction of business. (1917, c. 73, s. 4; C.S., s. 6713; 1933, c. 442, s. 1; 1981, c. 766, s. 3.)

§ 90-142. Rules and regulations.

The State Board of Chiropractic Examiners may adopt suitable rules and regulations for the performance of their duties and the enforcement of the provisions of this Article. (1919, c. 148, s. 4; C.S., s. 6714; 1967, c. 263, s. 2.)

§ 90-143. Definitions of chiropractic; examinations; educational requirements.

(a) "Chiropractic" is herein defined to be the science of adjusting the cause of disease by realigning the spine, releasing pressure on nerves radiating from the spine to all parts of the body, and allowing the nerves to carry their full quota of health current (nerve energy) from the brain to all parts of the body.

(b) It shall be the duty of the North Carolina State Board of Chiropractic Examiners (hereinafter referred to as "Board") to examine for licensure to practice chiropractic in this State any applicant who is or will become, within 60 days of examination, a graduate of a four-year chiropractic college that is either accredited by the Council on Chiropractic Education or deemed by the Board to be the equivalent of such a college and who furnishes to the Board, in the manner prescribed by the Board, all of the following:

(1) Satisfactory evidence of good moral character.
(2) Proof that the applicant has received a baccalaureate degree from a college or university accredited by a regional accreditation body recognized by the United States Department of Education.
(3) A transcript confirming that the applicant has received at least 4,200 hours of accredited chiropractic education. The Board shall not count any hours earned at an institution that was not accredited by the Council on Chiropractic Education or was not, as determined by the Board, the equivalent of such an institution at the time the hours were earned.

The examination shall include the following studies: neurology, chemistry, pathology, anatomy, histology, physiology, embryology, dermatology, diagnosis, microscopy, gynecology, hygiene, eye, ear, nose and throat, orthopody, diagnostic radiology, North Carolina jurisprudence, palpation, nerve tracing, chiropractic philosophy, theory, teaching and practice of chiropractic, and any other related studies as the Board may consider necessary to determine an applicant's fitness to practice. The Board may include as part of the examination any examination developed and administered by the National Board of Chiropractic Examiners or its successor organization that the Board considers appropriate, and the examination may be administered by a national testing service. The Board shall set the passing scores for all parts of the examination.

(c) The Board shall not issue a license to any applicant until the applicant exhibits a diploma or other proof that the Doctor of Chiropractic degree has been conferred.

(d) The Board may grant a license to an applicant if the applicant's scores on all parts of the examination required by the Board equal or exceed passing scores set by the Board and the applicant satisfies all other requirements for licensure as provided in this Article. (1917, c. 73, s. 5; 1919, c. 148, ss. 1, 2, 5; C.S., s. 6715; 1933, c. 442, s. 1; 1937, c. 293, s. 1; 1963, c. 646, s. 2; 1967, c. 263, s. 3; 1977, c. 1109, s. 1; 1981, c. 766, s. 4; 1987, c. 304; 1989, c. 555, ss. 2, 3, 4; 1997-230, s. 1; 2003-155, s. 1.)

CASE NOTES

Scope of Practice. — By enacting Session Laws 1987, Chapter 555, which amended this section, the General Assembly did not intend to expand the scope of chiropractic practice, but intended merely to clarify the law. Thomas v. Barnhill, 102 N.C. App. 551, 403 S.E.2d 102 (1991).

The testimony of a chiropractor to the strain or sprain of a muscle is not beyond the field of chiropractic practice as defined by this section. Thomas v. Barnhill, 102 N.C. App. 551, 403 S.E.2d 102 (1991).

Discretionary Power of Board. — This section did not dispense with the discretionary power of the Board to pass upon the requisites of good character, or the fact as to whether the applicants thereunder had been bona fide practitioners for the requisite time. It was held that the courts would not inquire into such matters and that a mandamus would not lie to compel the Board to issue a license under this section. Hamlin v. Carlson, 178 N.C. 431, 101 S.E. 22 (1919).

Competency to Give Expert Testimony. — Doctors with unlimited licenses are competent to give expert testimony in the entire medical field. Chiropractors, on the other hand, are limited in their testimony to their special field as defined and limited by this section. Allen v. Hinson, 12 N.C. App. 515, 183 S.E.2d 852, cert. denied, 279 N.C. 726, 184 S.E.2d 883 (1971), decided prior to enactment of § 90-157.2.

Chiropractor Not Qualified to Testify as to Muscle Injury. — In a personal injury action arising from an automobile accident, the chiropractor's testimony as to the plaintiff's strain or sprain of a muscle was properly excluded, because such injury and treatment is beyond the field of chiropractic medicine as defined by this section; on the other hand, the trial court erred in excluding the chiropractor's testimony concerning the plaintiff's nerve strain or sprain, because such injury and treatment is within the field of chiropractic medicine. Ellis v. Rouse, 86 N.C. App. 367, 357 S.E.2d 699 (1987).

Testimony regarding ligaments of the spine is within the scope of chiropractic as defined in this section. Smith v. Buckhram, 91 N.C. App. 355, 372 S.E.2d 90 (1988), cert. denied, 324 N.C. 113, 377 S.E.2d 236 (1989).

Cited in Cohn v. Wilkes Regional Medical Ctr., 113 N.C. App. 275, 437 S.E.2d 889, cert. denied, 336 N.C. 603, 447 S.E.2d 387 (1994); Winston v. Brodie, 134 N.C. App. 260, 517 S.E.2d 203 (1999).

§ 90-143.1. Applicants licensed in other states.

If an applicant for licensure is already licensed in another state to practice chiropractic, the Board shall issue a license to practice chiropractic to the applicant upon evidence that:

(1) The applicant is currently an active, competent practitioner and is in good standing; and
(2) The applicant has practiced at least one year out of the three years immediately preceding his or her application; and
(3) The applicant currently holds a valid license in another state; and
(4) No disciplinary proceeding or unresolved complaint is pending anywhere at the time a license is to be issued by this State; and
(5) The licensure requirements in the other state are equivalent to or higher than those required by this State.

Any license issued upon the application of any chiropractor from any other state shall be subject to all of the provisions of this Article with reference to the license issued by the State Board of Chiropractic Examiners upon examination, and the rights and privileges to practice the profession of chiropractic under any license so issued shall be subject to the same duties, obligations, restrictions, and conditions as imposed by this Article on chiropractors originally examined by the State Board of Chiropractic Examiners. (1981, c. 766, s. 5.)

§ 90-143.2. Certification of diagnostic imaging technicians.

(a) The State Board of Chiropractic Examiners shall certify the competence of any person employed by a licensed chiropractor practicing in the State if the employee's duties include the production of diagnostic images, whether by X ray or other imaging technology. Applicants for certification must demonstrate proficiency in the following subjects:

(1) Physics and equipment of radiographic imaging;
(2) Principles of radiographic exposure;
(3) Radiographic protection;
(4) Anatomy and physiology;
(5) Radiographic positioning and procedure.

The State Board of Chiropractic Examiners may adopt rules pertaining to initial educational requirements, examination of applicants, and continuing education requirements as are reasonably required to enforce this provision.

(b) Any person seeking to renew a certification of competence previously issued by the Board shall pay to the secretary of the Board a fee as prescribed and set by the Board which fee shall not be more than fifty dollars ($50.00). (1991, c. 633, s. 1; 2002-59, s. 1.)

§ 90-143.3. Criminal record checks of applicants for licensure.

(a) Any person applying for licensure as a chiropractic physician in this State shall provide to the Board a fingerprint card in a format acceptable to the Board and a form signed by the applicant consenting to a criminal record check and the use of the applicant's fingerprints and such other identifying information as may be required by the State or national data banks. The Board shall submit these documents to the Department of Justice, along with a request for a criminal record check of the applicant.

(b) Upon receipt of the Board's submission, the Department of Justice shall commence the requested criminal record check. The Department of Justice shall forward a set of the applicant's fingerprints to the State Bureau of Investigation for a search of the State's criminal records, and the State Bureau of Investigation shall forward a set of the applicant's fingerprints to the Federal Bureau of Investigation for a search of national criminal records. The Department of Justice may charge the licensure applicant a fee for performing the criminal record check.

(c) The Board shall keep all information obtained from criminal record checks privileged and confidential, in accordance with applicable State law and federal guidelines, and the information shall not be a public record under Chapter 132 of the General Statutes. If the Board refuses to issue a license based in whole or part on information obtained from a criminal record check, the Board may disclose the relevant information to the applicant but shall not provide a copy of the record check to the applicant.

(d) When acting in good faith and in conformity with this section, the Board, its officers, and employees shall be immune from civil liability for initially refusing licensure based on information contained in a criminal record check supplied by the Department of Justice, even if the information relied upon is later shown to be erroneous. (2007-525, s. 1.)

Editor's Note. — Session Laws 2007-525, s. 15, made this section effective October 1, 2007.

§ 90-144. Meetings of Board of Examiners.

The North Carolina Board of Chiropractic Examiners shall meet at least once a year at such time and place as said Board shall determine at which meetings applicants for license shall be examined. (1917, c. 73, s. 6; C.S., s. 6716; 1933, c. 442, s. 1; 1949, c. 785, s. 1; 1985, c. 760, s. 1.)

§ 90-145. Grant of license.

The Board of Chiropractic Examiners shall grant to each applicant who is found to be competent, upon examination, a license authorizing him or her to practice chiropractic in North Carolina. (1917, c. 73, s. 7; C.S., s. 6717; 1949, c. 785, s. 2; 1981, c. 766, s. 6.)

§ 90-146. Graduates from other states.

A graduate of a regular chiropractic school who comes into this State from another state may be granted a license by the Board of Examiners as required in this Article. (1917, c. 73, s. 8; C.S., s. 6718.)

§ 90-147. Practice without license a misdemeanor; injunctions.

Any person practicing chiropractic in this State without possessing a license as provided in this Article shall be guilty of a Class 1 misdemeanor.

The Board of Chiropractic Examiners may appear in its own name in the superior court in an action for injunctive relief to prevent violation of this section, and the superior court shall have the power to grant such injunction regardless of whether criminal prosecution has been or may be instituted. An action under this section shall be commenced in the superior court district in which the respondent resides or has his principal place of business or in which the alleged violation occurred. (1917, c. 73, s. 9; C.S., s. 6719; 1993, c. 539, s. 631; 1994, Ex. Sess., c. 24, s. 14(c); 2001-281, s. 4.)

§ 90-148. Records of Board.

The secretary of the Board of Chiropractic Examiners shall keep a record of the proceedings of the Board, giving the name of each applicant for license, and the name of each applicant licensed and the date of such license. (1917, c. 73, s. 10; C.S., s. 6720.)

§ 90-149. Application fee.

Each applicant shall pay the secretary of the Board a fee as prescribed and set by the Board which fee shall not be more than three hundred dollars ($300.00). (1917, c. 73, s. 11; C.S., s. 6721; 1977, c. 922, s. 1; 2001-493, s. 6.)

§ 90-150: Repealed by Session Laws 1967, c. 218, s. 4.

§ 90-151. Extent and limitation of license.

Any person obtaining a license from the Board of Chiropractic Examiners shall have the right to practice the science known as chiropractic, in accordance with the method, thought, and practice of chiropractors, as taught in recognized chiropractic schools and colleges, but shall not prescribe for or administer to any person any medicine or drugs, nor practice osteopathy or surgery. (1917, c. 73, s. 12; C.S., s. 6722; 1933, c. 442, s. 3.)

§ 90-151.1. Selling nutritional supplements to patients.

A chiropractic physician may sell nutritional supplements at a chiropractic office to a patient as part of the patient's plan of treatment but may not otherwise sell nutritional supplements at a chiropractic office. A chiropractic physician who sells nutritional supplements to a patient must keep a record of the sale that complies with G.S. 105-164.24, except that the record may not disclose the name of the patient. (1997-369, s. 1.)

§ 90-152: Repealed by Session Laws 1967, c. 691, s. 59.

§ 90-153. Licensed chiropractors may practice in public hospitals.

A licensed chiropractor in this State may have access to and practice chiropractic in any hospital or sanitarium in this State that receives aid or support from the public, and shall have access to diagnostic X-ray records and laboratory records relating to the chiropractor's patient. (1919, c. 148, s. 3; C.S., s. 6724; 1977, c. 1109, s. 2.)

CASE NOTES

Hospital Not Required to Give Access. — Legislature's use of the word "may" indicates it is not a requirement that a licensed chiropractor have access to and practice chiropractic in any hospital. Cohn v. Wilkes Regional Medical Ctr., 113 N.C. App. 275, 437 S.E.2d 889, cert. denied, 336 N.C. 603, 447 S.E.2d 387 (1994).

OPINIONS OF ATTORNEY GENERAL

Chiropractor may review diagnostic X-ray records of his patient when such records are in the possession of a hospital receiving public aid or support. See opinion of Attorney General to The Honorable Ramey F. Kemp, Member of The House of Representatives, N.C. General Assembly, 48 N.C.A.G. 32 (1978).

§ 90-154. Grounds for professional discipline.

(a) The Board of Chiropractic Examiners may impose any of the following sanctions, singly or in combination, when it finds that a practitioner or applicant is guilty of any offense described in subsection (b):

(1) Permanently revoke a license to practice chiropractic;
(2) Suspend a license to practice chiropractic;
(3) Refuse to grant a license;
(4) Censure a practitioner;
(5) Issue a letter of reprimand;
(6) Place a practitioner on probationary status and require him to report regularly to the Board upon the matters which are the basis of probation.

(b) Any one of the following is grounds for disciplinary action by the Board under subsection (a):

(1) Advertising services in a false or misleading manner.
(2) Conviction of a felony or of a crime involving moral turpitude.
(3) Addiction to or severe dependency upon alcohol or any other drug that impairs the ability to practice safely.

(4) Unethical conduct as defined in G.S. 90-154.2.
(5) Negligence, incompetence, or malpractice in the practice of chiropractic.
(6) Repealed by Session Laws 1995, c. 188, s. 1.
(7) Not rendering acceptable care in the practice of the profession as defined in G.S. 90-154.3.
(8) Lewd or immoral conduct toward a patient.
(9) Committing or attempting to commit fraud, deception, or misrepresentation.
(10) Offering to waive a patient's obligation to pay any deductible or copayment required by the patient's insurer.
(11) Failing to honor promptly a patient's request for a copy of any claim form submitted to the patient's insurer.
(12) Rebating or offering to rebate to a patient any portion of the funds received from the patient's insurer, unless the sum rebated constitutes the refund of an overpayment to which the patient is lawfully entitled.
(13) Advertising any free or reduced rate service without prominently stating in the advertisement the usual fee for that service.
(14) Charging an insurer or other third-party payor a fee greater than a patient would be charged for the same service if the patient were paying directly.
(15) Charging an insurer or other third-party payor a fee greater than the advertised fee for the same service.
(16) Violating the provisions of G.S. 90-154.1.
(17) Physical, mental, or emotional infirmity of such severity as to impair the ability to practice safely.
(18) Violating the provisions of G.S. 90-151 regarding the extent and limitation of license.
(19) Concealing information from the Board or failing to respond truthfully and completely to an inquiry from the Board concerning any matter affecting licensure.
(20) Failing to comply with a decision of the Board that is final.
(21) Committing an act on or after October 1, 2007, which demonstrates a lack of good moral character which would have been a basis for denying a license under G.S. 90-143(b)(1), had it been committed before application for a license.

(c) If a licensee is found guilty in a contested case arising under subsection (b) of this section, the Board may assess the licensee the reasonable cost of the hearing held to make such a determination if the Board finds that the licensee's defense at the hearing was dilatory or not asserted in good faith. (1917, c. 73, s. 14; C.S., s. 6725; 1949, c. 785, s. 3; 1963, c. 646, s. 3; 1981, c. 766, s. 7; 1983 (Reg. Sess., 1984), c. 1067, s. 1; 1985, c. 367, ss. 1, 2; c. 760, ss. 2, 3; 1995, c. 188, s. 1; 1999-430, s. 1; 2007-525, s. 4.)

Effect of Amendments. — Session Laws 2007-525, s. 4, effective October 1, 2007, added subdivision (b)(21).

CASE NOTES

The phrase "unethical conduct" in this section constitutes a sufficiently definite standard so that the Board of Chiropractic Examiners may set policies within it without exercising a legislative function. Farlow v. North Carolina State Bd. of Chiropractic Exmrs., 76 N.C. App. 202, 332 S.E.2d 696, cert. denied and appeal dismissed, 314 N.C. 664, 336 S.E.2d 621 (1985).

Prescription of Unnecessary Course of Conduct. — "Unethical conduct," which this section authorizes the Board of Chiropractic

Examiners to penalize, includes "dishonorable conduct" in prescribing a course of treatment for patients which is not justified by the injuries they have received but is done to inflate insurance claims. Farlow v. North Carolina State Bd. of Chiropractic Exmrs., 76 N.C. App. 202, 332 S.E.2d 696, cert. denied and appeal dismissed, 314 N.C. 664, 336 S.E.2d 621 (1985).

Criminal Conviction and Disciplinary Sanctions Not Double Jeopardy. — A conviction under a federal statute followed by disciplinary sanctions pursuant to a state statute for the same conduct does not violate the double jeopardy clause. In re Cobb, 102 N.C. App. 466, 402 S.E.2d 475, cert. denied, appeal dismissed, 329 N.C. 269, 407 S.E.2d 832 (1991).

Cited in Dailey v. North Carolina State Bd. of Dental Exmrs., 309 N.C. 710, 309 S.E.2d 219 (1983).

§ 90-154.1. Collection of certain fees prohibited.

(a) Any patient or any other person responsible for payment has the right to refuse to pay, cancel payment, or be reimbursed for payment for any service, examination, or treatment other than the advertised reduced rate service, examination or treatment which is performed as a result of and within 72 hours of responding to any advertisement for a free or reduced rate service, free or reduced rate examination, or free or reduced rate treatment. Any further treatment shall be agreed upon in writing and signed by both parties.

(b) Any chiropractic advertisement that offers a free or reduced rate service, examination or treatment shall contain the following notice to prospective patients: "If you decide to purchase additional treatment, you have the legal right to change your mind within three days and receive a refund." If the advertisement is published in print, the foregoing notice shall appear in capital letters clearly distinguishable from the rest of the text. If the advertisement is broadcast on radio or television, the foregoing notice shall be recited at the end of the advertisement.

(c) Repealed by Session Laws 1995, c. 188, s. 2, effective October 1, 1995.

(d) Any bill sent to a patient or any other person responsible for payment as a result of the patient responding to a chiropractic advertisement shall clearly contain the language of the first sentence of subsection (a) and have distinguished on its face the charge for the reduced rate services, including an itemization of free services, and the separate charge for any services, examinations or treatments other than the advertised free or reduced rate services, examinations, or treatments. The reduced rate charges shall be labeled "Free or Reduced Rate Charges" and any other charges shall be labeled "Non-advertised Services, Examinations, or Treatments". (1985, c. 367, s. 3; 1987, c. 733; 1995, c. 188, s. 2.)

§ 90-154.2. Unethical conduct.

Unethical conduct is defined as:

(1) The over-utilization or improper use, in the providing of treatment, physiological therapeutics, radiographics, or any other service not commensurate with the stated diagnosis and clinical findings. This determination shall be based upon the collective findings and experience of the Board utilizing the best available, relative information and advice. There must be a rationale for the services provided the patient.

(2) The billing or otherwise charging of a fee to a third party payor for a service offered by the doctor as a free service, which service is accepted as a free service by any patient when, in fact, the doctor of chiropractic is transmitting any charge to a third-party payor for payment.

(3) The over-utilization of ionizing radiation in the re-X-ray of a patient. The acceptable guidelines for re-X-ray are:

a. When fractures are evident;
b. When bone pathologies are under evaluation;
c. When soft tissue pathologies are under evaluation;
d. When there is reinjury;
e. When the original X-ray findings have revealed limitations of ranges and motion, re-X-ray may be done after clinical progress has revealed objective improvement, but not within 12 days and only limited views would be indicated.

(4) Any licensee's failure to use the words Chiropractic Physician, Chiropractor or the initials D.C. in conjunction with the use of his name in his capacity as a Chiropractor on all reports, statements of claim for services rendered and on all signs, letterheads, business cards, advertising, and any other items of identification.
(5) Violation of the Rules of Ethics of Advertising and Publicity.
(6) The allowance of any unlicensed person to practice chiropractic in the office of a licensed chiropractic. (1985, c. 760, s. 4.)

§ 90-154.3. Acceptable care in the practice of chiropractic.

(a) It shall be unlawful for a doctor of chiropractic to examine, treat, or render any professional service to a patient that does not conform to the standards of acceptable care.

(b) For purposes of disciplinary action, the Board of Chiropractic Examiners may adopt rules that establish and define standards of acceptable care with respect to:
(1) Examination and diagnosis;
(2) The use of chiropractic adjustive procedures;
(3) Physiological therapeutic agents;
(4) Diagnostic radiology;
(5) The maintenance of patient records; and
(6) Sanitation, safety, and the adequacy of clinical equipment.

(c) If the Board has not defined a standard of acceptable care by rule, then the standard of acceptable care shall be the usual and customary method as taught in the majority of recognized chiropractic colleges.

(d) Nothing in this section shall alter the lawful scope of practice of chiropractic as defined in G.S. 90-143 or the limitation of license as defined in G.S. 90-151. (1985, c. 760, s. 5; 1995, c. 188, s. 3.)

§ 90-154.4. Enticements prohibited.

(a) For purposes of this section, an enticement is anything of monetary value offered by a chiropractor to a prospective patient as an incentive to enter treatment. Except as permitted in subsection (b) of this section, it shall be an unlawful rebate, in violation of G.S. 90-154(b)(12), for a chiropractor to offer an enticement to a prospective patient if, at the time the offer is made, the chiropractor knows or has reason to believe that the prospective patient's treatment expenses will be paid in whole or part by an insurer or other third-party payor.

(b) Unless prohibited by other State or federal law, the following marketing practices shall not be construed as violations of subsection (a) of this section:
(1) Free or reduced rates, services, examinations, or treatments advertised and delivered in conformity with G.S. 90-154.1.
(2) Cash or point-of-service discounts not more than 30 percentage points lower than the charges customarily billed to third-party payors.
(3) Prepaid wellness plans covering only services that can be performed entirely by the offering chiropractor or the chiropractor's staff within the confines of the chiropractor's office.

(4) Merchandise with a value of not more than ten dollars ($10.00) given to a prospective patient for promotional purposes. (2007-525, s. 3.)

Editor's Note. — Session Laws 2007-525, s. 15, made this section effective October 1, 2007.

§ 90-155. Annual fee for renewal of license.

Any person practicing chiropractic in this State, in order to renew his license, shall, on or before the first Tuesday after the first Monday in January in each year after a license is issued to him as herein provided, pay to the secretary of the Board of Chiropractic Examiners a renewal license fee as prescribed and set by the said Board which fee shall not be more than one hundred fifty dollars ($150.00), and shall furnish the Board evidence that he has attended two days of educational sessions or programs approved by the Board during the preceding 12 months, provided the Board may waive this educational requirement due to sickness or other hardship of applicant.

Any license or certificate granted by the Board under this Article shall automatically be canceled if the holder thereof fails to secure a renewal within 30 days from the time herein provided; but any license thus canceled may, upon evidence of good moral character and proper proficiency, be restored upon the payment of the renewal fee and an additional twenty-five dollars ($25.00) reinstatement fee.

If any licensee of the Board retires from active practice, the licensee may renew his license annually by paying the license fee and shall not be required to furnish the Board proof of continuing education; however, if at a later time the licensee desires to resume active practice, the licensee shall first appear before the Board and the Board shall determine his competency to practice. (1917, c. 73, s. 15; C.S., s. 6726; 1933, c. 442, s. 4; 1937, c. 293, s. 2; 1963, c. 646, s. 4; 1971, c. 715; 1977, c. 922, ss. 2, 3; 1985, c. 760, s. 6; 2001-493, s. 4.)

§ 90-156. Pay of Board and authorized expenditures.

Notwithstanding G.S. 93B-5(a), the members of the Board of Chiropractic Examiners shall receive as compensation for their services a sum not to exceed two hundred dollars ($200.00) for each day during which they are engaged in the official business of the Board and their actual expenses, including transportation and lodging, when meeting for the purpose of holding examinations, and performing any other duties placed upon them by this Article, to be paid by the treasurer of the Board out of the moneys received by him as license fees, or from renewal fees. The Board shall also expend out of such fund so much as may be necessary for preparing licenses, securing seal, providing for programs for licensed doctors of chiropractic in North Carolina, and all other necessary expenses in connection with the duties of the Board. (1917, c. 73, s. 16; C.S., s. 6727; 1949, c. 785, s. 4; 1981, c. 766, s. 8; 2001-493, s. 5.)

§ 90-157. Chiropractors subject to State and municipal regulations.

Chiropractors shall observe and be subject to all State and municipal regulations relating to the control of contagious and infectious diseases. (1917, c. 73, s. 17; C.S., s. 6728.)

§ 90-157.1. Free choice by patient guaranteed.

No agency of the State, county or municipality, nor any commission or clinic, nor any board administering relief, social security, health insurance or health service under the laws of the State of North Carolina shall deny to the recipients or beneficiaries of their aid or services the freedom to choose a duly licensed chiropractor as the provider of care or services which are within the scope of practice of the profession of chiropractic as defined in this Chapter. (1977, c. 1109, s. 3.)

CASE NOTES

Cited in Cohn v. Wilkes Regional Medical Ctr., 113 N.C. App. 275, 437 S.E.2d 889, cert. denied, 336 N.C. 603, 447 S.E.2d 387 (1994).

OPINIONS OF ATTORNEY GENERAL

This section is applicable to a self-insured employee health insurance plan operated by a county hospital. See opinion of Attorney General to Mr. J. Hoyte Stultz, Jr., Attorney for N.C. State Board of Chiropractic Examiners, 52 N.C.A.G. 80 (1983).

§ 90-157.2. Chiropractor as expert witness.

A Doctor of Chiropractic, for all legal purposes, shall be considered an expert in his field and, when properly qualified, may testify in a court of law as to:

(1) The etiology, diagnosis, prognosis, and disability, including anatomical, neurological, physiological, and pathological considerations within the scope of chiropractic, as defined in G.S. 90-151; and

(2) The physiological dynamics of contiguous spinal structures which can cause neurological disturbances, the chiropractic procedure preparatory to, and complementary to the correction thereof, by an adjustment of the articulations of the vertebral column and other articulations. (1977, c. 1109, s. 3; 1989, c. 555, s. 1.)

Legal Periodicals. — For note discussing the ambit of this section in allowing chiropractors to testify as experts, see 9 N.C. Cent. L.J. 103 (1977).

CASE NOTES

Legislative Intent. — In 1989, the General Assembly added language to this section providing that a chiropractor may testify about the "physiological dynamics of contiguous spinal structures which can cause neurological disturbances." Thomas v. Barnhill, 102 N.C. App. 551, 403 S.E.2d 102 (1991).

The purpose of subsection (2) was "to cure the confusion in the case law created by inconsistent court decisions." Thomas v. Barnhill, 102 N.C. App. 551, 403 S.E.2d 102 (1991).

Chiropractor Not Qualified to Testify as to Muscle Injury. — In a personal injury action arising from an automobile accident, the chiropractor's testimony as to the plaintiff's strain or sprain of a muscle was properly excluded, because such injury and treatment is beyond the field of chiropractic medicine as defined by G.S. 90-143; on the other hand, the trial court erred in excluding the chiropractor's testimony concerning the plaintiff's nerve strain or sprain, because such injury and treatment is within the field of chiropractic medicine. Ellis v. Rouse, 86 N.C. App. 367, 357 S.E.2d 699 (1987).

Testimony regarding ligaments of the spine is within the scope of chiropractic as defined in G.S. 90-143. Smith v. Buckhram, 91 N.C. App. 355, 372 S.E.2d 90 (1988), cert. denied, 324 N.C. 113, 377 S.E.2d 236 (1989).

Testimony Regarding Extremities. — Trial court correctly allowed chiropractor's testimony concerning injuries to victim's bodily extremities, as these constitute parts of the body to which nerves radiate from the spine and come within the scope chiropractic expertise. Winston v. Brodie, 134 N.C. App. 260, 517 S.E.2d 203 (1999).

Testimony Regarding Permanency And Cause of Injuries. — Trial court correctly allowed chiropractor's testimony concerning the permanency and cause of victim's injuries. Winston v. Brodie, 134 N.C. App. 260, 517 S.E.2d 203 (1999).

Expert's testimony was within the expertise of a chiropractor as authorized by this section. Wooten v. Warren ex rel. Gilmer, 117 N.C. App. 350, 451 S.E.2d 342 (1994).

Jury Instructions Held Sufficient. — Where doctor of chiropractic was qualified and tendered as an expert witness and the jury was instructed that he was "accepted by the Court as an expert in the field of chiropractic," the trial court did not err in failing to instruct the jury later that a chiropractor is an expert witness in accordance with this provision. Blackmon v. Bumgardner, 135 N.C. App. 125, 519 S.E.2d 335 (1999).

Cited in Currence v. Hardin, 296 N.C. 95, 249 S.E.2d 387 (1978); Mitchem v. Sims, 55 N.C. App. 459, 285 S.E.2d 839 (1982); Peaches v. Payne, 139 N.C. App. 580, 533 S.E.2d 851 (2000).

§ 90-157.3. Ownership of chiropractic practices limited.

(a) Each partner in a partnership that is engaged in the practice of chiropractic shall be licensed under this Article.

(b) Each general partner in a limited partnership that is engaged in the practice of chiropractic and each limited partner who takes part in the control of the practice shall be licensed under this Article.

(c) The provisions of Chapter 55B of the General Statutes shall apply to all business corporations organized under Chapter 55 of the General Statutes and engaged in the practice of chiropractic. (1999-430, s. 2.)

Article 9.

Nurse Practice Act.

§§ 90-158 through 90-171.18: Recodified as §§ 90-171.19 to 90-171.47.

Editor's Note. — This Article was rewritten by Session Laws 1981, c. 360, s. 1, effective July 1, 1981, and has been recodified as Article 9A, G.S. 90-171.19 et seq.

Article 9A.

Nursing Practice Act.

§ 90-171.19. Legislative findings.

The General Assembly of North Carolina finds that mandatory licensure of all who engage in the practice of nursing is necessary to ensure minimum standards of competency and to provide the public safe nursing care. (1981, c. 360, s. 1.)

Cross References. — As to limited liability companies and their powers, see G.S. 57C-2-01 et seq.

Editor's Note. — This Article is Article 9 of this Chapter as rewritten by Session Laws 1981, c. 360, s. 1, effective July 1, 1981, and recodified. Where appropriate, the historical citations to the sections of the former Article have been added to the corresponding sections of the new Article.

Legal Periodicals. — For survey of 1981 administrative law, see 60 N.C.L. Rev. 1165 (1982).

For note, "Nurse Malpractice in North Carolina: The Standard of Care," see 65 N.C.L. Rev. 579 (1987).

CASE NOTES

Violation of Minimum Standards as Violation of North Carolina Public Policy. — Plaintiff's complaint adequately alleged that she was terminated for meeting the minimum requirements of the practice of nursing as established and mandated by this Article and regulations thereunder, in violation of the public policy of North Carolina to ensure the public a minimum level of safe nursing care. Deerman v. Beverly Cal. Corp., 135 N.C. App. 1, 518 S.E.2d 804 (1999).

§ 90-171.20. Definitions.

As used in this Article, unless the context requires otherwise:

(1) "Board" means the North Carolina Board of Nursing.

(2) "Health care provider" means any licensed health care professional and any agent or employee of any health care institution, health care insurer, health care professional school, or a member of any allied health profession. For purposes of this Article, a person enrolled in a program that prepares the person to be a licensed health care professional or an allied health professional shall be deemed a health care provider.

(3) "License" means a permit issued by the Board to practice nursing as a registered nurse or as a licensed practical nurse, including a renewal thereof.

(4) "Nursing" is a dynamic discipline which includes the assessing, caring, counseling, teaching, referring and implementing of prescribed treatment in the maintenance of health, prevention and management of illness, injury, disability or the achievement of a dignified death. It is ministering to; assisting; and sustained, vigilant, and continuous care of those acutely or chronically ill; supervising patients during convalescence and rehabilitation; the supportive and restorative care given to maintain the optimum health level of individuals, groups, and communities; the supervision, teaching, and evaluation of those who perform or are preparing to perform these functions; and the administration of nursing programs and nursing services.

(5) "Nursing program" means any educational program in North Carolina offering to prepare persons to meet the educational requirements for licensure under this Article.

(6) "Person" means an individual, corporation, partnership, association, unit of government, or other legal entity.

(7) The "practice of nursing by a registered nurse" consists of the following 10 components:

a. Assessing the patient's physical and mental health, including the patient's reaction to illnesses and treatment regimens.

b. Recording and reporting the results of the nursing assessment.

c. Planning, initiating, delivering, and evaluating appropriate nursing acts.

d. Teaching, assigning, delegating to or supervising other personnel in implementing the treatment regimen.

e. Collaborating with other health care providers in determining the appropriate health care for a patient but, subject to the provisions of G.S. 90-18.2, not prescribing a medical treatment regimen or making a medical diagnosis, except under supervision of a licensed physician.

f. Implementing the treatment and pharmaceutical regimen prescribed by any person authorized by State law to prescribe the regimen.

g. Providing teaching and counseling about the patient's health.

h. Reporting and recording the plan for care, nursing care given, and the patient's response to that care.

i. Supervising, teaching, and evaluating those who perform or are preparing to perform nursing functions and administering nursing programs and nursing services.

j. Providing for the maintenance of safe and effective nursing care, whether rendered directly or indirectly.

(8) The "practice of nursing by a licensed practical nurse" consists of the following seven components:

a. Participating in the assessment of the patient's physical and mental health, including the patient's reaction to illnesses and treatment regimens.

b. Recording and reporting the results of the nursing assessment.

c. Participating in implementing the health care plan developed by the registered nurse and/or prescribed by any person authorized by State law to prescribe such a plan, by performing tasks assigned or delegated by and performed under the supervision or under orders or directions of a registered nurse, physician licensed to practice medicine, dentist, or other person authorized by State law to provide the supervision.

c1. Assigning or delegating nursing interventions to other qualified personnel under the supervision of the registered nurse.

d. Participating in the teaching and counseling of patients as assigned by a registered nurse, physician, or other qualified professional licensed to practice in North Carolina.

e. Reporting and recording the nursing care rendered and the patient's response to that care.

f. Maintaining safe and effective nursing care, whether rendered directly or indirectly. (1981, c. 360, s. 1; 2001-98, s. 1.)

Legal Periodicals. — For note, "Nurse Malpractice in North Carolina: The Standard of Care," see 65 N.C.L. Rev. 579 (1987).

CASE NOTES

Dispute as to Nurses Administering Anesthesia. — Trial court properly denied the North Carolina Board of Nursing's motion to enforce a consent order as against petitioners, the North Carolina Medical Society, the North Carolina Society of Anesthesiologists, Inc., a doctor, and the North Carolina Medical Board, because petitioners did not violate the consent order by issuing a position statement with regard to nurses administering anesthesia and never acquiesced to the Board's administrative rule via the consent order on the same topic. N.C. Med. Soc'y v. N.C. Bd. of Nursing, 169 N.C. App. 1, 610 S.E.2d 722 (2005), cert. denied, 360 N.C. 66, 621 S.E.2d 875 (2005).

Nurses were not liable for obeying a doctor's order unless that order was so obviously negligent as to lead any reasonable person to anticipate that substantial injury would result to the patient from its execution; even if there was a fact issue regarding the doctor's negligence in deciding to perform a mid-forceps delivery, that evidence did not establish that the negligence was so obvious as to require the nurses to refuse to obey the doctor. Daniels v. Durham County Hosp. Corp., 171 N.C. App. 535, 615 S.E.2d 60, 2005 N.C. App. LEXIS 1370 (2005).

Applied in Deerman v. Beverly Cal. Corp., 135 N.C. App. 1, 518 S.E.2d 804 (1999).

OPINIONS OF ATTORNEY GENERAL

A registered nurse may administer certain medication pursuant to standing orders to a patient in a venereal disease clinic of a local health department after it is determined that he has a gonorrhea type discharge or has had contact with someone having gonorrhea. See opinion of Attorney General to Dwight H. Wheless, Dare County Attorney, 50 N.C.A.G. 9 (1980).

It is unlawful for certified registered nurse anesthetists (CRNAs) to provide anesthesia care without physician supervision. See opinion of Attorney General to The Honorable James S. Forrester, M.D. North Carolina General Assembly, 1998 N.C.A.G. 58 (12/31/98).

Administration of Additional Doses of Caudal Analgesia. — Following the setting in place of the needle for the injection of caudal analgesia and the administration of such analgesia to the patient, it is permissible for a registered nurse to administer additional dosage of the same medication pursuant to direct orders from the attending physician. Opinion of the Attorney General to Mr. Bryant D. Paris, Jr., Executive Secretary, North Carolina Board of Medical Examiners, Dec. 17, 1979.

§ 90-171.21. Board of Nursing; composition; selection; vacancies; qualifications; term of office; compensation.

(a) The Board shall consist of 14 members. Eight members shall be registered nurses. Three members shall be licensed practical nurses. Three members shall be representatives of the public.

(b) Selection. — The North Carolina Board of Nursing shall conduct an election each year to fill vacancies of nurse members of the Board scheduled to occur during the next year. Nominations of candidates for election of registered nurse members shall be made by written petition signed by not less than 10 registered nurses eligible to vote in the election. Nominations of candidates for election of licensed practical nurse members shall be made by written petition signed by not less than 10 licensed practical nurses eligible to vote in the election. Every licensed registered nurse holding an active license shall be eligible to vote in the election of registered nurse board members. Every licensed practical nurse holding an active license shall be eligible to vote in the election of licensed practical nurse board members. The list of nominations shall be filed with the Board after January 1 of the year in which the election is to be held and no later than midnight of the first day of April of such year. Before preparing ballots, the Board shall notify each person who has been duly nominated of the person's nomination and request permission to enter the person's name on the ballot. A member of the Board who is nominated for reelection and who does not withdraw the member's name from the ballot is disqualified to participate in conducting the election. Elected members shall begin their term of office on January 1 of the year following their election.

Nominations of persons to serve as public members of the Board may be made to the Governor or the General Assembly by any citizen or group within the State. The Governor shall appoint one public member to the Board, and the General Assembly shall appoint two public members to the Board. Of the public members appointed by the General Assembly, one shall be appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, and one shall be appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives.

Board members shall be commissioned by the Governor upon their election or appointment.

(c) Vacancies. — All unexpired terms of Board members appointed by the General Assembly shall be filled within 45 days after the term is vacated. The Governor shall fill all other unexpired terms on the Board within 30 days after the term is vacated. For vacancies of registered nurse or licensed practical nurse members, the Governor shall appoint the person who received the next highest number of votes to those elected members at the most recent election for board members. Appointees shall serve the remainder of the unexpired term and until their successors have been duly elected or appointed and qualified.

(d) Qualifications. — Of the eight registered nurse members on the Board, one shall be a nurse administrator employed by a hospital or a hospital system, who shall be accountable for the administration of nursing services and not directly involved in patient care; one shall be an individual who meets the requirements to practice as a certified registered nurse anesthetist, a certified nurse midwife, a clinical nurse specialist, or a nurse practitioner; two shall be staff nurses, defined as individuals who are primarily involved in direct patient care regardless of practice setting; one shall be an at-large registered nurse who meets the requirements of sub-subdivisions (1) a., a1., and b. of this subsection, but is not currently an educator in a program leading to licensure or any other degree-granting program; and three shall be nurse educators. Minimum ongoing employment requirements for every registered nurse and licensed practical nurse shall include continuous employment equal to or greater than fifty percent (50%) of a full-time position that meets the criteria for the specified Board member position. Of the three nurse educators, one shall be a practical nurse educator, one shall be an associate degree or diploma nurse educator, and one shall be a baccalaureate or higher degree nurse educator. All nurse educators shall meet the minimum education requirement as established by the Board's education program standards for nurse faculty. Candidates eligible for election to the Board as nurse educators are not eligible for election as the at-large member.

(1) Except for the at-large member, every registered nurse member shall meet the following criteria:
  a. Hold a current, unencumbered license to practice as a registered nurse in North Carolina.
  a1. Be a resident of North Carolina.
  b. Have a minimum of five years of experience as a registered nurse.
  c. Have been engaged continuously in a position that meets the criteria for the specified Board position for at least three years immediately preceding election.
  d. Show evidence that the employer of the registered nurse is aware that the nurse intends to serve on the Board.

(2) Every licensed practical nurse member shall meet the following criteria:
  a. Hold a current, unencumbered license to practice as a licensed practical nurse in North Carolina.
  a1. Be a resident of North Carolina.
  c. Have a minimum of five years of experience as a licensed practical nurse.
  d. Have been engaged continuously in the position of a licensed practical nurse for at least three years immediately preceding election.
  e. Show evidence that the employer of the licensed practical nurse is aware that the nurse intends to serve on the Board.

(3) A public member appointed by the Governor shall not be a provider of health services or employed in the health services field. No public member appointed by the Governor or person in the public member's immediate family as defined by G.S. 90-405(8) shall be currently employed as a licensed nurse or been previously employed as a licensed nurse.

(4) The nurse practitioner, nurse anesthetist, nurse midwife, or clinical nurse specialist member shall be recognized by the Board as a registered nurse who meets the following criteria:
  a. Has graduated from or completed a graduate level advanced practice nursing education program accredited by a national accrediting body.
  b. Maintains current certification or recertification from a national credentialing body approved by the Board or meets other requirements established by rules adopted by the Board.
  c. Practices in a manner consistent with rules adopted by the Board and other applicable law.

(e) Term. — Members of the Board shall serve four-year staggered terms. No member shall serve more than two consecutive four-year terms or eight consecutive years after January 1, 2005.

(f) Removal. — The Board may remove any of its members for neglect of duty, incompetence, or unprofessional conduct. A member subject to disciplinary proceedings shall be disqualified from Board business until the charges are resolved.

(g) Reimbursement. — Board members are entitled to receive compensation and reimbursement as authorized by G.S. 93B-5. (1981, c. 360, s. 1; c. 852, s. 1; 1987, c. 651, s. 2; 1991, c. 643, s. 1; 1991 (Reg. Sess., 1992), c. 1011, s. 3; 1997-456, s. 27; 2001-98, s. 2; 2003-146, s. 1; 2004-199, s. 26(a); 2006-264, s. 47.)

Cross References. — As to Nurses Aides Registry, see G.S. 90-171.55.

Editor's Note. — Session Laws 2003-146, s. 7, provides: "The terms of members serving on the Board of Nursing on December 31, 2004, expire on that date. To establish staggered terms for the appointments of public members made pursuant to G.S. 90-171.21(b), as enacted in Section 1 of this act, the Governor shall appoint one member for a four-year term, the General Assembly, upon the recommendation of the President Pro Tempore of the Senate, shall appoint one member for a three-year term, and the General Assembly, upon the recommendation of the Speaker of the House of Representatives, shall appoint one member for a two-year term.

"To stagger terms for members elected to the Board, the Board shall conduct an election in 2004 pursuant to G.S. 90-171.21(b) to elect members as follows:

"(1) An at-large registered nurse and a licensed practical nurse, to serve for a one-year term.

"(2) A staff registered nurse, a registered nurse who is an associate degree or diploma nurse educator, and a licensed practical nurse, each to serve for a two-year term.

"(3) A registered nurse who is a baccalaureate or higher degree nurse educator, a registered nurse administrator employed by a hospital or a hospital system, and a licensed practical nurse, each to serve for a three-year term.

"(4) A staff registered nurse, a registered nurse who is a practical nurse educator, and either a certified registered nurse anesthetist, a certified nurse midwife, a clinical nurse specialist, or a nurse practitioner, each to serve for a four-year term.

"All members appointed and elected to the Board pursuant to this section shall begin serving their terms on January 1, 2005. After staggered terms have been established, all subsequent appointments and elections to the Board shall be for four-year terms. For the purpose of initial application of the provisions of G.S. 90-171.21(e) that limit members to eight consecutive years of service, consecutive service as of December 31, 2004, shall count, and if the member reaches the eight-year maximum during a term of office, that person is not eligible to continue in office and a vacancy is created to be filled for the remainder of the unexpired term."

Subsection (d), as amended by Session Laws 2004-199, s. 26(a), effective August 17, 2004, is applicable to members elected to the Board on or after January 1, 2005.

Effect of Amendments. — Session Laws 2006-264, s. 47, effective August 27, 2006, in subdivision (d)(3), rewrote the first sentence, and inserted "appointed by the Governor" following "No public member" near the beginning of the second sentence.

CASE NOTES

Board of Nursing Entitled to Sovereign Immunity Defense. — Trial court properly dismissed an employee's wrongful termination complaint for failure to state a claim as the North Carolina Board of Nursing was a state agency that was entitled to a defense of sovereign immunity as the Board was enacted by G.S. 90-171.21, three members of the Board were appointed by the North Carolina Governor and the North Carolina legislature under G.S. 90-171.21(b), and its duties, as set forth in G.S. 90-171.23(b), served a public purpose. Abbott v. N.C. Bd. of Nursing, 177 N.C. App. 45, 627 S.E.2d 482, 2006 N.C. App. LEXIS 714 (2006).

Cited in Watkins v. N.C. State Bd. of Dental Exam'rs, 358 N.C. 190, 593 S.E.2d 764 (2004).

§ 90-171.22. Officers.

The officers of the Board shall be a chair, a vice-chair, and any other officers the Board considers necessary. All officers shall be elected annually by the Board for terms of one year and shall serve until their successors have been elected and qualified. (1981, c. 360, s. 1; 2003-146, s. 2.)

§ 90-171.23. Duties, powers, and meetings.

(a) Meetings. The Board shall hold at least two meetings each year to transact its business. The Board shall adopt rules with respect to calling, holding, and conducting regular and special meetings and attendance at meetings. The majority of the Board members constitutes a quorum.

(b) Duties, powers. The Board is empowered to:

(1) Administer this Article.
(2) Issue its interpretations of this Article.
(3) Adopt, amend or repeal rules and regulations as may be necessary to carry out the provisions of this Article.
(4) Establish qualifications of, employ, and set the compensation of an executive officer who shall be a registered nurse and who shall not be a member of the Board.
(5) Employ and fix the compensation of other personnel that the Board determines are necessary to carry into effect this Article and incur other expenses necessary to effectuate this Article.
(6) Examine, license, and renew the licenses of duly qualified applicants for licensure.
(7) Cause the prosecution of all persons violating this Article.
(8) Establish standards to be met by the students, and to pertain to faculty, curricula, facilities, resources, and administration for any nursing program as provided in G.S. 90-171.38.
(9) Review all nursing programs at least every eight years or more often as considered necessary by the Board or program director.
(10) Grant or deny approval for nursing programs as provided in G.S. 90-171.39.
(11) Upon request, grant or deny approval of continuing education programs for nurses as provided in G.S. 90-171.42.
(12) Keep a record of all proceedings and make available to the Governor and licensees an annual summary of all actions taken.
(13) Appoint, as necessary, advisory committees which may include persons other than Board members to deal with any issue under study.
(14) Appoint and maintain a subcommittee of the Board to work jointly with the subcommittee of the North Carolina Medical Board to develop rules and regulations to govern the performance of medical acts by registered nurses and to determine reasonable fees to accompany an application for approval or renewal of such approval as provided in G.S. 90-6. The fees and rules developed by this subcommittee shall govern the performance of medical acts by registered nurses and shall become effective when they have been adopted by both Boards.
(15) Recommend and collect such fees for licensure, license renewal, examinations and reexaminations as it deems necessary for fulfilling the purposes of this Article.
(16) Adopt a seal containing the name of the Board for use on all certificates, licenses, and official reports issued by it.
(17) Enter into interstate compacts to facilitate the practice and regulation of nursing.

(18) Establish programs for aiding in the recovery and rehabilitation of nurses who experience chemical addiction or abuse or mental or physical disabilities and programs for monitoring such nurses for safe practice.

(19) Request that the Department of Justice conduct criminal history record checks of applicants for licensure pursuant to G.S. 114-19.11.

(20) Adopt rules requiring an applicant to submit to the Board evidence of the applicant's continuing competence in the practice of nursing at the time of license renewal or reinstatement.

(21) Proceed in accordance with G.S. 90-171.37A, notwithstanding G.S. 150B-40(b), when conducting a contested case hearing in accordance with Article 3A of Chapter 150B of the General Statutes.

(22) Designate one or more of its employees to serve papers or subpoenas issued by the Board. Service under this subdivision is permitted in addition to any other methods of service permitted by law.

(23) Acquire, hold, rent, encumber, alienate, and otherwise deal with real property in the same manner as a private person or corporation, subject only to approval of the Governor and the Council of State. Collateral pledged by the Board for an encumbrance is limited to the assets, income, and revenues of the Board. (1981, c. 360, s. 1; c. 665, s. 2; c. 852, s. 4; 1995, c. 94, s. 28; 1997-491, s. 1; 1999-291, s. 1; 2001-98, s. 3; 2001-371, s. 3; 2003-146, s. 3; 2005-186, s. 1; 2007-148, s. 1.)

Editor's Note. — Session Laws 1995, c. 94, s. 28, states in the introductory language that "G.S. 90-171.23(14) reads as rewritten." The amendment has been set out in subsection (b)(14) above at the direction of the Revisor of Statutes.

Effect of Amendments. — Session Laws 2007-148, s. 1, effective June 29, 2007, added subdivisions (b)(21) through (b)(23).

CASE NOTES

Board of Nursing Entitled to Sovereign Immunity Defense. — Trial court properly dismissed an employee's wrongful termination complaint for failure to state a claim as the North Carolina Board of Nursing was a state agency that was entitled to a defense of sovereign immunity as the Board was enacted by G.S. 90-171.21, three members of the Board were appointed by the North Carolina Governor and the North Carolina legislature under G.S. 90-171.21(b), and its duties, as set forth in G.S. 90-171.23(b), served a public purpose. Abbott v. N.C. Bd. of Nursing, 177 N.C. App. 45, 627 S.E.2d 482, 2006 N.C. App. LEXIS 714 (2006).

Cited in Cafiero v. North Carolina Bd. of Nursing, 102 N.C. App. 610, 403 S.E.2d 582 (1991); Best v. North Carolina State Bd. of Dental Exmrs., 108 N.C. App. 158, 423 S.E.2d 330 (1992); Leahy v. North Carolina Bd. of Nursing, 346 N.C. 775, 488 S.E.2d 245 (1997).

§ 90-171.24. Executive director.

The executive director shall perform the duties prescribed by the Board, serve as secretary/treasurer to the Board, and furnish a surety bond as provided in G.S. 128-8. The bond shall be made payable to the Board. (1981, c. 360, s. 1; 1993, c. 198, s. 1.)

Editor's Note. — Section 128-8, referred to in this section, was repealed by Session Laws 1981, c. 884, s. 13, effective July 8, 1981.

§ 90-171.25. Custody and use of funds.

The executive director shall deposit in financial institutions designated by the Board as official depositories all fees payable to the Board. The funds shall be deposited in the name of the Board and shall be used to pay all expenses incurred by the Board in carrying out the purposes of this Article. (1981, c. 360, s. 1; 1993, c. 198, s. 2; c. 257, s. 4; 1995, c. 509, s. 41.)

§ 90-171.26. The Board may accept contributions, etc.

The Board may accept grants, contributions, devices, bequests, and gifts which shall be kept in a separate fund and shall be used by it to enhance the practice of nursing. (1981, c. 360, s. 1.)

§ 90-171.27. Expenses payable from fees collected by Board.

(a) All salaries, compensation, and expenses incurred or allowed for the purposes of carrying out this Article shall be paid by the Board exclusively out of the fees received by the Board as authorized by this Article, or funds received from other sources. In no case shall any salary, expense, or other obligation of the Board be charged against the treasury of the State of North Carolina. All moneys and receipts shall be kept in a special fund by and for the use of the Board for the exclusive purpose of carrying out the provisions of this Article.

(b) The schedule of fees shall not exceed the following rates:

Application for examination leading to certificate and license as registered nurse	$75.00
Application for certificate and license as registered nurse by endorsement	150.00
Application for each re-examination leading to certificate and license as registered nurse	75.00
Renewal of license to practice as registered nurse (two-year period)	100.00
Reinstatement of lapsed license to practice as a registered nurse and renewal fee	180.00
Application for examination leading to certificate and license as licensed practical nurse by examination	75.00
Application for certificate and license as licensed practical nurse by endorsement	150.00
Application for each re-examination leading to certificate and license as licensed practical nurse	75.00
Renewal of license to practice as a licensed practical nurse (two-year period)	100.00
Reinstatement of lapsed license to practice as a licensed practical nurse and renewal fee	180.00
(See editor's note for initial fee) Application fee for retired registered nurse status or retired licensed practical nurse status	50.00
Reinstatement of retired registered nurse to practice as a registered nurse or a retired licensed practical nurse to practice as a licensed practical nurse (two-year period)	100.00
Reasonable charge for duplication services and materials.	

A fee for an item listed in this schedule shall not increase from one year to the next by more than twenty percent (20%).

(c) No refund of fees will be made.

(d) The Board may assess costs of disciplinary action against a nurse found in violation of the North Carolina Nursing Practice Act. (1947, c. 1091, s. 1;

1953, c. 750; c. 1199, ss. 1, 4; 1955, c. 1266, ss. 2, 3; 1961, c. 431, s. 2; 1965, c. 578, s. 1; 1971, c. 534; 1981, c. 360, s. 1; c. 661; 1987, c. 651, s. 1; 1997-384, s. 1; 2003-29, s. 2.)

Editor's Note. — Session Laws 2003-29, s. 3, provides: "The Board shall initially charge a twenty-five dollar ($25.00) application fee for retired registered nurse status or retired licensed practical nurse status. Nothing in this section shall prohibit the Board from amending the fee pursuant to Chapter 150B of the General Statutes."

§ 90-171.28. Nurses registered under previous law.

On June 30, 1981, any nurse who holds a license to practice nursing as a registered nurse or licensed practical nurse, issued by a competent authority pursuant to laws providing for the licensure of nurses in North Carolina, shall be deemed to be licensed under the provisions of this Article, but such person shall otherwise comply with the provisions of this Article including those provisions governing licensure renewal. (1953, c. 1199, s. 1; 1965, c. 578, s. 1; 1981, c. 360, s. 1.)

§ 90-171.29. Qualifications of applicants for examination.

In order to be eligible for licensure by examination, the applicant shall make a written application to the Board on forms furnished by the Board and shall submit to the Board an application fee and written evidence, verified by oath, sufficient to satisfy the Board that the applicant has graduated from a course of study approved by the Board and is mentally and physically competent to practice nursing. (1947, c. 1091, s. 1; 1953, c. 750; c. 1199, ss. 1, 4; 1955, c. 1266, s. 2; 1961, c. 431, s. 2; 1965, c. 578, s. 1; 1973, c. 93, s. 4; 1981, c. 360, s. 1.)

§ 90-171.30. Licensure by examination.

At least twice each year the Board shall give an examination, at the time and place it determines, to applicants for licensure to practice as a registered nurse or licensed practical nurse. The Board shall adopt rules, not inconsistent with this Article, governing qualifications of applicants, the conduct of applicants during the examination, and the conduct of the examination. The applicants shall be required to pass the examination required by the Board. The Board shall adopt rules which identify the criteria which must be met by an applicant in order to be issued a license. When the Board determines that an applicant has met those criteria, passed the required examination, submitted the required fee, and has demonstrated to the Board's satisfaction that he or she is mentally and physically competent to practice nursing, the Board shall issue a license to the applicant. (1947, c. 1091, s. 1; 1953, c. 1199, s. 1; 1965, c. 578, s. 1; 1981, c. 360, s. 1; 1991, c. 643, s. 2; 1993, c. 198, s. 3.)

CASE NOTES

Cited in Leahy v. North Carolina Bd. of Nursing, 346 N.C. 775, 488 S.E.2d 245 (1997).

§ 90-171.31. Reexamination.

Any applicant who fails to pass the first licensure examination may take subsequent examinations in accordance with the rules of the Board. (1981, c. 360, s. 1; 1993, c. 198, s. 4.)

§ 90-171.32. Qualifications for license as a registered nurse or a licensed practical nurse without examination.

The Board may, without examination, issue a license to an applicant who is duly licensed as a registered nurse or licensed practical nurse under the laws of another state, territory of the United States, the District of Columbia, or foreign country when that jurisdiction's requirements for licensure as a registered nurse or a licensed practical nurse, as the case may be, are substantially equivalent to or exceed those of the State of North Carolina at the time the applicant was initially licensed, and when, in the Board's opinion, the applicant is competent to practice nursing in this State. The Board may require such applicant to prove competence and qualifications to practice as a registered nurse or licensed practical nurse in North Carolina. (1947, c. 1091, s. 1; 1953, c. 1199, s. 1; 1961, c. 431, s. 2; 1965, c. 578, s. 1; 1981, c. 360, s. 1.)

§ 90-171.33. Temporary license.

(a) Until the implementation of the computer-adaptive licensure examination, the Board may issue a nonrenewable temporary license to persons who are applying for licensure under G.S. 90-171.30, and who are scheduled for the licensure examination at the first opportunity after graduation, for a period not to exceed the lesser of nine months or the date of applicant's notification of the results of the licensure examination. The Board shall revoke the temporary license of any person who does not take the examination as scheduled, or who has failed the examination for licensure as provided by this act.

(b) Upon implementation of the computer-adaptive licensure examination, no temporary licenses will be issued to persons who are applying for licensure under G.S. 90-171.30.

(c) The Board may issue a nonrenewable temporary license to persons applying for licensure under G.S. 90-171.32 for a period not to exceed the lesser of six months or until the Board determines whether the applicant is qualified to practice nursing in North Carolina. Temporary licensees may perform patient-care services within limits defined by the Board. In defining these limits, the Board shall consider the ability of the temporary licensee to safely and properly carry out patient-care services. Temporary licensees shall be held to the standard of care of a fully licensed nurse. (1981, c. 360, s. 1; 1991, c. 643, s. 3; 1993, c. 198, s. 5.)

§ 90-171.34. Licensure renewal.

Every unencumbered license, except temporary license, issued under this Article shall be renewed for two years. On or before the date the current license expires, every person who desires to continue to practice nursing shall apply for licensure renewal to the Board on forms furnished by the Board and shall also file the required fee. The Board shall provide space on the renewal form for the licensee to specify the amount of continuing education received during the renewal period. Failure to renew the license before the expiration date shall result in automatic forfeiture of the right to practice nursing in North Carolina until such time that the license has been reinstated. (1981, c. 360, s. 1; 1993, c. 198, s. 6.)

§ 90-171.35. Reinstatement.

A licensee who has allowed license to lapse by failure to renew as herein provided may apply for reinstatement on a form provided by the Board. The

Board shall require the applicant to return the completed application with the required fee and to furnish a statement of the reason for failure to apply for renewal prior to the deadline. If the license has lapsed for at least five years, the Board shall require the applicant to complete satisfactorily a refresher course approved by the Board, or provide proof of active licensure within the past five years in another jurisdiction. The Board may require any applicant for reinstatement to satisfy the Board that the license should be reinstated. If, in the opinion of the Board, the applicant has so satisfied the Board, it shall issue a renewal of license to practice nursing, or it shall issue a license to practice nursing for a limited time. (1981, c. 360, s. 1; 1993, c. 198, s. 7.)

§ 90-171.36. Inactive list.

(a) When a licensee submits a request for inactive status, the Board shall issue to the licensee a statement of inactive status and shall place the licensee's name on the inactive list. While on the inactive list, the person shall not be subjected to renewal requirements and shall not practice nursing in North Carolina.

(b) When such person desires to be removed from the inactive list and returned to the active list within five years of being placed on inactive status, an application shall be submitted to the Board on a form furnished by the Board and the fee shall be paid for license renewal. The Board shall require evidence of competency to resume the practice of nursing before returning the applicant to active status. If the person has been on the inactive list for more than five years, the applicant must satisfactorily complete a refresher course approved by the Board or provide proof of active licensure within the past five years in another jurisdiction. (1981, c. 360, s. 1; 1993, c. 198, s. 8.)

§ 90-171.36A. Retired nurse status; reinstatement.

(a) After a registered nurse or a licensed practical nurse has retired, upon payment of the one-time fee required by G.S. 90-171.27(b), the Board may issue a special license to a registered nurse or licensed practical nurse in recognition of the nurse's retired status.

(b) If a retired registered nurse or licensed practical nurse wishes to return to the practice of nursing, the retired nurse shall apply for reinstatement on a form provided by the Board and satisfy any requirements the Board deems necessary to reinstate the license. (2003-29, s. 1.)

Editor's Note. — Session Laws 2003-29, s. 3, provides: "The Board shall initially charge a twenty-five dollar ($25.00) application fee for retired registered nurse status or retired licensed practical nurse status. Nothing in this section shall prohibit the Board from amending the fee pursuant to Chapter 150B of the General Statutes."

§ 90-171.37. Revocation, discipline, suspension, probation, or denial of licensure.

The Board shall initiate an investigation upon receipt of information about any practice that might violate any provision of this Article or any rule or regulation promulgated by the Board. In accordance with the provisions of Chapter 150B of the General Statutes, the Board shall have the power and authority to: (i) refuse to issue a license to practice nursing; (ii) refuse to issue a certificate of renewal of a license to practice nursing; (iii) revoke or suspend a license to practice nursing; and (iv) invoke other such disciplinary measures, censure, or probative terms against a licensee as it deems fit and proper; in any instance or instances in which the Board is satisfied that the applicant or licensee:

(1) Has given false information or has withheld material information from the Board in procuring or attempting to procure a license to practice nursing.

(2) Has been convicted of or pleaded guilty or nolo contendere to any crime which indicates that the nurse is unfit or incompetent to practice nursing or that the nurse has deceived or defrauded the public.

(3) Has a mental or physical disability or uses any drug to a degree that interferes with his or her fitness to practice nursing.

(4) Engages in conduct that endangers the public health.

(5) Is unfit or incompetent to practice nursing by reason of deliberate or negligent acts or omissions regardless of whether actual injury to the patient is established.

(6) Engages in conduct that deceives, defrauds, or harms the public in the course of professional activities or services.

(7) Has violated any provision of this Article.

(8) Has willfully violated any rules enacted by the Board.

The Board may take any of the actions specified above in this section when a registered nurse approved to perform medical acts has violated rules governing the performance of medical acts by a registered nurse; provided this shall not interfere with the authority of the North Carolina Medical Board to enforce rules and regulations governing the performance of medical acts by a registered nurse.

The Board may reinstate a revoked license, revoke censure or probative terms, or remove other licensure restrictions when it finds that the reasons for revocation, censure or probative terms, or other licensure restrictions no longer exist and that the nurse or applicant can reasonably be expected to safely and properly practice nursing. (1981, c. 360, s. 1; c. 852, s. 3; 1987, c. 827, s. 1; 1991, c. 643, s. 4; 1991 (Reg. Sess., 1992), c. 1030, s. 22; 1995, c. 94, s. 29; 2001-98, s. 4.)

Legal Periodicals. — For note, "Nurse Malpractice in North Carolina: The Standard of Care," see 65 N.C.L. Rev. 579 (1987).

CASE NOTES

One isolated act can meet the definition of "conduct" as used in subdivision (4) of this section. Cafiero v. North Carolina Bd. of Nursing, 102 N.C. App. 610, 403 S.E.2d 582 (1991).

Application to Single Act. — Petitioner's argument that subdivision (4) of this section was not intended to apply to a single act of negligence overlooks the fact that a single act may have very serious consequences. A single act may endanger health or even life. Petitioner's inference from the use of the present tense in subdivision (4) of this section that a sanction is permissible only if the violation is continuing at the time of the hearing would lead to absurd results, and the language of a statute will be interpreted so as to avoid an absurd consequence. Cafiero v. North Carolina Bd. of Nursing, 102 N.C. App. 610, 403 S.E.2d 582 (1991).

Cited in Dailey v. North Carolina State Bd. of Dental Exmrs., 309 N.C. 710, 309 S.E.2d 219 (1983); Leahy v. North Carolina Bd. of Nursing, 346 N.C. 775, 488 S.E.2d 245 (1997); Deerman v. Beverly Cal. Corp., 135 N.C. App. 1, 518 S.E.2d 804 (1999).

§ 90-171.37A. Use of hearing committee and depositions.

(a) The Board, in its discretion, may designate in writing three or more of its members to conduct hearings as a hearing committee to take evidence. A majority of the hearing committee shall be licensed nurses.

(b) Evidence and testimony may be presented at hearings before the Board or a hearing committee in the form of depositions before any person authorized to administer oaths in accordance with the procedure for the taking of depositions in civil actions in the superior court.

(c) The hearing committee shall submit a recommended decision that contains findings of fact and conclusions of law to the Board. Before the Board makes a final decision, it shall give each party an opportunity to file written exceptions to the recommended decision made by the hearing committee and to present oral arguments to the Board. A majority of the qualified members present and voting of the full Board shall issue a final decision. (2007-148, s. 2.)

Editor's Note. — Session Laws 2007-148, s. 4, made this section effective June 29, 2007.

§ 90-171.38. Standards for nursing programs.

(a) A nursing program may be operated under the authority of a general hospital, or an approved post-secondary educational institution. The Board shall establish, revise, or repeal standards for nursing programs. These standards shall specify program requirements, curricula, faculty, students, facilities, resources, administration, and describe the approval process. Any institution desiring to establish a nursing program shall apply to the Board and submit satisfactory evidence that it will meet the standards established by the Board. Those standards shall be designed to ensure that graduates of those programs have the education necessary to safely and competently practice nursing.

(b) Any individual, organization, association, corporation, or institution may establish a program for the purpose of training or educating any registered nurse licensed under G.S. 90-171.30, 90-171.32, or 90-171.33 in the skills, procedures, and techniques necessary to conduct medical examinations for the purpose of collecting evidence from the victims of first-degree rape as defined in G.S. 14-27.2, second-degree rape as defined in G.S. 14-27.3, statutory rape as defined in G.S. 14-27.7A, first-degree sexual offense as defined in G.S. 14-27.4, second-degree sexual offense as defined in G.S. 14-27.5 or attempted first-degree or second-degree rape or attempted first-degree or second-degree sexual offense as defined in G.S. 14-27.6. The Board, pursuant to G.S. 90-171.23(b)(14) and, in cooperation with the North Carolina Medical Board as described in G.S. 90-6, shall establish, revise, or repeal standards for any such program. Any individual, organization, association, corporation, or institution which desires to establish a program under this subsection shall apply to the Board and submit satisfactory evidence that it will meet the standards prescribed by the Board. (1981, c. 360, s. 1; 1987, c. 827, s. 1; 1991, c. 643, s. 5; 1997-375, s. 1; 2003-146, s. 4.)

Editor's Note. — G.S. 14-27.6, referred to in subsection (b), was repealed by Session Laws 1994, Extra Session, c. 14, s. 71(3).

§ 90-171.39. Approval.

The Board shall designate persons to survey proposed nursing programs, including the clinical facilities. The persons designated by the Board shall submit a written report of the survey to the Board. If in the opinion of the Board the standards for approved nursing education are met, the program shall be given approval. (1981, c. 360, s. 1.)

§ 90-171.40. Ongoing approval.

The Board shall review all nursing programs in the State at least every eight years or more often as considered necessary. If the Board determines that any approved nursing program does not meet or maintain the standards required by the Board, the Board shall give written notice specifying the deficiencies to the institution responsible for the program. The Board shall withdraw approval from a program that fails to correct deficiencies within a reasonable time. The Board shall publish annually a list of nursing programs in this State showing their approval status. (1981, c. 360, s. 1; 2003-146, s. 5.)

§ 90-171.41. Baccalaureate in nursing candidate credits.

Every graduate of a diploma or associate degree school of nursing in this State who has passed the registered nurse examination shall, upon admission to any State-supported institution of higher learning offering baccalaureate education in nursing, be granted credit for previous experience in the diploma or associate degree school of nursing on an individual basis by the utilization of the most effective method of evaluation to the end that the applicant shall receive optimum credit and that upon graduation the applicant will have earned the baccalaureate degree in nursing. (1969, c. 547, s. 1; 1981, c. 360, s. 1.)

§ 90-171.42. Continuing education programs.

(a) Upon request, the Board shall grant approval to continuing education programs upon a finding that the program offers an educational experience designed to enhance the practice of nursing.

(b) If the program offers to teach nurses to perform advance skills, the Board may grant approval for the program and the performance of the advanced skills by those successfully completing the program when it finds that the nature of the procedures taught in the program and the program facilities and faculty are such that a nurse successfully completing the program can reasonably be expected to carry out those procedures safely and competently. (1981, c. 360, s. 1; 1991, c. 643, s. 6.)

§ 90-171.43. License required.

No person shall practice or offer to practice as a registered nurse or licensed practical nurse, or use the word "nurse" as a title for herself or himself, or use an abbreviation to indicate that the person is a registered nurse or licensed practical nurse, unless the person is currently licensed as a registered nurse or licensed practical nurse as provided by this Article. If the word "nurse" is part of a longer title, such as "nurse's aide", a person who is entitled to use that title shall use the entire title and may not abbreviate the title to "nurse". This Article shall not, however, be construed to prohibit or limit the following:

(1) The performance by any person of any act for which that person holds a license issued pursuant to North Carolina law;
(2) The clinical practice by students enrolled in approved nursing programs, continuing education programs, or refresher courses under the supervision of qualified faculty;
(3) The performance of nursing performed by persons who hold a temporary license issued pursuant to G.S. 90-171.33;
(4) The delegation to any person, including a member of the patient's family, by a physician licensed to practice medicine in North Carolina, a licensed dentist or registered nurse of those patient-care services

which are routine, repetitive, limited in scope that do not require the professional judgment of a registered nurse or licensed practical nurse;

(5) Assistance by any person in the case of emergency.

Any person permitted to practice nursing without a license as provided in subdivision (2) or (3) of this section shall be held to the same standard of care as any licensed nurse. (1981, c. 360, s. 1; 1993, c. 198, s. 9; 1999-320, s. 2.)

CASE NOTES

Cited in State v. Clemmons, 111 N.C. App. 569, 433 S.E.2d 748 (1993).

§ 90-171.43A. Mandatory employer verification of licensure status.

(a) Before hiring a registered nurse or a licensed practical nurse in North Carolina, a health care facility shall verify that the applicant has a current, valid license to practice nursing pursuant to G.S. 90-171.43.

(b) For purposes of this section, "health care facility" means:

(1) Facilities described in G.S. 131E-256(b).

(2) Public health departments, physicians' offices, ambulatory care facilities, and rural health clinics. (2003-146, s. 6.)

§ 90-171.44. Prohibited acts.

It shall be a violation of this Article, and subject to action under G.S. 90-171.37, for any person to:

(1) Sell, fraudulently obtain, or fraudulently furnish any nursing diploma or aid or abet therein.

(2) Practice nursing under cover of any fraudulently obtained license.

(3) Practice nursing without a license. This subdivision shall not be construed to prohibit any licensed registered nurse who has successfully completed a program established under G.S. 90-171.38(b) from conducting medical examinations or performing procedures to collect evidence from the victims of offenses described in that subsection.

(4) Conduct a nursing program or a refresher course for activation of a license, that is not approved by the Board.

(5) Employ unlicensed persons to practice nursing. (1981, c. 360, s. 1; 1991, c. 643, s. 7; 1993, c. 198, s. 10; 1997-375, s. 2.)

§ 90-171.45. Violation of Article.

The violation of any provision of this Article, except G.S. 90-171.47, shall be a Class 1 misdemeanor. (1981, c. 360, s. 1; 1993, c. 539, s. 632; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 90-171.46. Injunctive authority.

The Board may apply to the superior court for an injunction to prevent violations of this Article or of any rules enacted pursuant thereto. The court is empowered to grant such injunctions regardless of whether criminal prosecution or other action has been or may be instituted as a result of such violation. (1981, c. 360, s. 1.)

§ 90-171.47. Reports: immunity from suit.

Any person who has reasonable cause to suspect misconduct or incapacity of a licensee or who has reasonable cause to suspect that any person is in violation of this Article, including those actions specified in G.S. 90-171.37(1) through (8), G.S. 90-171.43, and G.S. 90-171.44, shall report the relevant facts to the Board. Upon receipt of such charge or upon its own initiative, the Board may give notice of an administrative hearing or may, after diligent investigation, dismiss unfounded charges. Any person making a report pursuant to this section shall be immune from any criminal prosecution or civil liability resulting therefrom unless such person knew the report was false or acted in reckless disregard of whether the report was false. (1981, c. 360, s. 1; 1991, c. 643, s. 8; 1993, c. 198, s. 11.)

CASE NOTES

Applied in Pangburn v. Saad, 73 N.C. App. 336, 326 S.E.2d 365 (1985).

§ 90-171.48. Criminal history record checks of applicants for licensure.

(a) Definitions.— The following definitions shall apply in this section:

(1) Applicant.— A person applying for licensure as a registered nurse or licensed practical nurse either by examination pursuant to G.S. 90-171.29 and G.S. 90-171.30 or without examination pursuant to G.S. 90-171.32.

(2) Criminal history.— A history of conviction of a State crime, whether a misdemeanor or felony, that bears on an applicant's fitness for licensure to practice nursing. The crimes include the criminal offenses set forth in any of the following Articles of Chapter 14 of the General Statutes: Article 5, Counterfeiting and Issuing Monetary Substitutes; Article 5A, Endangering Executive and Legislative Officers; Article 6, Homicide; Article 7A, Rape and Other Sex Offenses; Article 8, Assaults; Article 10, Kidnapping and Abduction; Article 13, Malicious Injury or Damage by Use of Explosive or Incendiary Device or Material; Article 14, Burglary and Other Housebreakings; Article 15, Arson and Other Burnings; Article 16, Larceny; Article 17, Robbery; Article 18, Embezzlement; Article 19, False Pretenses and Cheats; Article 19A, Obtaining Property or Services by False or Fraudulent Use of Credit Device or Other Means; Article 19B, Financial Transaction Card Crime Act; Article 20, Frauds; Article 21, Forgery; Article 26, Offenses Against Public Morality and Decency; Article 26A, Adult Establishments; Article 27, Prostitution; Article 28, Perjury; Article 29, Bribery; Article 31, Misconduct in Public Office; Article 35, Offenses Against the Public Peace; Article 36A, Riots and Civil Disorders; Article 39, Protection of Minors; Article 40, Protection of the Family; Article 59, Public Intoxication; and Article 60, Computer-Related Crime. The crimes also include possession or sale of drugs in violation of the North Carolina Controlled Substances Act in Article 5 of Chapter 90 of the General Statutes and alcohol-related offenses including sale to underage persons in violation of G.S. 18B-302 or driving while impaired in violation of G.S. 20-138.1 through G.S. 20-138.5.

(b) All applicants for licensure shall consent to a criminal history record check. Refusal to consent to a criminal history record check may constitute grounds for the Board to deny licensure to an applicant. The Board shall ensure that the State and national criminal history of an applicant is checked. The Board shall be responsible for providing to the North Carolina Department of Justice the fingerprints of the applicant to be checked, a form signed by the applicant consenting to the criminal record check and the use of fingerprints and other identifying information required by the State or National Repositories, and any additional information required by the Department of Justice. The Board shall keep all information obtained pursuant to this section confidential.

(c) If an applicant's criminal history record check reveals one or more convictions listed under subsection (a) (2) of this section, the conviction shall not automatically bar licensure. The Board shall consider all of the following factors regarding the conviction:

(1) The level of seriousness of the crime.
(2) The date of the crime.
(3) The age of the person at the time of the conviction.
(4) The circumstances surrounding the commission of the crime, if known.
(5) The nexus between the criminal conduct of the person and the job duties of the position to be filled.
(6) The person's prison, jail, probation, parole, rehabilitation, and employment records since the date the crime was committed.
(7) The subsequent commission by the person of a crime listed in subsection (a) of this section.

If, after reviewing the factors, the Board determines that the grounds set forth in subsections (1), (2), (3), (4), (5), or (6) of G.S. 90-171.37 exist, the Board may deny licensure of the applicant. The Board may disclose to the applicant information contained in the criminal history record check that is relevant to the denial. The Board shall not provide a copy of the criminal history record check to the applicant. The applicant shall have the right to appear before the Board to appeal the Board's decision. However, an appearance before the full Board shall constitute an exhaustion of administrative remedies in accordance with Chapter 150B of the General Statutes.

(d) Limited immunity.— The Board, its officers and employees, acting in good faith and in compliance with this section, shall be immune from civil liability for denying licensure to an applicant based on information provided in the applicant's criminal history record check. (2001-371, s. 2.)

§ **90-171.49:** Reserved for future codification purposes.

ARTICLE 9B.

Information and Financial Assistance for Nursing Students and Inactive Nurses.

§ 90-171.50. Existing scholarship and loan information to be consolidated and published.

The State Education Assistance Authority of the Board of Governors of The University of North Carolina shall consolidate information on existing scholarships and loan programs available for nursing education. The information shall be published in a brochure and made available to high schools, colleges, Area Health Education Centers, and other facilities. (1987 (Reg. Sess., 1988), c. 1049, s. 1(a).)

§ 90-171.51. Emergency Financial Assistance Fund.

There is established an Emergency Financial Assistance Fund for students in State educational nursing and licensed practical nursing programs, to be administered by each campus. Emergency need is defined as acute financial need caused by a particular event which immediately and severely impacts a particular student's ability to continue his or her educational program in nursing on that student's current schedule. Allowable expenses, for emergency assistance, shall include funds for child care, transportation, housing, and medical care; and shall not be considered as an ongoing source of income for those expenses. Emergency assistance shall be limited to four hundred dollars ($400.00) per academic year for any individual. The local Board of Trustees at each campus shall review quarterly the expenditures under this Fund, and the Department of Community Colleges and the Board of Governors of The University of North Carolina shall assess the Fund's impact on completion rates in these programs, and report their assessment to the General Assembly. (1987 (Reg. Sess., 1988), c. 1049, s. 2(a).)

§ 90-171.52. Nursing licensing exam follow-up assistance.

The Board of Governors of The University of North Carolina shall direct the constituent institutions and the State Board of Community Colleges shall direct the Community Colleges to provide follow-up assistance for their students who fail the nursing licensing exam for the first time. This follow-up assistance shall include consultation with the Board of Nursing on areas needing improvement and shall include providing additional appropriate preparation assistance before the next exam date. (1987 (Reg. Sess., 1988), c. 1049, s. 3.)

§ 90-171.53. Area Health Education Centers publicity programs.

The Area Health Education Centers of The University of North Carolina and the Board of Nursing shall cooperate in developing publicity on:

(1) New salary levels and job opportunities in nursing;
(2) The availability of refresher courses; and
(3) License renewal requirements for registered nurses whose licenses are not currently active.

This information shall be provided to nurses without a current license in an effort to attract them back into nursing practice. (1987 (Reg. Sess., 1988), c. 1049, s. 5.)

§ 90-171.54: Reserved for future codification purposes.

Article 9C.

Nurses Aides Registry Act.

§ 90-171.55. Nurses Aides Registry.

(a) The Board of Nursing, established pursuant to G.S. 90-171.21, shall establish a Nurses Aides Registry for persons functioning as nurses aides regardless of title. The Board shall consider those Level I nurses aides employed in State licensed or Medicare/Medicaid certified nursing facilities who meet applicable State and federal registry requirements as adopted by the

North Carolina Medical Care Commission as having fulfilled the training and registry requirements of the Board. The Board may not charge an annual fee to a nurse aide I registry applicant. The Board may charge an annual fee of twelve dollars ($12.00) for each nurse aide II registry applicant. The Board shall adopt rules to ensure that whenever possible, the fee is collected through the employer or prospective employer of the registry applicant. Fees collected may be used by the Board in administering the registry. The Board's authority granted by this Article shall not conflict with the authority of the Medical Care Commission.

(b)(1) Each nurses aide training program, except for those operated by (i) institutions under the Board of Governors of The University of North Carolina, (ii) institutions of the North Carolina Community College System, (iii) public high schools, and (iv) hospital authorities acting pursuant to G.S. 131E-23(31), shall provide a guaranty bond unless the program has already provided a bond or an alternative to a bond under G.S. 115D-95. The Board of Nursing may revoke the approval of a program that fails to maintain a bond or an alternative to a bond pursuant to this subsection or G.S. 115D-95.

(2) When application is made for approval or renewal of approval, the applicant shall file a guaranty bond with the clerk of the superior court of the county in which the program will be located. The bond shall be in favor of the students. The bond shall be executed by the applicant as principal and by a bonding company authorized to do business in this State. The bond shall be conditioned to provide indemnification to any student, or his parent or guardian, who has suffered a loss of tuition or any fees by reason of the failure of the program to offer or complete student instruction, academic services, or other goods and services related to course enrollment for any reason, including the suspension, revocation, or nonrenewal of a program's approval, bankruptcy, foreclosure, or the program ceasing to operate.

The bond shall be in an amount determined by the Board to be adequate to provide indemnification to any student, or his parent or guardian, under the terms of the bond. The bond amount for a program shall be at least equal to the maximum amount of prepaid tuition held at any time during the last fiscal year by the program. The bond amount shall also be at least ten thousand dollars ($10,000).

Each application for a license shall include a letter signed by an authorized representative of the program showing in detail the calculations made and the method of computing the amount of the bond pursuant to this subdivision and the rules of the Board. If the Board finds that the calculations made and the method of computing the amount of the bond are inaccurate or that the amount of the bond is otherwise inadequate to provide indemnification under the terms of the bond, the Board may require the applicant to provide an additional bond.

The bond shall remain in force and effect until cancelled by the guarantor. The guarantor may cancel the bond upon 30 days notice to the Board. Cancellation of the bond shall not affect any liability incurred or accrued prior to the termination of the notice period.

(3) An applicant that is unable to secure a bond may seek a waiver of the guaranty bond from the Board and approval of one of the guaranty bond alternatives set forth in this subdivision. With the approval of the Board, an applicant may file with the clerk of the superior court of the county in which the program will be located, in lieu of a bond:

a. An assignment of a savings account in an amount equal to the bond required (i) which is in a form acceptable to the Board; (ii) which is executed by the applicant; and (iii) which is executed by a state or federal savings and loan association, state bank, or national bank, that is doing business in North Carolina and whose accounts are insured by a federal depositors corporation; and (iv) for which access to the account in favor of the State of North Carolina is subject to the same conditions as for a bond in subdivision (2) of this subsection.

b. A certificate of deposit (i) which is executed by a state or federal savings and loan association, state bank, or national bank, which is doing business in North Carolina and whose accounts are insured by a federal depositors corporation; and (ii) which is either payable to the State of North Carolina, unrestrictively endorsed to the Board; in the case of a negotiable certificate of deposit, is unrestrictively endorsed to the Board; or in the case of a nonnegotiable certificate of deposit, is assigned to the Board in a form satisfactory to the Board; and (iii) for which access to the certificate of deposit in favor of the State of North Carolina is subject to the same conditions as for a bond in subdivision (2) of this subsection. (1989, c. 323, s. 1; 1989 (Reg. Sess., 1990), c. 824, s. 5; 1999-254, s. 1.)

§ 90-171.56. Medication aide requirements.

The Board of Nursing shall do the following:

(1) Establish standards for faculty and applicant requirements for medication aide training.

(2) Provide ongoing review and evaluation, and recommend changes, for faculty and medication aide training requirements to support safe medication administration and improve client, resident, and patient outcomes. (2005-276, s. 10.40C(b); 2007-148, s. 3.)

Editor's Note. — Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 10.40C(d), provides: "This section becomes effective July 1, 2006. The North Carolina Board of Nursing and the Department of Health and Human Services shall report on the implementation of this act to the House of Representatives Appropriations Subcommittee on Health and Human Services, the Senate Appropriations Committee on Health and Human Services, and the Fiscal Research Division not later than March 1, 2006, and annually thereafter."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-148, s. 3, effective June 29, 2007, in subdivision (1), inserted "and applicant" near the middle and substituted a period for "; and" at the end.

§§ 90-171.57 through 90-171.59: Reserved for future codification purposes.

ARTICLE 9D.

Nursing Scholars Program.

§ 90-171.60. North Carolina Nursing Scholars Commission established; membership.

(a) There is established the North Carolina Nursing Scholars Commission. The Commission shall exercise its powers and duties independently of the Board of Governors of The University of North Carolina and the State Board of Community Colleges. Staff assistance to the Commission shall be provided by the staff of the State Education Assistance Authority (SEAA) as created in G.S. 116-203.

(b) The Commission shall consist of 11 members as follows:
(1) The chairperson of the State Board of Nursing, or his designee;
(2) The chairperson of the Board of the State Education Assistance Authority;
(3) Three persons appointed by the Governor;
(4) Three persons appointed by the General Assembly on the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121; and
(5) Three persons appointed by the General Assembly on the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121.

(c) Each of the appointing entities shall seek to achieve a balanced membership representing, to the maximum extent possible, the State as a whole. Commission members shall be chosen from among individuals who have demonstrated a commitment to nursing, health care, or education.

(d) Of the Commission members appointed by the Governor, two shall each serve an initial term of two years, and one shall serve an initial term of four years. Of the Commission members appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives, one shall serve an initial term of two years, and two shall each serve an initial term of four years. Of the Commission members appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, one shall serve an initial term of two years, and two shall each serve an initial term of four years. Thereafter, all appointments to the Commission shall be for four-year terms.

(e) In the event a vacancy occurs for any reason, the vacancy shall be filled by appointment by the entity that made the appointment, except that vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122. The new appointee shall serve for the remainder of the unexpired term.

(f) The chairperson of the Commission shall be selected annually by the Commission from its members.

(g) Members of the Commission shall receive per diem and necessary travel and subsistence expenses in accordance with Chapter 138 of the General Statutes.

(h) The Commission shall meet regularly at times and places deemed necessary by the chairperson. (1989, c. 594, s. 1; 1991 (Reg. Sess., 1992), c. 879, s. 6.)

Editor's Note. — Session Laws 1989, c. 594, s. 2 provides: "Nothing in this act obligates the General Assembly to appropriate funds. Sections of this act that require additional funding are not effective until the necessary funds are appropriated." Such an appropriation was made in 1989. See Session Laws 1989, c. 794, s. 5(b) and (c).

§ 90-171.61. Nursing Scholars Program established; administration.

(a) There is established the Nursing Scholars Program. The North Carolina Nursing Scholars Commission shall determine selection criteria, methods of selection, and shall select recipients of scholarship loans made under the Nursing Scholars Program.

(b) The Nursing Scholars Program shall be used to provide the following:

(1) Scholarship loans in amounts of up to six thousand five hundred dollars ($6,500) per year, for each scholarship of no more than four years per recipient, to North Carolina residents interested in preparing to become registered nurses through associate or baccalaureate degree programs or through diploma programs.

(2) through (4) Repealed by Session Laws 2006-66, s. 9.9(a), effective July 1, 2006, and applicable to all scholarship loans awarded or renewed on or after that date.

(5) Scholarship loans of six thousand five hundred dollars ($6,500) per year, per recipient, for two years of study leading to a master of science in nursing degree for residents already holding a baccalaureate degree in nursing.

In awarding scholarship loans pursuant to subdivisions (1) and (5) of this subsection, the Commission may award pro rata scholarship loans to recipients enrolled at least half-time in study to become registered nurses or to attain a master of science in nursing degree. In awarding all scholarship loans, the Commission shall give priority to full-time students over part-time students. The State Education Assistance Authority shall adopt specific rules to regulate scholarship loans to part-time nursing students.

Within current funds available or with any additional funds provided by the General Assembly for this purpose, the Commission may set aside slots for scholarship loans prescribed by subdivision (1) of this subsection to enable licensed practical nurses to become registered nurses. The State Education Assistance Authority shall adopt specific rules to regulate these scholarship loans.

(b1) If a recipient is awarded a scholarship loan under this program and is enrolled, or accepted for enrollment, in a baccalaureate nursing program, but is unable to pursue the course of study in nursing for a semester due to limited faculty resources at the institution for that semester, then the recipient shall continue to receive the scholarship loan for that semester and shall not be required to forfeit or repay the scholarship loan for that semester provided that the recipient remains otherwise eligible for the program. This waiver shall be valid for only one semester of study and may extend a recipient's eligibility for funding under the program by no more than one semester.

(c) The Commission shall adopt stringent standards, which may include minimum grade point average, scholastic aptitude test scores, and other standards deemed appropriate by the Commission, to ensure that only the best potential students receive and retain loans under the Nursing Scholars Program. Standards adopted by the Commission shall include provisions for ensuring that the qualifications of applicants who are or would be nontraditional students are considered fairly in providing them with opportunities to compete for the loans. Loans under the Nursing Scholars Program shall be awarded only to applicants who meet the standards set by the Commission and who agree to practice nursing in North Carolina upon completion of the nursing education program supported by the loan.

(d) The Commission shall develop and administer the Nursing Scholars Program in cooperation with nursing schools at institutions approved by the Commission and the North Carolina Board of Nursing. The Nursing Scholars

Program shall provide for participants to be exposed to a range of extracurricular activities while in school, which activities shall be aimed at instilling in students a strong motivation to remain in the practice of nursing and to provide leadership for the nursing profession.

(e) The Commission may form regional review committees within North Carolina to assist it in identifying the best high school seniors and other applicants for the program. The Commission and the review committees shall make an effort to identify and encourage minority students and students who may not otherwise consider a career in nursing to apply for the Nursing Scholars Program.

(f) Upon the naming of recipients of loans from the Nursing Scholars Program, the Commission shall inform the State Education Assistance Authority (SEAA) of its decisions. The SEAA shall perform all of the administrative functions necessary to implement this Article, which functions shall include: rule-making, dissemination of information to the public, distribution and receipt of applications for scholarship loans, and the functions necessary for the execution, payment, and enforcement of promissory notes required under this Article. (1989, c. 594, s. 1; 1991, c. 550, s. 1; 1993 (Reg. Sess., 1994), c. 769, s. 17.11(a); 1997-214, s. 1; 2005-276, s. 9.33; 2006-66, s. 9.9(a).)

Editor's Note. — Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Effect of Amendments. — Session Laws 2006-66, s. 9.9.(a), effective July 1, 2006, rewrote subsection (b); inserted "and retain" preceding "loans under the Nursing Scholars Program" in the first sentence of subsection (c); and inserted "within North Carolina" following "regional review committees" in the first sentence of subsection (e).

§ 90-171.62. Terms of loans; receipt and disbursement of funds.

(a) All scholarship loans shall be evidenced by notes made payable to the State Education Assistance Authority that bear interest at the rate of ten percent (10%) per year beginning 90 days after completion of the nursing education program, or 90 days after termination of the scholarship loan, whichever is earlier. The scholarship loan may be terminated upon the recipient's withdrawal from school or by the recipient's failure to meet the standards set by the Commission.

(b) The State Education Assistance Authority shall forgive the loan if, within seven years after graduation from a nursing education program, the recipient practices nursing in North Carolina for one year for every year a scholarship loan was provided. If the recipient repays the scholarship loan by cash payments, all indebtedness shall be repaid within ten years. The Authority may provide for accelerated repayment and for less than full-time employment options to encourage the practice of nursing in either geographic or nursing specialty shortage areas. The Authority shall adopt specific rules to designate these geographic areas and these nursing specialty shortage areas, upon recommendations of the North Carolina Center for Nursing. The North Carolina Center for Nursing shall base its recommendations on objective information provided by interested groups or agencies and upon objective information collected by the Center. The Authority may forgive the scholarship loan if it determines that it is impossible for the recipient to practice nursing in North Carolina for a sufficient time to repay the loan because of the death or permanent disability of the recipient within ten years following graduation or termination of enrollment in a nursing education program.

(c) All funds appropriated to or otherwise received by the Nursing Scholars Program for scholarships, all funds received as repayment of scholarship loans, and all interest earned on these funds, shall be placed in a revolving fund. This revolving fund may be used only for scholarship loans granted under the Nursing Scholars Program. (1989, c. 594, s. 1; 1991, c. 550, s. 1.1; 1993 (Reg. Sess., 1994), c. 769, s. 17.11(b).)

§§ 90-171.63, 90-171.64: Reserved for future codification purposes.

ARTICLE 9E.

Need-Based Nursing Scholarships.

§ 90-171.65. Need-based nursing scholarships fund.

(a) There is created a need-based scholarship loan fund for nursing students. Need-based scholarship loans shall be available for study in nursing programs offered by community colleges and The University of North Carolina, and by private colleges that offer licensed practical nursing or registered nursing programs. Part-time students and nontraditional students who have post-secondary degrees, and registered nurses pursuing a baccalaureate degree in nursing, are eligible to receive need-based nursing scholarship loans.

(b) Need-based nursing scholarship loan funds shall be administered by the State Education Assistance Authority in accordance with rules and regulations adopted by the Board of the State Education Assistance Authority. Distribution of scholarship loan funds among students enrolled in the constituent institutions of The University of North Carolina, community colleges, and private colleges shall be in amounts proportionate to the amounts awarded to each such group of students in the preceding fiscal year. Scholarship loans shall be made only to prospective and enrolled nursing students under the terms and conditions established for the need-based nursing scholarship loan program by the State Education Assistance Authority.

(c) The State Education Assistance Authority shall carry out the following functions in implementing the need-based nursing scholarship loan program:

(1) Promulgate the rules and regulations necessary to implement the scholarship program, including the selection criteria and method of selection of recipients of need-based nursing scholarship loans;
(2) Disburse, collect, and monitor scholarship loan funds;
(3) Establish the terms and conditions of promissory notes executed by loan recipients;
(4) Approve service repayment agreements;
(5) Collect cash repayments required when service repayment is not completed; and
(6) Adopt rules to allow for the forgiveness of scholarship loans if it determines that it is impossible for the recipient to practice nursing in North Carolina for a sufficient time to repay the loan because of the death or permanent disability of the recipient within ten years following graduation or termination of enrollment in a nursing education program.

(d) Repealed by Session Laws 2005-40, s. 1, effective January 1, 2006, and applicable to all scholarship loans awarded after that date. (1989, c. 560, s. 17; 1991, c. 550, s. 1.2; 2005-40, s. 1.)

Effect of Amendments. — Session Laws 2005-40, s. 1, effective January 1, 2006, and applicable to all scholarship loans awarded after that date, rewrote the section, repealing subsection (d).

§§ 90-171.66 through 90-171.69: Reserved for future codification purposes.

Article 9F.

North Carolina Center for Nursing.

§ 90-171.70. North Carolina Center for Nursing; establishment; goals.

There is established the North Carolina Center for Nursing to address issues of supply and demand for nursing, including issues of recruitment, retention, and utilization of nurse manpower resources. The General Assembly finds that the Center will repay the State's investment by providing an ongoing strategy for the allocation of the State's resources directed towards nursing. The primary goals for the Center shall be:

(1) To develop a strategic statewide plan for nursing manpower in North Carolina by:
   a. Establishing and maintaining a database on nursing supply and demand in North Carolina, to include (i) current supply and demand, and (ii) future projections; and
   b. Selecting priorities from the plan to be addressed.

(2) To convene various groups representative of nurses, other health care providers, business and industry, consumers, legislators, and educators to:
   a. Review and comment on data analysis prepared for the Center;
   b. Recommend systemic changes, including strategies for implementation of recommended changes; and
   c. To evaluate and report the results of these efforts to the General Assembly and others.

(3) To enhance and promote recognition, reward, and renewal activities for nurses in North Carolina by:
   a. Promoting continuation of Institutes for Nursing Excellence programs as piloted by the Area Health Education Centers in 1989-90 or similar options;
   b. Proposing and creating additional reward, recognition, and renewal activities for nurses; and
   c. Promoting media and positive image-building efforts for nursing. (1991, c. 550, s. 3.)

§ 90-171.71. North Carolina Center for Nursing; governing board.

(a) The North Carolina Center for Nursing shall be governed by a policy-setting board of directors. The Board shall consist of 16 members, with a simple majority of the Board being nurses representative of various practice areas. Other members shall include representatives of other health care professions, business and industry, health care providers, and consumers. The Board shall be appointed as follows:

(1) Four members appointed by the General Assembly upon recommendation of the President Pro Tempore of the Senate, at least one of whom shall be a registered nurse and at least one other a representative of the hospital industry;

(2) Four members appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives, at least

one of whom shall be a registered nurse and at least one other a representative of the long-term care industry;

(3) Four members appointed by the Governor, two of whom shall be registered nurses; and

(4) Four nurse educators, one of whom shall be appointed by the Board of Governors of The University of North Carolina, one other by the State Board of Community Colleges, one other by the North Carolina Association of Independent Colleges and Universities, and one by the Area Health Education Centers Program.

(b) The initial terms of the members shall be as follows:

(1) Of the members appointed pursuant to subdivision (1) of subsection (a) of this section, two shall be appointed for terms expiring June 30, 1994, one for a term expiring June 30, 1993, and one for a term expiring June 30, 1992;

(2) Of the members appointed pursuant to subdivision (2) of subsection (a) of this section, one shall be appointed for a term expiring June 30, 1994, two for terms expiring June 30, 1993, and one for a term expiring June 30, 1992;

(3) Of the members appointed pursuant to subdivision (3) of subsection (a) of this section, one shall be appointed for a term expiring June 30, 1994, one for a term expiring June 30, 1993, and two for terms expiring June 30, 1992; and

(4) Of the members appointed pursuant to subdivision (4) of subsection (a) of this section, the terms of the members appointed by the Board of Governors of The University of North Carolina and the State Board of Community Colleges shall expire June 30, 1994; the term of the member appointed by the North Carolina Association of Independent Colleges shall expire June 30, 1993; and the term of the member appointed by the Area Health Education Centers Program shall expire June 30, 1992.

After the initial appointments expire, the terms of all of the members shall be three years, with no member serving more than two consecutive terms.

(c) The Board of Directors shall have the following powers and duties:

(1) To employ the executive director;

(2) To determine operational policy;

(3) To elect a chairperson and officers, to serve two-year terms. The chairperson and officers may not succeed themselves;

(4) To establish committees of the Board as needed;

(5) To appoint a multidisciplinary advisory council for input and advice on policy matters;

(6) To implement the major functions of the Center for Nursing as established in the goals set out in subsection (a) of this section; and

(7) To seek and accept non-State funds for carrying out Center policy.

(d) The Board shall receive the per diem and allowances prescribed by G.S. 138-5 for State boards and commissions.

(e) The North Carolina Center for Nursing shall be administered by The University of North Carolina through the Center's Board of Directors established under this section. (1991, c. 550, s. 3; 1991 (Reg. Sess., 1992), c. 879, s. 4.)

§ 90-171.72. North Carolina Center for Nursing; State support.

The General Assembly finds that it is imperative that the State protect its investment and progress made in its nursing efforts to date. The General Assembly further finds that the North Carolina Center for Nursing is the appropriate means to do so. The Center shall have State budget support for its operations so that it may have adequate resources for the tasks the General Assembly has set out in this Article. (1991, c. 550, s. 3.)

§§ **90-171.73 through 90-171.79:** Reserved for future codification purposes.

ARTICLE 9G.

Nurse Licensure Compact.

§ 90-171.80. Entering into Compact.

The Nurse Licensure Compact is hereby enacted into law and entered into by this State with all other states legally joining therein, in the form substantially as set forth in this Article. (1999-245, s. 1.)

Editor's Note. — Session Laws 1999-245, s. 2 provides: "Any nurse whose license has been restricted by the North Carolina Board of Nursing on the date this act becomes effective [July 1, 2000] shall not practice in any other party state as defined in G.S. 90-171.82(12), as enacted in Section 1 of this act, during the time in which the license is restricted unless the nurse receives prior authorization from such other party state."

§ 90-171.81. Findings and declaration of purpose.

(a) The General Assembly of North Carolina makes the following findings:

(1) The health and safety of the public are affected by the degree of compliance with and the effectiveness of enforcement activities related to states' nurse licensure laws.

(2) Violations of nurse licensure and other laws regulating the practice of nursing may result in injury or harm to the public.

(3) The expanded mobility of nurses and the use of advanced communication technologies as part of our nation's health care delivery system require greater coordination and cooperation among states in the areas of nurse licensure and regulation.

(4) New practice modalities and technology make compliance with individual states' nurse licensure laws difficult and complex.

(5) The current system of duplicative licensure for nurses practicing in multiple states is cumbersome and redundant to both nurses and states.

(b) The purposes of this Compact are to:

(1) Facilitate the states' responsibility to protect the public's health and safety.

(2) Ensure and encourage the cooperation of party states in the areas of nurse licensure and regulation.

(3) Facilitate the exchange of information between party states in the areas of nurse regulation, investigation, and adverse actions.

(4) Promote compliance with the laws governing the practice of nursing in each jurisdiction.

(5) Through the mutual recognition of party state licenses, grant all party states the authority to hold nurses accountable for meeting all state practice laws in the states in which their patients are located at the time care is rendered. (1999-245, s. 1.)

§ 90-171.82. Definitions.

The following definitions apply in this Article:

(1) Adverse action. — A home or remote state action.

(2) Alternative program. — A voluntary, nondisciplinary monitoring program approved by a nurse licensing board.

(3) Compact. — This Article.

(4) Coordinated licensure information system. — An integrated process for collecting, storing, and sharing information on nurse licensure and enforcement activities related to nurse licensure laws that is administered by a nonprofit organization composed of and controlled by state nurse licensing boards.

(5) Current significant investigative information. —

a. Investigative information that indicates a licensee has committed more than a minor infraction.

b. Investigative information that indicates a licensee represents an immediate threat to public health and safety.

(6) Home state. — The party state that is the nurse's primary state of residence.

(7) Home state action. — Any administrative, civil, equitable, or criminal action permitted by the home state's laws that is imposed on a nurse by the home state's licensing board or another authority. The term includes the revocation, suspension, or probation of a nurse's license or any other action that affects a nurse's authorization to practice.

(8) Licensee. — A person licensed by the North Carolina Board of Nursing or the nurse licensing board of a party state.

(9) Licensing board. — A party state's regulatory agency that is responsible for licensing nurses.

(10) Multistate licensure privilege. — Current official authority from a remote state permitting the practice of nursing as either a registered nurse or a licensed practical or vocational nurse in that state.

(11) Nurse. — A registered nurse or licensed practical or vocational nurse as those terms are defined by each party state's practice laws.

(12) Party state. — Any state that has adopted this Compact.

(13) Remote state. — A party state, other than the home state, where the patient is located at the time nursing care is provided. In the case of the practice of nursing not involving a patient, the term means the party state where the recipient of nursing practice is located.

(14) Remote state action. — Any administrative, civil, equitable, or criminal action permitted by the laws of a remote state that are imposed on a nurse by the remote state's nurse licensing board or other authority, including actions against a nurse's multistate licensure privilege to practice in the remote state. The term also includes cease and desist and other injunctive or equitable orders issued by remote states or their nurse licensing boards.

(15) State. — A state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.

(16) State practice laws. — The laws and regulations of individual party states that govern the practice of nursing, define the scope of nursing practice, and create the methods and grounds for disciplining nurses. The term does not include the initial qualifications for licensure or the requirements necessary to obtain and retain a license, except for qualifications or requirements of the home state. (1999-245, s. 1.)

§ 90-171.83. General provisions and jurisdiction.

(a) A license to practice registered nursing that is issued by a home state to a resident in that state shall be recognized by each party state as authorizing a multistate licensure privilege to practice as a registered nurse in each party state. A license to practice practical or vocational nursing that is issued by a home state to a resident in that state shall be recognized by each party state as authorizing a multistate licensure privilege to practice as a licensed practical or vocational nurse in each party state. In order to obtain or retain a license, an applicant must meet the home state's qualifications for licensure and license renewal as well as all other applicable state laws.

(b) Party states may, in accordance with each state's due process laws, revoke, suspend, or limit the multistate licensure privilege of any licensee to practice in their state and may take any other actions under their applicable state laws that are necessary to protect the health and safety of their citizens. If a party state takes an action authorized in this subsection, it shall promptly notify the administrator of the coordinated licensure information system. The administrator shall promptly notify the home state of any actions taken by remote states.

(c) Every licensee practicing in a party state shall comply with the state practice laws of the state in which the patient is located at the time care is rendered. The practice of nursing is not limited to patient care, but shall include all nursing practice as defined by the state practice laws of a party state. The practice of nursing in a party state shall subject a nurse to the jurisdiction of the nurse licensing board and the laws and the courts in that party state.

(d) The Compact does not affect additional requirements imposed by states for advanced-practice registered nursing. A multistate licensure privilege to practice registered nursing granted by a party state shall be recognized by other party states as a license to practice registered nursing if a license to practice registered nursing is required by state law as a precondition for qualifying for advanced-practice registered nurse authorization.

(e) Persons not residing in a party state may continue to apply for nurse licensure in party states as provided for under the laws of each party state. The license granted to such persons shall not be recognized as granting the privilege to practice nursing in any other party state unless explicitly agreed to by that party state. (1999-245, s. 1.)

§ 90-171.84. Application for licensure in a party state.

(a) Upon receiving an application for a license, the licensing board in a party state shall ascertain through the coordinated licensure information system whether the applicant holds or has ever held a license issued by any other state, whether there are any restrictions on the applicant's multistate licensure privilege, and whether any other adverse action by any state has been taken against the applicant's license.

(b) A licensee in a party state shall hold licensure in only one party state at a time. The license shall be issued by the home state.

(c) A licensee who intends to change his or her primary state of residence may apply for licensure in the new home state in advance of the change. However, a new license shall not be issued by a party state until after the licensee provides evidence of a change in his or her primary state of residence that is satisfactory to the new home state's licensing board.

(d) When a licensee changes his or her primary state of residence by moving between two party states and obtaining a license from the new home state, the license from the former home state is no longer valid.

(e) When a licensee changes his or her primary state of residence by moving from a nonparty state to a party state and obtaining a license from the new home state, the license issued by the nonparty state shall not be affected and shall remain in full force if the laws of the nonparty state so provide.

(f) When a licensee changes his or her primary state of residence by moving from a party state to a nonparty state, the license issued by the former home state converts to an individual state license that is valid only in the former home state. The license does not grant the multistate licensure privilege to practice in other party states. (1999-245, s. 1.)

§ 90-171.85. Adverse actions.

(a) The licensing board of a remote state shall promptly report to the administrator of the coordinated licensure information system any remote state actions, including the factual and legal basis for the actions, if known. The licensing board of a remote state shall also promptly report any current significant investigative information yet to result in a remote state action. The administrator of the coordinated licensure information system shall promptly notify the home state of any such reports.

(b) The licensing board of a party state may complete any pending investigation of a licensee who changes his or her primary state of residence during the course of the investigation. It may also take appropriate action against a licensee and shall promptly report the conclusion of the investigation to the administrator of the coordinated licensure information system. The administrator of the coordinated licensure information system shall promptly notify the new home state of any action taken against a licensee.

(c) A remote state may take adverse action that affects the multistate licensure privilege to practice within that party state. However, only the home state may take adverse action that affects a license that was issued by the home state.

(d) For purposes of taking adverse action, the licensing board of the home state shall give to conduct reported by a remote state the same priority and effect that it would if the conduct had occurred within the home state. The board shall apply its own state laws to determine the appropriate action that should be taken against the licensee.

(e) The home state may take adverse action based upon the factual findings of the remote state if each state follows its own procedures for imposing the adverse action.

(f) This Compact does not prohibit a party state from allowing a licensee to participate in an alternative program instead of taking adverse action against the licensee. If required by the party state's laws, the licensee's participation in an alternative program shall be confidential information. Party states shall require licensees who enter alternative programs to agree not to practice in any other party state during the term of the alternative program without prior authorization from the other party state. (1999-245, s. 1.)

§ 90-171.86. Current significant investigative information.

(a) If a licensing board finds current significant investigative information as defined in G.S. 90-171.82(5)a., the licensing board shall, after giving the licensee notice and an opportunity to respond if required by state law, conduct a hearing and decide what adverse action, if any, should be taken against the licensee.

(b) If a licensing board finds current significant investigative information as defined in G.S. 90-171.82(5)b., the licensing board may take adverse action against the licensee without first providing the licensee notice or an opportunity to respond to the information. A hearing shall be promptly commenced and determined. (1999-245, s. 1.)

§ 90-171.87. Additional authority of party state nursing licensing boards.

Notwithstanding any other powers, party state nurse licensing boards may do any of the following:

(1) If otherwise permitted by state law, recover from licensees the costs of investigating and disposing of cases that result in adverse action.

(2) Issue subpoenas for both hearings and investigations that require the attendance and testimony of witnesses and the production of evidence. Subpoenas issued by a nurse licensing board in a party state for the attendance and testimony of witnesses or the production of evidence from another party state shall be enforced in the other party state by any court of competent jurisdiction according to the practice and procedure of that court. The issuing authority shall pay any witness fees, travel expenses, mileage, and other fees required by the laws of the party state where the witnesses or evidence are located.

(3) Issue cease and desist orders to limit or revoke a licensee's authority to practice in the board's state.

(4) Adopt uniform rules and regulations that are developed by the Compact administrators as provided in G.S. 90-171.89(c). (1999-245, s. 1.)

§ 90-171.88. Coordinated licensure information system.

(a) All party states shall participate in a cooperative effort to create a coordinated data base of all licensed registered nurses and licensed practical or vocational nurses. This system shall include information on the licensure and disciplinary history of each licensee, as contributed by party states, to assist in the coordination of nurse licensure and enforcement efforts.

(b) Notwithstanding any other provision of law, all party states' licensing boards shall promptly report to the coordinated licensure information system any adverse action taken against licensees, actions against multistate licensure privileges, any current significant investigative information yet to result in adverse action, and any denials of applications for licensure and the reasons for the denials.

(c) Current significant investigative information shall be transmitted through the coordinated licensure information system only to party state licensing boards.

(d) Notwithstanding any other provision of law, all party states' licensing boards contributing information to the coordinated licensure information system may designate information that shall not be shared with nonparty states or disclosed to other entities or individuals without the express permission of the contributing party state.

(e) Any personally identifiable information obtained by a party state licensing board from the coordinated licensure information system shall not be shared with nonparty states or disclosed to other entities or individuals except to the extent permitted by the laws of the party state contributing the information.

(f) Any information contributed to the coordinated licensure information system that is subsequently required to be expunged by the laws of the party state contributing the information shall be expunged from the coordinated licensure information system.

(g) The Compact administrators, acting jointly and in consultation with the administrator of the coordinated licensure information system, shall formulate necessary and proper procedures for the identification, collection, and exchange of information under this Compact. (1999-245, s. 1.)

§ 90-171.89. Compact administration and interchange of information.

(a) The executive director of the nurse licensing board of each party state or the executive director's designee shall be the administrator of this Compact for that state.

(b) To facilitate the administration of this Compact, the Compact administrator of each party state shall furnish to the Compact administrators of all other party states information and documents concerning each licensee, including a uniform data set of investigations, identifying information, licensure data, and disclosable alternative program participation.

(c) Compact administrators shall develop uniform rules and regulations to facilitate and coordinate implementation of this Compact. These uniform rules shall be adopted by party states as authorized in G.S. 90-171.87(4). (1999-245, s. 1.)

§ 90-171.90. Immunity.

A party state or the officers, employees, or agents of a party state's nurse licensing board who act in accordance with this Compact shall not be liable for any good faith act or omission committed while they were engaged in the performance of their duties under this Compact. (1999-245, s. 1.)

§ 90-171.91. Effective date, withdrawal, and amendment.

(a) This Compact shall become effective as to any state when it has been enacted into the laws of that state. Any party state may withdraw from this Compact by enacting a statute repealing the Compact, but the withdrawal shall not take effect until six months after the withdrawing state has given notice of the withdrawal to the Compact administrators of all other party states.

(b) No withdrawal shall affect the validity or applicability of any report of adverse action taken by the licensing board of a state that remains a party to the Compact if the adverse action occurred prior to the withdrawal.

(c) This Compact does not invalidate or prevent any nurse licensure agreement or other cooperative arrangement between a party state and a nonparty state that is made in accordance with this Compact.

(d) This Compact may be amended by the party states. No amendment to this Compact shall become effective and binding upon the party states unless and until it is enacted into the laws of all party states. (1999-245, s. 1.)

§ 90-171.92. Dispute resolution.

If there is a dispute that cannot be resolved by the party states involved, the following procedure shall be used:

(1) The party states shall submit the issues in dispute to an arbitration panel that shall consist of an individual appointed by the Compact administrator in the home state, an individual appointed by the Compact administrator in the remote states involved, and an individual appointed by the Compact administrators of all the party states involved in the dispute.

(2) The decision of a majority of the arbitrators shall be final and binding. (1999-245, s. 1.)

§ 90-171.93. Construction and severability.

This Compact shall be liberally construed so as to effectuate the purposes as stated in G.S. 90-171.81(b). The provisions of this Compact shall be severable and if any phrase, clause, sentence, or provision of this Compact is declared to be contrary to the constitution of any party state or of the United States, or if the applicability thereof to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this Compact and the applicability thereof to any government, agency, person, or circumstance shall not be affected. If this Compact shall be held contrary to the constitution of any party state, the Compact shall remain in full force and effect as to the remaining party states and in full force and effect as to the party state affected as to all severable matters. (1999-245, s. 1.)

§ 90-171.94. Applicability of compact.

This Article is applicable only to nurses whose home states are determined by the North Carolina Board of Nursing to have licensure requirements that are substantially equivalent or more stringent than those of North Carolina. (1999-456, s. 25.)

§§ 90-171.95 through 90-171.99: Reserved for future codification purposes.

Article 9H.

Graduate Nurse Scholarship Program for Faculty Production.

§ 90-171.100. Graduate Nurse Scholarship Program for Faculty Production established; administration.

(a) There is established the Graduate Nurse Scholarship Program for Faculty Production. The North Carolina Nursing Scholars Commission shall determine selection criteria, methods of selection, and shall select recipients of scholarship loans made under the Graduate Nurse Scholarship Program for Faculty Production.

(b) The Graduate Nurse Scholarship Program for Faculty Production shall be used to provide the following:

(1) A scholarship loan for up to two years in the amount of fifteen thousand dollars ($15,000) per year, per recipient, to students enrolled in a masters degree program in nursing education or any other area of the nursing field that would permit them to become a nursing instructor at a North Carolina community college or university.

(2) A scholarship loan for up to three years in the amount of fifteen thousand dollars ($15,000) per year, per recipient, to students enrolled in a doctoral degree program in nursing education or any other area of the nursing field that would permit them to become a nursing instructor at a North Carolina community college or university.

(3) A scholarship loan for up to two years in the amount of fifteen thousand dollars ($15,000) per year, per recipient, to nursing faculty in the North Carolina Community College System enrolled in a master's degree program in nursing education.

(b1) The State Education Assistance Authority shall adopt specific rules to regulate these scholarship loans.

(c) If a recipient is awarded a scholarship loan under this program and is enrolled, or accepted for enrollment, in an eligible program, but is unable to pursue the course of study in nursing for a semester due to limited faculty resources at the institution for that semester, then the recipient shall continue to receive the scholarship loan for that semester and shall not be required to forfeit or repay the scholarship loan for that semester, provided that the recipient remains otherwise eligible for the program. This waiver shall be valid for only one semester of study and may extend a recipient's eligibility for funding under the program by no more than one semester.

(d) The Commission shall adopt stringent standards, which may include minimum grade point average, scholastic aptitude test scores, and other standards deemed appropriate by the Commission, to ensure that only the best potential students receive loans under the Graduate Nurse Scholarship Program for Faculty Production. Standards adopted by the Commission shall include provisions for ensuring that the qualifications of applicants who are or would be nontraditional students are considered fairly in providing them with opportunities to compete for the loans. Standards adopted by the Commission shall also provide that community college nursing faculty receive preference in awarding scholarship loans under this section. Loans under the Graduate Nurse Scholarship Program for Faculty Production shall be awarded only to applicants who meet the standards set by the Commission and who agree to teach in a North Carolina public or private nursing program upon completion of the nursing education program supported by the loan. If a recipient under this section is a nursing faculty member at a community college, then as a condition of a scholarship loan received under G.S. 90-171.100(b)(3), the recipient shall agree to continue to work for the community college system in North Carolina as provided in G.S. 90-171.101(b).

(e) The Commission shall develop and administer the Graduate Nurse Scholarship Program for Faculty Production in cooperation with nursing schools at institutions approved by the Commission and the North Carolina Board of Nursing. The Graduate Nurse Scholarship Program for Faculty Production shall provide for participants to be exposed to a range of extracurricular activities while in school, which activities shall be aimed at instilling in students a strong motivation to remain in the practice of nursing education and to provide leadership for the nursing profession.

(f) The Commission shall make an effort to identify and encourage minority students and students who may not otherwise consider a career in nursing to apply for the Graduate Nurse Scholarship Program for Faculty Production.

(g) Upon the naming of recipients of loans from the Graduate Nurse Scholarship Program for Faculty Production, the Commission shall inform the State Education Assistance Authority (SEAA) of its decisions. The SEAA shall perform all of the administrative functions necessary to implement this Article, which functions shall include: rulemaking, dissemination of information to the public, distribution and receipt of applications for scholarship loans, and the functions necessary for the execution, payment, and enforcement of promissory notes required under this Article. (2006-66, s. 9.6; 2007-323, s. 9.6(a).)

Editor's Note. — Session Laws 2006-66, s. 28.7, made this Article effective July 1, 2006.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 9.6, enacted this section as G.S. 90-171.95; it was recodified as G.S. 90-171.100 at the direction of the Revisor of Statutes.

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 9.6(a), effective July 1, 2007, added subdivision (b)(3); inserted the subsection (b1) designation; and, in subsection (d), added the third sentence and added the last sentence.

§ 90-171.101. Terms of loans; receipt and disbursement of funds.

(a) All scholarship loans shall be evidenced by notes made payable to the State Education Assistance Authority that bear interest at the rate of ten percent (10%) per year beginning 90 days after completion of the nursing education program, or 90 days after termination of the scholarship loan, whichever is earlier. The scholarship loan may be terminated upon the recipient's withdrawal from school or by the recipient's failure to meet the standards set by the Commission.

(b) The State Education Assistance Authority shall forgive the loan if, within seven years after graduation from a nursing education program, the recipient teaches in a public or private nursing education program in a public or private educational institution in North Carolina for one year for every year a scholarship loan was provided, unless the recipient was a nursing faculty member of a community college. In those circumstances, the State Education Assistance Authority shall forgive the loan if, within seven years after graduation from a nursing education program, the recipient teaches in a community college nursing education program in North Carolina for one year for every year a scholarship loan was provided. If the recipient repays the scholarship loan by cash payments, all indebtedness shall be repaid within 10 years. The Authority may provide for accelerated repayment and for less than full-time employment options to encourage the practice of nursing education in either geographic or nursing specialty shortage areas. The Authority shall adopt specific rules to designate these geographic areas and these nursing specialty shortage areas, upon recommendations of the North Carolina Center for Nursing. The North Carolina Center for Nursing shall base its recommendations on objective information provided by interested groups or agencies and upon objective information collected by the Center. The Authority may forgive the scholarship loan if it determines that it is impossible for the recipient to teach in a public or private nursing program, or in a community college nursing program if that was a condition of the scholarship loan, in North Carolina for a sufficient time to repay the loan because of the death or permanent disability of the recipient within 10 years following graduation or termination of enrollment in a nursing education program.

(c) All funds appropriated to or otherwise received by the Graduate Nurse Scholarship Program for Faculty Production for scholarships, all funds received as repayment of scholarship loans, and all interest earned on these funds shall be placed in a revolving fund. This revolving fund may be used only for scholarship loans granted under the Graduate Nurse Scholarship Program for Faculty Production. (2006-66, s. 9.6; 2007-323, s. 9.6(b).)

Editor's Note. — Session Laws 2006-66, s. 9.6, enacted this section as G.S. 90-171.96; it was recodified as G.S. 90-171.101 at the direction of the Revisor of Statutes.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 9.6(b), effective July 1, 2007, in subsection (b), inserted "unless the recipient was a nursing faculty member of a community college" in the first sentence, added the second sentence, and inserted "or in a community college nursing program if that was a condition of the scholarship loan" in the last sentence.

ARTICLE 10.

Midwives.

§ 90-172: Repealed by Session Laws 1983, c. 897, s. 2.

Cross References. — For present provisions as to regulation of midwifery, see G.S. 90-178.1 et seq.

§§ 90-173 through 90-178: Repealed by Session Laws 1957, c. 1357, s. 7.

ARTICLE 10A.

Practice of Midwifery.

§ 90-178.1. Title.

This Article shall be known and may be cited as the Midwifery Practice Act. (1983, c. 897, s. 1.)

Editor's Note. — Session Laws 1983, c. 897, s. 3 provides: "This Act shall become effective October 1, 1983. Any person who on October 1, 1983, had been a practicing midwife in North Carolina for more than 10 years may continue to assist at childbirth without approval under this Article. Any other person authorized to practice midwifery on September 30, 1983, may continue to practice midwifery without approval under this Article until April 1, 1984. No annual fee shall be collected for 1983."

Legal Periodicals. — For note, "Nurse Malpractice in North Carolina: The Standard of Care," see 65 N.C.L. Rev. 579 (1987).

§ 90-178.2. Definitions.

As used in this Article:

(1) "Interconceptional care" includes but is not limited to:
  a. Family planning;
  b. Screening for cancer of the breast and reproductive tract; and
  c. Screening for and management of minor infections of the reproductive organs;

(2) "Intrapartum care" includes but is not limited to:
  a. Attending women in uncomplicated labor;
  b. Assisting with spontaneous delivery of infants in vertex presentation from 37 to 42 weeks gestation;
  c. Performing amniotomy;
  d. Administering local anesthesia;
  e. Performing episiotomy and repair; and
  f. Repairing lacerations associated with childbirth.

(3) "Midwifery" means the act of providing prenatal, intrapartum, postpartum, newborn and interconceptional care. The term does not include the practice of medicine by a physician licensed to practice medicine when engaged in the practice of medicine as defined by law, the performance of medical acts by a physician assistant or nurse practitioner when performed in accordance with the rules of the North Carolina Medical Board, the practice of nursing by a registered nurse engaged in the practice of nursing as defined by law, or the rendering of childbirth assistance in an emergency situation.

(4) "Newborn care" includes but is not limited to:
  a. Routine assistance to the newborn to establish respiration and maintain thermal stability;
  b. Routine physical assessment including APGAR scoring;
  c. Vitamin K administration; and
  d. Eye prophylaxis for opthalmia neonatorum.

(5) "Postpartum care" includes but is not limited to:
  a. Management of the normal third stage of labor;
  b. Administration of pitocin and methergine after delivery of the infant when indicated; and
  c. Six weeks postpartum evaluation exam and initiation of family planning.

(6) "Prenatal care" includes but is not limited to:
  a. Historical and physical assessment;
  b. Obtaining and assessing the results of routine laboratory tests; and
  c. Supervising the use of prenatal vitamins, folic acid, iron, and nonprescription medicines. (1983, c. 897, s. 1; 1995, c. 94, s. 30.)

§ 90-178.3. Regulation of midwifery.

(a) No person shall practice or offer to practice or hold oneself out to practice midwifery unless approved pursuant to this Article.

(b) A person approved pursuant to this Article may practice midwifery in a hospital or non-hospital setting and shall practice under the supervision of a physician licensed to practice medicine who is actively engaged in the practice of obstetrics. A registered nurse approved pursuant to this Article is authorized to write prescriptions for drugs in accordance with the same conditions applicable to a nurse practitioner under G.S. 90-18.2(b).

(c) Graduate nurse midwife applicant status may be granted by the joint subcommittee in accordance with G.S. 90-178.4. (1983, c. 897, s. 1; 2000-140, s. 60.)

§ 90-178.4. Administration.

(a) The joint subcommittee of the North Carolina Medical Board and the Board of Nursing created pursuant to G.S. 90-18.2 shall administer the provisions of this Article and the rules adopted pursuant to this Article; Provided, however, that actions of the joint subcommittee pursuant to this Article shall not require approval by the North Carolina Medical Board and the Board of Nursing. For purposes of this Article, the joint subcommittee shall be enlarged by four additional members, including two certified midwives and two obstetricians who have had working experience with midwives.

(b) The joint subcommittee shall adopt rules pursuant to this Article to establish:

(1) A fee which shall cover application and initial approval up to a maximum of one hundred dollars ($100.00);
(2) An annual renewal fee to be paid by January 1 of each year by persons approved pursuant to this Article up to a maximum of fifty dollars ($50.00);
(3) A reinstatement fee for a lapsed approval up to a maximum of five dollars ($5.00);
(4) The form and contents of the applications which shall include information related to the applicant's education and certification by the American College of Nurse-Midwives; and
(5) The procedure for establishing physician supervision as required by this Article.

(c) The joint subcommittee may solicit, employ, or contract for technical assistance and clerical assistance and may purchase or contract for the materials and services it needs.

(d) All fees collected on behalf of the joint subcommittee and all receipts of every kind and nature, as well as the compensation paid the members of the joint subcommittee and the necessary expenses incurred by them in the performance of the duties imposed upon them, shall be reported annually to the State Treasurer. All fees and other moneys received by the joint subcommittee pursuant to the provisions of the General Statutes shall be kept in a separate fund by the joint subcommittee, to be held and expended only for such purposes as are proper and necessary to the discharge of the duties of the joint subcommittee and to enforce the provisions of this Article. No expense incurred by the joint subcommittee shall be charged against the State.

(e) Members of the joint subcommittee who are not officers or employees of the State shall receive compensation and reimbursement for travel and subsistence expenses at the rates specified in G.S. 138-5. Members of the joint subcommittee who are officers or employees of the State shall receive reimbursement for travel and subsistence expenses at the rate set out in G.S. 138-6. (1983, c. 897, s. 1; 1995, c. 94, s. 31.)

§ 90-178.5. Qualifications for approval.

In order to be approved by the joint subcommittee pursuant to this Article, a person shall:

(1) Complete an application on a form furnished by the joint subcommittee;
(2) Submit evidence of certification by the American College of Nurse-Midwives;
(3) Submit evidence of arrangements for physician supervision; and
(4) Pay the fee for application and approval. (1983, c. 897, s. 1.)

§ 90-178.6. Denial, revocation or suspension of approval.

(a) In accordance with the provisions of Chapter 150B, the joint subcommittee may deny, revoke or suspend approval when a person has:

(1) Failed to satisfy the qualifications for approval;
(2) Failed to pay the annual renewal fee by January 1 of the current year;
(3) Given false information or withheld material information in applying for approval;
(4) Demonstrated incompetence in the practice of midwifery;
(5) Violated any of the provisions of this Article;
(6) A mental or physical disability or uses any drug to a degree that interferes with his or her fitness to practice midwifery;
(7) Engaged in conduct that endangers the public health;
(8) Engaged in conduct that deceives, defrauds, or harms the public in the course of professional activities or services; or
(9) Been convicted of or pleaded guilty or nolo contendere to any felony under the laws of the United States or of any state of the United States indicating professional unfitness.

(b) Revocation or suspension of a license to practice nursing pursuant to G.S. 90-171.37 shall automatically result in comparable action against the person's approval to practice midwifery under this Article. (1983, c. 897, s. 1; 1987, c. 827, s. 1.)

Legal Periodicals. — For note, "Nurse Malpractice in North Carolina: The Standard of Care," see 65 N.C.L. Rev. 579 (1987).

§ 90-178.7. Enforcement.

(a) The joint subcommittee may apply to the Superior Court of Wake County to restrain any violation of this Article.

(b) Any person who violates G.S. 90-178.3(a) shall be guilty of a Class 3 misdemeanor. (1983, c. 897, s. 1; 1993, c. 539, s. 633; 1994, Ex. Sess., c. 24, s. 14(c).)

ARTICLE 11.

Veterinarians.

§ 90-179. Purpose of Article.

In order to promote the public health, safety, and welfare by safeguarding the people of this State against unqualified or incompetent practitioners of veterinary medicine, it is hereby declared that the right to practice veterinary medicine is a privilege conferred by legislative grant to persons possessed of the personal and professional qualifications specified in this Article. (1973, c. 1106, s. 1.)

Cross References. — As to limited liability companies and their powers, see G.S. 57C-2-01 et seq.

§ 90-180. Title.

This Article shall be known as the North Carolina Veterinary Practice Act. (1973, c. 1106, s. 1.)

§ 90-181. Definitions.

When used in this Article these words and phrases shall be defined as follows:

(1) "Accredited school of veterinary medicine" means any veterinary college or division of a university or college that offers the degree of doctor of veterinary medicine or its equivalent and that conforms to the standards required for accreditation by the American Veterinary Medical Association.

(2) "Animal" means any animal, mammal other than man and includes birds, fish, and reptiles, wild or domestic, living or dead.

(2a) "Animal dentistry" means the treatment, extraction, cleaning, adjustment, or "floating" (filing or smoothing) of an animal's teeth, and treatment of an animal's gums.

(3) "Board" means the North Carolina Veterinary Medical Board.

(3a) "Cruelty to animals" means to willfully overdrive, overload, wound, injure, torture, torment, deprive of necessary sustenance, cruelly beat, needlessly mutilate or kill any animal, or cause or procure any of these acts to be done to an animal; provided, that the words "torture," "torment," or "cruelty" include every act, omission, or neglect causing or permitting unjustifiable physical pain, suffering, or death.

(4) "Limited veterinary license" or "limited license" means a license issued by the Board under authority of this Article that specifically, by its terms, restricts the scope or areas of practice of veterinary medicine by the holder of the limited license; provided, that no limited license shall confer or denote an area of specialty of the holder of this limited veterinary license; and provided further, that unless otherwise provided by Board rule, the licensing requirements shall be identical to those specified for a veterinary license.

(5) "Person" means any individual, firm, partnership, association, joint venture, cooperative or corporation, or any other group or combination acting in concert; and whether or not acting as a principal, trustee, fiduciary, receiver, or as any kind of legal or personal representative, or as the successor in interest, assignee, agent, factor, servant, employee, director, officer, or any other representative of such person.

(6) "Practice of veterinary medicine" means:

a. To diagnose, treat, correct, change, relieve, or prevent animal disease, deformity, defect, injury, or other physical or mental conditions; including the prescription or administration of any drug, medicine, biologic, apparatus, application, anesthetic, or other therapeutic or diagnostic substance or technique on any animal.

b. To represent, directly or indirectly, publicly or privately, an ability and willingness to do any act described in sub-subdivision a. of this subdivision.

c. To use any title, words, abbreviation, or letters in a manner or under circumstances which induce the belief that the person using them is qualified to do any act described in sub-subdivision a. of this subdivision.

(7) "Veterinarian" shall mean a person who has received a doctor's degree in veterinary medicine from an accredited school of veterinary medicine and who is licensed by the Board to practice veterinary medicine.

(7a) "Veterinarian-client-patient relationship" means that:

a. The veterinarian has assumed the responsibility for making medical judgments regarding the health of the animal and the need for medical treatment, and the client (owner or other caretaker) has agreed to follow the instruction of the veterinarian.

b. There is sufficient knowledge of the animal by the veterinarian to initiate at least a general or preliminary diagnosis of the medical condition of the animal. This means that the veterinarian has recently seen and is personally acquainted with the keeping and care of the animal by virtue of an examination of the animal, or by medically appropriate and timely visits to the premises where the animal is kept.

c. The practicing veterinarian is readily available or provides for follow-up in case of adverse reactions or failure of the regimen of therapy.

(7b) "Veterinary license" or "license" means a license to practice veterinary medicine issued by the Board.

(8) "Veterinary medicine" includes veterinary surgery, obstetrics, dentistry, and all other branches or specialties of veterinary medicine.

(9) "Veterinary student intern" means a person who is enrolled in an accredited veterinary college, has satisfactorily completed the third year of veterinary college education, and is registered with the Board as a veterinary student intern.

(10) "Veterinary student preceptee" means a person who is pursuing a doctorate degree in an accredited school of veterinary medicine that

has a preceptor or extern program, has completed the academic requirements of that program, and is registered with the Board as a veterinary student preceptee.

(11) "Veterinary technician" means either of the following persons:
  a. A person who has successfully completed a post-high school course in the care and treatment of animals that conforms to the standards required for accreditation by the American Veterinary Medical Association and who is registered with the Board as a veterinary technician.
  b. A person who holds a degree in veterinary medicine from a college of veterinary medicine recognized by the Board for licensure of veterinarians and who is registered with the Board as a veterinary technician. (1961, c. 353, s. 2; 1973, c. 1106, s. 1; 1993, c. 500, s. 1.)

§ 90-181.1. Practice facility names and levels of service.

(a) In order to accurately inform the public of the levels of service offered, a veterinary practice facility shall use in its name one of the descriptive terms defined in subsection (b) of this section. The name of a veterinary practice facility shall, at all times, accurately reflect the level of service being offered to the public. If a veterinary facility or practice offers on-call emergency service, that service must be as that term is defined in subsection (b) of this section.

(b) The following definitions are applicable to this section:

(1) "Animal health center" or "animal medical center" means a veterinary practice facility in which consultative, clinical, and hospital services are rendered and in which a large staff of basic and applied veterinary scientists perform significant research and conduct advanced professional educational programs.

(2) "Emergency facility" means a veterinary medical facility whose primary function is the receiving, treatment, and monitoring of emergency patients during its specified hours of operation. At this veterinary practice facility a veterinarian is in attendance at all hours of operation and sufficient staff is available to provide timely and appropriate emergency care. An emergency facility may be an independent veterinary medical after-hours facility, an independent veterinary medical 24-hour facility, or part of a full-service hospital or large teaching institution.

(3) "Mobile facility" means a veterinary practice conducted from a vehicle with special medical or surgical facilities or from a vehicle suitable only for making house or farm calls; provided, the veterinary medical practice shall have a permanent base of operation with a published address and telephone facilities for making appointments or responding to emergency situations.

(4) "Office" means a veterinary practice facility where a limited or consultative practice is conducted and which provides no facilities for the housing of patients.

(5) "On-call emergency service" means a veterinary medical service at a practice facility, including a mobile facility, where veterinarians and staff are not on the premises during all hours of operation or where veterinarians leave after a patient is treated. A veterinarian shall be available to be reached by telephone for after-hours emergencies.

(6) "Veterinary clinic" or "animal clinic" means a veterinary practice facility in which the practice conducted is essentially an out-patient practice.

(7) "Veterinary hospital" or "animal hospital" means a veterinary practice facility in which the practice conducted includes the confinement as well as the treatment of patients.

(c) If a veterinary practice facility uses as its name the name of the veterinarian or veterinarians owning or operating the facility, the name of the veterinary practice facility shall also include a descriptive term from those listed in subsection (b) of this section to disclose the level of service being offered.

(d) Those facilities existing and approved by the Board as of December 31, 1993, may continue to use their approved name or designation until there is a partial or total change of ownership of the facility, at which time the name of the veterinary practice facility shall be changed, as necessary, to comply with this section. (1993, c. 500, s. 2.)

§ 90-182. North Carolina Veterinary Medical Board; appointment, membership, organization.

(a) In order to properly regulate the practice of veterinary medicine and surgery, there is established a Board to be known as the North Carolina Veterinary Medical Board which shall consist of eight members.

Five members shall be appointed by the Governor. Four of these members shall have been legal residents of and licensed to practice veterinary medicine in this State for not less than five years preceding their appointment. The other member shall not be licensed or registered under the Article and shall represent the interest of the public at large. Each member appointed by the Governor shall reside in a different congressional district.

The General Assembly, upon the recommendation of the President Pro Tempore of the Senate, shall appoint to the Board one member who shall have been a resident of and licensed to practice veterinary medicine in this State for not less than five years preceding the appointment. The General Assembly, upon the recommendation of the Speaker of the House of Representatives, shall appoint to the Board one member who shall have been a legal resident of and registered as a veterinary technician in this State for not less than five years preceding the appointment.

In addition to the seven members appointed as provided above, the Commissioner of Agriculture shall biennially appoint to the Board the State Veterinarian or another veterinarian from a staff of a North Carolina department or institution. This member shall have been a legal resident of and licensed to practice veterinary medicine in North Carolina for not less than five years preceding his appointment.

Every member shall, within 30 days after notice of appointment, appear before any person authorized to administer the oath of office and take an oath to faithfully discharge the duties of the office.

(b) No person who has been appointed to the Board shall continue his membership on the Board if during the term of his appointment he shall:

(1) Transfer his legal residence to another state; or

(2) Own or be employed by any wholesale or jobbing house dealing in supplies, equipment, or instruments used or useful in the practice of veterinary medicine; or

(3) Have his license to practice veterinary medicine revoked for any of the causes listed in G.S. 90-187.8.

(c) All members serving on the board on June 30, 1981, shall complete their respective terms. The Governor shall appoint the public member not later than July 1, 1981. No member appointed to the Board by the Governor, Lieutenant Governor, Speaker of the House of Representatives, or General Assembly on or after July 1, 1981, shall serve more than two complete consecutive five-year terms, except that each member shall serve until his successor is appointed and qualifies.

(d) The appointing authority may remove his appointee for the reasons specified in subsection (b) or for any good cause shown and may appoint members to fill unexpired terms. (1903, c. 503, s. 2; Rev., s. 5432; C.S., s. 6755; 1961, c. 353, s. 3; 1973, c. 1106, s. 1; c. 1331, s. 3; 1981, c. 767, s. 1; 1993, c. 500, ss. 3, 4; 2001-281, ss. 1, 2; 2001-487, s. 104.)

Editor's Note. — Session Laws 2001-281, s. 3, provides: "Notwithstanding the provisions of G.S. 90-182(a), as enacted in Section 1 of this act, the member appointed by the General Assembly, upon the recommendation of the Speaker of the House of Representatives, who shall have been a legal resident of and registered as a veterinary technician in this State for not less than five years preceding his or her appointment, shall be appointed for a five-year term to commence July 1, 2001, and to expire June 30, 2006. The member described in this section shall serve the term for which he or she was appointed and until his or her successor is appointed and qualified."

Session Laws 2001-487, s. 104, provides: "The prefatory language of Section 2 of S.L. 2001-281 reads as rewritten: 'SECTION 2. G.S. 90-182(c) reads as rewritten.'"

§ 90-183. Meeting of Board.

The Board shall meet at least four times per year at the time and place fixed by the Board. Other meetings may be called by the president of the Board by giving notice as may be required by rule. A majority of the Board shall constitute a quorum. Meetings shall be open and public except that the Board may meet in closed session to prepare, approve, administer, or grade examinations, or to deliberate the qualification of an applicant for license or the disposition of a proceeding to discipline a veterinarian.

At its last meeting of the fiscal year the Board shall organize by electing, for the following fiscal year, a president, a vice-president, a secretary-treasurer, and such other officers as may be prescribed by rule. Officers of the Board shall serve for terms of one year and until a successor is elected, without limitation on the number of terms an officer may serve. The president shall serve as chairman of Board meetings. (1903, c. 503, ss. 3, 4, 6, 7; Rev., s. 5433; C.S., s. 6756; 1973, c. 1106, s. 1; 1993, c. 500, s. 5.)

§ 90-184. Compensation of the Board.

In addition to such reimbursement for travel and other expenses as is normally allowed to State employees, each member of the Board, for each day or substantial portion thereof that the member is engaged in the work of the Board may receive a per diem allowance, as determined by the Board in accordance with G.S. 93B-5. None of the expenses of the Board or of the members shall be paid by the State. (1903, c. 503, s. 9; Rev., s. 5434; C.S., s. 6757; 1961, c. 353, s. 4; 1973, c. 1106, s. 1; 1981, c. 767, s. 2; 1991 (Reg. Sess., 1992), c. 1011, s. 4; 1993, c. 500, s. 6.)

§ 90-185. General powers of the Board.

The Board may:

(1) Examine and determine the qualifications and fitness of applicants for a license to practice veterinary medicine in the State.

(2) Issue, renew, deny, suspend, or revoke licenses and limited veterinary licenses, and issue, deny, or revoke temporary permits to practice veterinary medicine in the State or otherwise discipline veterinarians consistent with the provisions of Chapter 150B of the General Statutes and of this Article and the rules adopted under this Article.

(3) Conduct investigations for the purpose of discovering violations of this Article or grounds for disciplining veterinarians.

(4) Employ full-time or part-time personnel — professional, clerical, or special — necessary to effectuate the provisions of this Article,

purchase or rent necessary office space, equipment, and supplies, and purchase liability or other insurance to cover the activities of the Board, its operations, or its employees.

(5) Appoint from its own membership one or more members to act as representatives of the Board at any meeting within or without the State where such representation is deemed desirable.

(6) Adopt, amend, or repeal all rules necessary for its government and all regulations necessary to carry into effect the provisions of this Article, including the establishment and publication of standards of professional conduct for the practice of veterinary medicine.

The powers enumerated above are granted for the purpose of enabling the Board effectively to supervise the practice of veterinary medicine and are to be construed liberally to accomplish this objective. (1973, c. 1106, s. 1; c. 1331, s. 3; 1981, c. 767, s. 3; 1987, c. 827, s. 1; 1993, c. 500, s. 7.)

§ 90-186. Special powers of the Board.

In addition to the powers set forth in G.S. 90-185 above, the Board may:

(1) Fix minimum standards for continuing veterinary medical education for veterinarians and technicians, which shall be a condition precedent to the renewal of a veterinary license, limited license, veterinary faculty certificate, zoo veterinary certificate, or veterinary technician registration, respectively, under this Article;

(2) Inspect any hospitals, clinics, mobile units or other facilities used by any practicing veterinarian, either by a member of the Board or its authorized representatives, for the purpose of reporting the results of the inspection to the Board on a form prescribed by the Board and seeking disciplinary action for violations of health, sanitary, and medical waste disposal rules of the Board affecting the practice of veterinary medicine, or violations of rules of any county, state, or federal department or agency having jurisdiction in these areas of health, sanitation, and medical waste disposal that relate to or affect the practice of veterinary medicine;

(3) Upon complaint or information received by the Board, prohibit through summary emergency order of the Board, prior to a hearing, the operation of any veterinary practice facility that the Board determines is endangering, or may endanger, the public health or safety or the welfare and safety of animals, and suspend the license of the veterinarian operating the veterinary practice facility, provided that upon the issuance of any summary emergency order, the Board shall initiate, within 10 days, a notice of hearing under the administrative rules issued pursuant to this Article and Chapter 150B of the General Statutes for an administrative hearing on the alleged violation;

(4) Provide special registration for "veterinary technicians," "veterinary student interns" and "veterinary student preceptees" and adopt rules concerning the training, registration and service limits of such assistants while employed by and acting under the supervision and responsibility of veterinarians. The Board has exclusive jurisdiction in determining eligibility and qualification requirements for these assistants. Renewals of registrations for veterinary technicians shall be required at least every 24 months, provided that the certificate of registration for the veterinary technician is otherwise eligible for renewal;

(5) Provide, pursuant to administrative rules, requirements for the inactive status of licenses and limited veterinary licenses;

(6) Set and require fees pursuant to administrative rule for the following:
  a. Issuance or renewal of a certificate of registration for a professional corporation, in an amount not to exceed one hundred fifty dollars ($150.00).
  b. Administering a North Carolina license examination, in an amount not to exceed two hundred fifty dollars ($250.00).
  c. Securing and administering national examinations, including the National Board Examination or the Clinical Competency Test, in amounts directly related to the costs to the Board.
  d. Inspection of a veterinary practice facility in an amount not to exceed seventy-five dollars ($75.00).
  e. Issuance or renewal of a license or a limited license in an amount not to exceed one hundred fifty dollars ($150.00).
  f. Issuance or renewal of a veterinary faculty certificate, in an amount not to exceed one hundred fifty dollars ($150.00).
  g. Issuance or renewal of a zoo veterinary certificate, in an amount not to exceed one hundred fifty dollars ($150.00).
  h. Reinstatement of an expired license, a limited license, a veterinary faculty certificate, a zoo veterinary certificate, a veterinary technician registration, or a professional corporation registration in an amount not to exceed one hundred dollars ($100.00).
  i. Issuance or renewal of a veterinary technician registration, in an amount not to exceed fifty dollars ($50.00).
  j. Issuance of a veterinary student intern registration, in an amount not to exceed twenty-five dollars ($25.00).
  k. Issuance of a veterinary student preceptee registration, in an amount not to exceed twenty-five dollars ($25.00).
  l. Late fee for renewal of a license, a limited license, a veterinary technician registration, a veterinary faculty certificate, a zoo veterinary certificate, or a professional corporation registration, in an amount not to exceed fifty dollars ($50.00).
  m. Issuance of a temporary permit to practice veterinary medicine in an amount not to exceed one hundred fifty dollars ($150.00).
  n. Providing copies, upon request, of Board publications, rosters, or other materials available for distribution from the Board, in an amount determined by the Board that is reasonably related to the costs of providing those copies.

The fees set under this subdivision for the renewal of a license, a limited license, a registration, or a certificate apply to each year of the renewal period.

(7) Pursuant to administrative rule, to assess and recover against persons holding licenses, limited licenses, temporary permits, or any certificates issued by the Board, costs reasonably incurred by the Board in the investigation, prosecution, hearing, or other administrative action of the Board in final decisions or orders where those persons are found to have violated the Veterinary Practice Act or administrative rules of the Board issued pursuant to the Act; provided, that all costs shall be the property of the Board. (1973, c. 1106, s. 1; 1981, c. 767, s. 4; 1987, c. 827, s. 1; 1993, c. 500, s. 8.)

§ 90-187. Application for license; qualifications.

(a) Any person desiring a license to practice veterinary medicine in this State shall make written application to the Board.

(b) The application shall show that the applicant is a graduate of an accredited veterinary school, a person of good moral character, and such other information and proof as the Board may require by rule. The Board may receive applications from senior students at accredited veterinary schools but an application is not complete until the applicant furnishes proof of graduation and such other information required by this Article and Board rules. The application shall be accompanied by a fee in the amount established and published by the Board.

(c) An application from a graduate of a nonaccredited college of veterinary medicine outside the United States and Canada may not be considered by the Board until the applicant furnishes satisfactory proof of graduation from a college of veterinary medicine and of successful completion of the certification program developed and administered by the Educational Commission for Foreign Veterinary Graduates of the American Veterinary Medical Association, which certification program shall include examinations with respect to clinical proficiency and comprehension of and ability to communicate in the English language.

(d) If the Board determines that the applicant possesses the proper qualifications, it may admit the applicant to the next examination, or if the applicant is eligible for a license without examination under G.S. 90-187.3; the Board may grant the applicant a license. (1903, c. 503, ss. 3, 5, 8; Rev., s. 5435; C.S., s. 6758; 1951, c. 749; 1961, c. 353, s. 5; 1973, c. 1106, s. 1; 1981, c. 767, ss. 5, 6; 1993, c. 500, s. 9.)

§ 90-187.1. Examinations.

The Board shall hold at least one examination during each year and may hold such additional examinations as may appear necessary. The executive director shall give public notice of the time and place for each examination at least 90 days in advance of the date set for the examination. A person desiring to take an examination shall make application at least 60 days before the date of the examination. The Board shall determine the passing score for the successful completion of an examination.

After each examination the executive director shall notify each examinee of the result of the examination. The Board shall issue licenses to the persons successfully completing the requirements for licensure required by this Article and by Board rule. (1903, c. 503, ss. 3, 5, 8; Rev., s. 5435; C.S., s. 6758; 1951, c. 749; 1961, c. 353, s. 5; 1973, c. 1106, s. 1; 1993, c. 500, s. 10.)

§ 90-187.2. Status of persons previously licensed.

Any person holding a valid license to practice veterinary medicine in this State on July 1, 1974, shall be recognized as a licensed veterinarian and shall be entitled to retain this status so long as he complies with the provisions of this Article, and Board rules adopted pursuant thereto. (1973, c. 1106, s. 1.)

§ 90-187.3. Applicants licensed in other states.

(a) The Board may issue a license without written examination, other than the written North Carolina license examination, to applicants already licensed in another state provided the applicant presents evidence satisfactory to the Board that:

(1) The applicant is currently an active, competent practitioner in good standing.

(2) The applicant has practiced at least three of the five years immediately preceding filing the application.

(3) The applicant currently holds an active license in another state.

(4) There is no disciplinary proceeding or unresolved complaint pending against the applicant at the time a license is to be issued by this State.

(4a) Any disciplinary actions taken against the applicant or his or her license by the other state in which he or she is licensed will not affect the applicant's competency to practice veterinary medicine as provided in this Article or any rules adopted by the Board.

(5) The licensure requirements in the other state are substantially equivalent to those required by this State.

(6) The applicant has achieved a passing score on the written North Carolina license examination.

(a1) Expired.

(b) The Board may issue a license without a written examination, other than the written North Carolina license examination, to an applicant who meets the requirements of G.S. 90-187(c).

(c) The Board may at its discretion orally or practically examine any person qualifying for licensure under this section, by administering a nationally recognized clinical competency test as well as the North Carolina license examination.

(d) The Board may issue a limited license to practice veterinary medicine to an applicant who is not otherwise eligible for a license to practice veterinary medicine under this Article, without examination, if the applicant meets the criteria established in subdivisions (1) through (6) of subsection (a) of this section. (1959, c. 744; 1973, c. 1106, s. 1; 1981, c. 767, s. 7; 1993, c. 500, s. 11; 1999-203, ss. 1, 2.)

§ 90-187.4. Temporary permit.

(a) The Board may issue, without examination, a temporary permit to practice veterinary medicine in this State:

(1) To a qualified applicant for license pending examination, provided that such temporary permit shall expire the day after the notice of results of the first examination given after the permit is issued.

(2) To a nonresident veterinarian validly licensed in another state, territory, or district of the United States or a foreign country, provided that such temporary permit shall be issued for a period of no more than 60 days.

(3) Temporary permits, as provided in (1) and (2) above, may contain any restrictions as to time, place, or supervision, that the Board deems appropriate. The State Veterinarian shall be notified as to the issuance of all temporary permits.

(b) A temporary permit may be summarily revoked by majority vote of the Board without a hearing. (1903, c. 503, ss. 3, 5, 8; Rev., s. 5435; C.S., s. 6758; 1951, c. 749; 1961, c. 353, s. 5; 1973, c. 1106, s. 1; 1993, c. 500, s. 12.)

§ 90-187.5. License renewal.

All licenses and limited licenses shall expire annually or biennially, as determined by the Board, on December 31 but may be renewed by application to the Board and payment of the renewal fee established and published by the Board. The executive director shall issue a new certificate of registration to all persons registering under this Article. Failure to apply for renewal within 60 days after expiration shall result in automatic revocation of the license or limited license and any person who shall practice veterinary medicine after such revocation shall be practicing in violation of this Article. Provided, that any person may renew an expired license or limited license at any time within two years following its expiration upon application and compliance with Board requirements and the payment of all applicable fees in amounts allowed by this Article or administrative rule of the Board; and further provided, that the applicant is otherwise eligible under this Article or administrative rules of the Board to have the license renewed. (1961, c. 353, s. 6; 1973, c. 1106, s. 1; 1993, c. 500, s. 13.)

§ 90-187.6. Veterinary technicians and veterinary employees.

(a) "Veterinary technicians," "veterinary student interns," and "veterinary student preceptees," before performing any services otherwise prohibited to persons not licensed or registered under this Article, shall be approved by and registered with the Board. The Board shall be responsible for all matters pertaining to the qualifications, registration, discipline, and revocation of registration of these persons, under this Article and rules issued by the Board.

(b) The services of a technician, intern, preceptee, or other veterinary employee shall be limited to services under the direction and supervision of a veterinarian. This employee shall receive no fee or compensation of any kind for services other than any salary or compensation paid to the employee by the veterinarian or veterinary facility by which the employee is employed. The employee may participate in the operation of a branch office, clinic, or allied establishment only to the extent allowable under and as defined by this Article or by rules issued by the Board.

(c) An employee under the supervision of a veterinarian may perform such duties as are required in the physical care of animals and in carrying out medical orders as prescribed by the veterinarian, requiring an understanding of animal science but not requiring the professional services as set forth in G.S. 90-181(6)a. In addition, a veterinary technician may assist veterinarians in diagnosis, laboratory analysis, anesthesia, and surgical procedures. Neither the employee nor the veterinary technician may perform any act producing an irreversible change in the animal. An employee, other than a veterinary technician, intern, or preceptee, may, under the direct supervision of a veterinarian, perform duties including collection of specimen; testing for intestinal parasites; collecting blood; testing for heartworms and conducting other laboratory tests; taking radiographs; and cleaning and polishing teeth, provided that the employee has had sufficient on-the-job training by a veterinarian to perform these specified duties in a competent manner. It shall be the responsibility of the veterinarian supervising the employee to ascertain that the employee performs these specified duties assigned to the employee in a competent manner. These specified duties shall be performed under the direct supervision of the veterinarian in charge of administering care to the patient.

(d) Veterinary student interns, in addition to all of the services permitted to veterinary technicians, may, under the direct personal supervision of a veterinarian, perform surgery and administer therapeutic or prophylactic drugs.

(e) Veterinary student preceptees, in addition to all of the services permitted to veterinary technicians and veterinary student interns, may, upon the direction of the employing veterinarian, make ambulatory calls and hospital and clinic diagnoses, prescriptions and treatments.

(f) Any person registered as a veterinary technician, veterinary student intern, or veterinary student preceptee, who shall practice veterinary medicine except as provided herein, shall be guilty of a Class 1 misdemeanor, and shall also be subject to revocation of registration. Any nonregistered veterinary employee employed under subsection (c) who practices veterinary medicine except as provided under that subsection shall be guilty of a Class 1 misdemeanor.

(g) Any veterinarian directing or permitting a veterinary technician, intern, preceptee or other employee to perform a task or procedure not specifically allowed under this Article and the rules of the Board shall be guilty of a Class 1 misdemeanor. (1973, c. 1106, s. 1; 1981, c. 767, ss. 8-11; 1993, c. 500, s. 14; c. 539, ss. 634, 635; 1995, c. 509, s. 42.)

§ 90-187.7. Abandonment of animals; notice to owner; relief from liability for disposal; "abandoned" defined.

(a) Any animal placed in the custody of a licensed veterinarian for treatment, boarding or other care, which shall be unclaimed by its owner or his agent for a period of more than 10 days after written notice by registered or certified mail, return receipt requested, to the owner or his agent at his last known address, shall be deemed to be abandoned and may be turned over to the nearest humane society, or dog pound or disposed of as such custodian may deem proper.

(b) The giving of notice to the owner, or the agent of the owner, of such animal by the licensed veterinarian, as provided in subsection (a) of this section, shall relieve the licensed veterinarian and any custodian to whom such animal may be given of any further liability for disposal.

(c) For the purpose of this Article the term "abandoned" shall mean to forsake entirely, or to neglect or refuse to provide or perform the legal obligations for care and support of an animal by its owner, or his agent. Such abandonment shall constitute the relinquishment of all rights and claims by the owner to such animal. (1973, c. 1106, s. 1.)

§ 90-187.8. Discipline of licensees.

(a) Upon complaint or information, and within the Board's discretion, the Board may revoke or suspend a license issued under this Article, may otherwise discipline a person licensed under this Article, or may deny a license required by this Article in accordance with the provisions of this Article, Board rules, and Chapter 150B of the General Statutes. As used in this section, the word "license" includes a license, a limited license, a veterinary faculty certificate, a zoo veterinary certificate, and a registration of a veterinary technician, a veterinary student intern, and a veterinary student preceptee.

(b) The Board may impose and collect from a licensee a civil monetary penalty of up to five thousand dollars ($5,000) for each violation of this Article or a rule adopted under this Article. The clear proceeds of these civil penalties shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

The amount of the civil penalty, up to the maximum, shall be determined upon a finding of one or more of the following factors:

(1) The degree and extent of harm to the public health or to the health of the animal under the licensee's care.
(2) The duration and gravity of the violation.
(3) Whether the violation was committed willfully or intentionally or reflects a continuing pattern.
(4) Whether the violation involved elements of fraud or deception either to the client or to the Board, or both.
(5) The prior disciplinary record with the Board of the licensee.
(6) Whether and the extent to which the licensee profited by the violation.

(c) Grounds for disciplinary action shall include but not be limited to the following:

(1) The employment of fraud, misrepresentation, or deception in obtaining a license.
(2) An adjudication of insanity or incompetency.

(3) The impairment of a person holding a license issued by the Board, when the impairment is caused by that person's use of alcohol, drugs, or controlled substances, and the impairment interferes with that person's ability to practice within the scope of the license with reasonable skill and safety and in a manner not harmful to the public or to animals under the person's care.
(4) The use of advertising or solicitation which is false, misleading, or deceptive.
(5) Conviction of a felony or other public offense involving moral turpitude.
(6) Incompetence, gross negligence, or other malpractice in the practice of veterinary medicine.
(7) Having professional association with or knowingly employing any person practicing veterinary medicine unlawfully.
(8) Fraud or dishonesty in the application or reporting of any test for disease in animals.
(9) Failure to keep veterinary premises and equipment in a clean and sanitary condition, violating an administrative rule of the Board concerning the minimum sanitary requirements of veterinary hospitals, veterinary clinics, or other practice facilities, or violating other State or federal statutes, rules, or regulations concerning the disposal of medical waste.
(10) Failure to report, as required by the laws and regulations of the State, or making false report of, any contagious or infectious disease.
(11) Dishonesty or gross negligence in the inspection of foodstuffs or the issuance of health or inspection certificates.
(12) Conviction of a criminal offense involving cruelty to animals or the act of cruelty to animals.
(13) Revocation of a license to practice veterinary medicine by another state, territory or district of the United States only if the grounds for revocation in the other jurisdiction would also result in revocation of the practitioner's license in this State.
(14) Unprofessional conduct as defined in regulations adopted by the Board.
(15) Conviction of a federal or state criminal offense involving the illegal use, prescription, sale, or handling of controlled substances, other drugs, or medicines.
(16) The illegal use, dispensing, prescription, sale, or handling of controlled substances or other drugs and medicines.
(17) Failure to comply with regulations of the United States Food and Drug Administration regarding biologics, controlled substances, drugs, or medicines.
(18) Selling, dispensing, prescribing, or allowing the sale, dispensing, or prescription of biologics, controlled substances, drugs, or medicines without a veterinarian-client-patient relationship with respect to the sale, dispensing, or prescription.
(19) Acts or behavior constituting fraud, dishonesty, or misrepresentation in dealing with the Board or in the veterinarian-client-patient relationship. (1903, c. 503, s. 10; Rev., s. 5436; C.S., s. 6759; 1953, c. 1041, s. 16; 1961, c. 353, s. 7; 1973, c. 1106, s. 1; c. 1331, s. 3; 1981, c. 767, ss. 12, 13; 1987, c. 827, s. 1; 1993, c. 500, s. 15; 1998-215, s. 136.)

§ 90-187.9. Reinstatement.

Any person whose license is suspended or revoked may, at the discretion of the Board, be relicensed or reinstated at any time without an examination by majority vote of the Board on written application made to the Board showing cause justifying relicensing or reinstatement. (1961, c. 353, s. 8; 1973, c. 1106, s. 1.)

§ 90-187.10. Necessity for license; certain practices exempted.

No person shall engage in the practice of veterinary medicine or own all or part interest in a veterinary medical practice in this State or attempt to do so without having first applied for and obtained a license for such purpose from the North Carolina Veterinary Medical Board, or without having first obtained from said Board a certificate of renewal of license for the calendar year in which such person proposes to practice and until he shall have been first licensed and registered for such practice in the manner provided in this Article and the rules and regulations of the said Board.

Nothing in this Article shall be construed to prohibit:

(1) Any person or his employee from administering to animals, the title to which is vested in himself, except when said title is so vested for the purpose of circumventing the provisions of this Article;

(2) Any person who is a regular student or instructor in a legally chartered college from the performance of those duties and actions assigned as his responsibility in teaching or research;

(3) Any veterinarian not licensed by the Board who is a member of the armed forces of the United States or who is an employee of the United States Department of Agriculture, the United States Public Health Service or other federal agency, or the State of North Carolina, or political subdivision thereof, from performing official duties while so commissioned or employed;

(4) Any person from such practices as permitted under the provisions of G.S. 90-185, House Bill 659, Chapter 17, Public Laws 1937, or House Bill 358, Chapter 5, Private Laws 1941;

(5) Any person from dehorning or castrating male food animals;

(6) Any person from providing for or assisting in the practice of artificial insemination;

(7) Any physician licensed to practice medicine in this State, or his assistant, while engaged in medical research;

(8) Any certified rabies vaccinator appointed, certified and acting within the provisions of G.S. 130A-186;

(9) Any veterinarian licensed to practice in another state from examining livestock or acting as a consultant in North Carolina, provided he is directly supervised by a veterinarian licensed by the Board who must, at or prior to the first instance of consulting, notify the Board, in writing, that he is supervising the consulting veterinarian, give the Board the name, address, and licensure status of the consulting veterinarian, and also verify to the Board that the supervising veterinarian assumes responsibility for the professional acts of the consulting veterinarian; and provided further, that the consultation by the veterinarian in North Carolina does not exceed 10 days or parts thereof per year, and further that all infectious or contagious diseases diagnosed are reported to the State Veterinarian within 48 hours; or

(10) Any person employed by the North Carolina Department of Agriculture and Consumer Services as a livestock inspector or by the U.S. Department of Agriculture as an animal health technician from performing regular duties assigned to him or her during the course and scope of that person's employment. (1903, c. 503, s. 12; Rev., s. 5438; C.S., s. 6761; 1961, c. 353, s. 9; 1973, c. 1106, s. 1; 1983, c. 891, s. 11; 1993, c. 500, s. 16; 1995, c. 509, s. 43; 1997-261, s. 11.)

Legal Periodicals. — For comment on the statutory standard of care for North Carolina health care providers, see 1 Campbell L. Rev. 111 (1979).

§ 90-187.11. Partnership, corporate, or sole proprietorship practice.

A veterinary medical practice may be conducted as a sole proprietorship, by a partnership, or by a duly registered professional corporation.

Whenever the practice of veterinary medicine is carried on by a partnership, all partners must be licensed.

It shall be unlawful for any corporation to practice or offer to practice veterinary medicine as defined in this Article, except as provided for in Chapter 55B of the General Statutes of North Carolina. (1961, c. 353, s. 8; 1973, c. 1106, s. 1; 1993, c. 500, s. 17.)

§ 90-187.12. Unauthorized practice; penalty.

If any person shall

(1) Practice or attempt to practice veterinary medicine in this State without first having obtained a license or temporary permit from the Board; or

(2) Practice veterinary medicine without the renewal of his license, as provided in G.S. 90-187.5; or

(3) Practice or attempt to practice veterinary medicine while his license is revoked, or suspended, or when a certificate of license has been refused; or

(4) Violate any of the provisions of this Article,

said person shall be guilty of a Class 1 misdemeanor. Each act of such unlawful practice shall constitute a distinct and separate offense. (1913, c. 129, s. 2; C.S., s. 6762; 1961, c. 353, s. 10; c. 756; 1973, c. 1106, s. 1; 1993, c. 539, s. 636; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 90-187.13. Injunctions.

The Board may appear in its own name in the superior courts in an action for injunctive relief to prevent violation of this Article and the superior courts shall have power to grant such injunctions regardless of whether criminal prosecution has been or may be instituted as a result of such violations. Actions under this section shall be commenced in the superior court district or set of districts as defined in G.S. 7A-41.1 in which the respondent resides or has his principal place of business or in which the alleged acts occurred. (1981, c. 767, s. 14; 1987 (Reg. Sess., 1988), c. 1037, s. 102.)

§ 90-187.14. Veterinary faculty certificates and zoo veterinary certificates.

(a) The Board may, upon application, issue veterinary faculty certificates in lieu of a license that otherwise would be required by this Article.

(b) The Board may, upon application, issue zoo veterinary certificates in lieu of a license that otherwise would be required by this Article, to veterinarians employed by the North Carolina State Zoo.

(c) The Board shall determine by administrative rule the application procedure, fees, criteria for the issuance, continuing education, renewal, suspension or revocation, and the scope of practice under the veterinary faculty certificate or the zoo veterinary certificate. There shall be an annual renewal of each certificate and all persons holding these certificates shall be subject to the jurisdiction of the Board in all respects under this Article. (1993, c. 500, s. 18.)

§ 90-187.15. Board agreement for programs for impaired veterinary personnel.

(a) The Board may enter into agreements with organizations that have developed programs for impaired veterinary personnel. Activities to be covered by these agreements may include investigation, review, and evaluation of records, reports, complaints, litigation, and other information about the practices or the practice patterns of veterinary personnel licensed or registered by the Board as these matters may relate to impaired veterinary personnel. Organizations having programs for impaired veterinary personnel may include a statewide supervisory committee or various regional or local components or subgroups.

(b) Agreements authorized under this section shall include provisions for the impaired veterinary personnel organizations to: (i) receive relevant information from the Board and other sources; (ii) conduct any investigation, review, or evaluation in an expeditious manner; (iii) provide assurance of confidentiality of nonpublic information and of the process; (iv) make reports of investigations and evaluations to the Board; and (v) implement any other related activities for operating and promoting a coordinated and effective process. The agreement shall include provisions assuring basic due process for veterinary personnel who become involved.

(c) Organizations entering into agreements with the Board shall establish and maintain a program for impaired veterinary personnel licensed or registered by the Board for the purpose of identifying, reviewing, and evaluating the ability of those veterinarians or veterinary technicians to function as veterinarians or veterinary technicians and provide programs for treatment and rehabilitation. The Board may provide funds for the administration of these impaired veterinary personnel peer review programs. The Board may adopt rules pursuant to Chapter 150B of the General Statutes to apply to the operation of impaired veterinary personnel programs, with provisions for: (i) definitions of impairment; (ii) guidelines for program elements; (iii) procedures for receipt and use of information of suspected impairment; (iv) procedures for intervention and referral; (v) arrangements for monitoring treatment, rehabilitation, posttreatment support, and performance; (vi) reports of individual cases to the Board; (vii) periodic reporting of statistical information; (viii) assurance of confidentiality of nonpublic information and of the process; and (ix) other necessary measures.

(d) Upon investigation and review of a veterinarian licensed by the Board or a veterinary technician registered with the Board, or upon receipt of a complaint or other information, an impaired veterinary personnel organization that enters into an agreement with the Board shall report to the Board detailed information about any veterinarian licensed or veterinary technician registered by the Board if:

(1) The veterinarian or veterinary technician constitutes an imminent danger to the public, to patients, or to himself or herself.

(2) The veterinarian or veterinary technician refuses to cooperate with the program, refuses to submit to treatment, or is still impaired after treatment and exhibits professional incompetence.

(3) It reasonably appears that there are other grounds for disciplinary action.

(e) Any confidential information or other nonpublic information acquired, created, or used in good faith by an impaired veterinary personnel organization or the Board regarding a participant pursuant to this section shall remain confidential and shall not be subject to discovery or subpoena in a civil case, nor subject to disclosure as a public document by the Board pursuant to Chapter 132 of the General Statutes. No person participating in good faith in an impaired veterinary personnel program developed under this section shall be required in a civil case to disclose any information, including opinions, recommendations, or evaluations, acquired or developed solely in the course of participating in the program.

(f) Impaired veterinary personnel activities conducted in good faith pursuant to any program developed under this section shall not be grounds for civil action under the laws of this State, and the activities are deemed to be State-directed and sanctioned and shall constitute "State action" for the purposes of application of antitrust laws. (2003-139, s. 1.)

ARTICLE 12.

Podiatrists.

§§ 90-188 through 90-202.1: Recodified as §§ 90-202.2 through 90-202.14.

Editor's Note. — This Article was rewritten by Session Laws 1975, c. 672, s. 1, effective July 1, 1975, and has been recodified as Article 12A, G.S. 90-202.2 et seq.

ARTICLE 12A.

Podiatrists.

§ 90-202.2. "Podiatry" defined.

(a) Podiatry as defined by this Article is the surgical, medical, or mechanical treatment of all ailments of the human foot and ankle, and their related soft tissue structures to the level of the myotendinous junction. Excluded from the definition of podiatry is the amputation of the entire foot, the administration of an anesthetic other than local, and the surgical correction of clubfoot of an infant two years of age or less.

(b) Except for procedures for bone spurs and simple soft tissue procedures, any surgery on the ankle or on the soft tissue structures related to the ankle, any amputations, and any surgical correction of clubfoot shall be performed by a podiatrist only in a hospital licensed under Article 5 of Chapter 131E of the General Statutes or in a multispecialty ambulatory surgical facility that is not a licensed office setting, and that is licensed under Part D of Article 6 of Chapter 131E of the General Statutes. Before performing any of the surgeries referred to in this subsection in a multispecialty ambulatory surgical facility, the podiatrist shall have applied for and been granted privileges to perform this surgery in the multispecialty ambulatory surgical facility. The granting of these privileges shall be based upon the same criteria for granting hospital privileges under G.S. 131E-85.

(c) The North Carolina Board of Podiatry Examiners shall maintain a list of podiatrists qualified to perform the surgeries listed in subsection (b) of this section, along with specific information on the surgical training successfully completed by each licensee. (1919, c. 78, s. 2; C.S., s. 6763; 1945, c. 126; 1963, c. 1195, s. 2; 1971, c. 1211; 1975, c. 672, s. 1; 1995, c. 248, s. 1.)

Cross References. — As to limited liability companies and their powers, see G.S. 57C-2-01 et seq.

Editor's Note. — This Article is Article 12 of this Chapter as rewritten by Session Laws 1975, c. 672, s. 1, effective July 1, 1975, and recodified. Where appropriate, the historical citations to the sections of the former Article have been added to the corresponding sections of the new Article.

CASE NOTES

Cited in Whitehurst v. Boehm, 41 N.C. App. 670, 255 S.E.2d 761 (1979); Costin v. Shell, 53 N.C. App. 117, 280 S.E.2d 42 (1981); Cooper v. Forsyth County Hosp. Auth., 604 F. Supp. 685 (M.D.N.C. 1985); Cooper v. Forsyth County Hosp. Auth., 789 F.2d 278 (4th Cir. 1986).

§ 90-202.3. Unlawful to practice unless registered.

No person shall practice podiatry unless he shall have been first licensed and registered so to do in the manner provided in this Article, and if any person shall practice podiatry without being duly licensed and registered, as provided in this Article, he shall not be allowed to maintain any action to collect any fee for such services. Any person who engages in the practice of podiatry unless licensed and registered as hereinabove defined, or who attempts to do so, or who professes to do so, shall be guilty of a Class 1 misdemeanor. Each act of such unlawful practice shall constitute a separate offense. (1919, c. 78, s. 1; C.S., s. 6764; 1963, c. 1195, s. 2; 1967, c. 1217, s. 2; 1975, c. 672, s. 1; 1993, c. 539, s. 637; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 90-202.4. Board of Podiatry Examiners; terms of office; powers; duties.

(a) There shall be established a Board of Podiatry Examiners for the State of North Carolina. This Board shall consist of four members appointed by the Governor. Three of the members shall be licensed podiatrists who have practiced podiatry in North Carolina for not less than seven years immediately preceding their election and who are elected and nominated to the Governor as hereinafter provided. The other member shall be a person chosen by the Governor to represent the public at large. The public member shall not be a health care provider nor may he or she be the spouse of a health care provider. For purposes of Board membership, "health care provider" means any licensed health care professional and any agent or employee of any health care institution, health care insurer, health care professional school, or a member of any allied health profession. For purposes of this section, a person enrolled in a program to prepare him to be a licensed health care professional or an allied health professional shall be deemed a health care provider. For purposes of this section, any person with significant financial interest in a health service or profession is not a public member.

(b) All Board members serving on June 30, 1981, shall be eligible to complete their respective terms. No member appointed to the Board on or after July 1, 1981, shall serve more than two complete consecutive three-year terms, except that each member shall serve until his successor is chosen and qualified.

(c) Podiatrist members chosen as provided for in subsection (d) shall be selected upon the expiration of the respective terms of the members of the present Board of Podiatry Examiners. Membership on the Board resulting from appointment before July 1, 1981, shall not be considered in determining the permissible length of service under subsection (b). The Governor shall appoint the public member not later than July 1, 1981.

(d) The Governor shall appoint podiatrist members of the Board from a list provided by the Board of Podiatry Examiners. For each vacancy, the Board shall submit at least two names to the Governor. All nominations of podiatrist members of the Board shall be conducted by the Board of Podiatry Examiners, which is hereby constituted a Board of Podiatry Elections. Every podiatrist with a current North Carolina license residing in this State shall be eligible to vote in all elections. The list of licensed podiatrists shall constitute the registration list for elections. The Board of Podiatry Elections is authorized to make rules relative to the conduct of these elections, provided such rules are not in conflict with the provisions of this section and provided that notice shall be given to all licensed podiatrists residing in North Carolina. All such rules shall be adopted subject to the procedures of Chapter 150B of the General Statutes of North Carolina. From any decision of the Board of Podiatry Elections relative to the conduct of such elections, appeal may be taken to the courts in the manner provided by Chapter 150B of the General Statutes.

(e) Any initial or regular member of the Board may be removed from office by the Governor for good cause shown. Any vacancy in the initial or regular podiatrist membership of the Board shall be filled for the period of the unexpired term by the Governor from a list of at least two names submitted by the podiatrist members of the Board. Any vacancy in the public membership of the Board shall be filled by the Governor for the unexpired term.

(f) The Board is authorized to elect its own presiding and other officers.

(g) The Board, in carrying out its responsibilities, shall have authority to employ personnel, full-time or part-time, as shall be determined to be necessary in the work of the Board. The Board shall have authority to pay compensation to the member of the Board holding the position of secretary-treasurer on a basis to be determined by the Board; Provided that in the event the positions of secretary and treasurer are not combined but are held by different members of the Board, the Board shall have authority to pay compensation to the member holding the position of secretary and to the member holding the position of treasurer, if the Board so chooses, on a basis to be determined by the Board. The Board is required to keep proper and complete records with respect to all of its activities, financial and otherwise, and shall on or before January 30 of each year submit a written report to the Governor and to such other officials and/or agencies as other sections of the General Statutes may require, said report covering the activities of the Board during the previous calendar year, which report shall include a verified financial statement. The Board is authorized to adopt rules and regulations governing its proceedings and the practice of podiatry in this State, not inconsistent with the provisions of this Article. The Board shall maintain at all times an up-to-date list of the names and addresses of each licensed podiatrist in North Carolina, which list shall be available for inspection and which shall be included in the annual report referred to above. (1919, c. 78, s. 3; C.S., s. 6765; 1963, c. 1195, s. 2; 1967, c. 1217, s. 3; 1975, c. 672, s. 1; 1981, c. 659, s. 1; 1983, c. 217, ss. 1-4; 1987, c. 827, s. 1.)

Editor's Note. — Session Laws 2005-415, s. 3, provides: "The State licensing boards subject to G.S. 90-681 [renumbered as G.S. 90-701], as enacted by this act, and the Division of Facility Services [now the Division of Health Service Regulation] of the Department of Health and Human Services shall report to the 2006 Regular Session of the 2005 General Assembly upon its convening. The report shall indicate efforts made to apprise licensed practitioners and to evaluate licensed practitioners' and licensed health care facilities' compliance with the requirements of G.S. 90-681 [renumbered as G.S. 90-701], as enacted by this act."

§ 90-202.5. Applicants to be examined; examination fee; requirements; temporary licenses.

(a) Any person not heretofore authorized to practice podiatry in this State shall file with the Board of Podiatry Examiners an application for examination accompanied by a fee not to exceed three hundred fifty dollars ($350.00), together with proof that the applicant is of good moral character, and has obtained a preliminary education equivalent to four years of instruction in a high school and three years of instruction in a college or university approved by the American Association of Colleges and Universities. Before taking the examination, the applicant must be a graduate of a college of podiatric medicine accredited by the National Council on Education of the American Podiatry Association.

Effective January 1, 1992, every applicant, as a prerequisite for licensure under this Article, shall complete one year of clinical residency or other equivalent postgraduate clinical program approved by the North Carolina Board of Podiatry Examiners and, before taking the North Carolina podiatry licensure examination, shall present evidence to the Board that he has passed the National Board Examination.

Any person licensed to practice podiatry on or before January 1, 1992, who is actively involved in a postgraduate clinical program approved by the Board shall be permitted to practice podiatry in the approved program pending its completion.

(b) Effective January 1, 1992, the Board may issue a temporary license to practice podiatry to any applicant for licensure, for a period and under conditions established by the Board, while the person resides in North Carolina and is participating in a clinical residency or other equivalent postgraduate clinical program approved by the Board. A temporary license is valid only while the licensee is actively participating in the program and may not be extended beyond the determined length of training set by the Board. (1919, c. 78, s. 9; C.S., s. 6766; 1963, c. 1195, ss. 1, 2; 1967, c. 1217, s. 4; 1975, c. 672, s. 1; 1981, c. 659, s. 2; 1983, c. 217, s. 5; 1989, c. 214; 1991, c. 457, s. 1.)

CASE NOTES

Educational Requirements Not Comparable with Those of Medicine. — The practice of podiatry is a narrowly restricted one. This allied health profession is not at all comparable with the practice of medicine and surgery. The educational requirements for a podiatrist are less demanding than those for physicians and surgeons. Whitehurst v. Boehm, 41 N.C. App. 670, 255 S.E.2d 761 (1979).

§ 90-202.6. Examinations; subjects; certificates.

(a) The Board of Podiatry Examiners shall hold at least one examination annually for the purpose of examining applicants under this Article. The examination shall be at such time and place as the Board may see fit. The Board may make such rules and regulations as it may deem necessary to conduct its examinations and meetings. It shall provide, preserve and keep a complete record of all its transactions. Examinations for registration under this Article shall be in the English language and shall be written, oral, or clinical, or a combination of written, oral or clinical, as the Board may determine, and may include the following subjects: anatomy, physiology, bacteriology, chemistry, dermatology, podiatry, surgery, materia medica, pharmacology and pathology. No applicant shall be granted a license certificate by the Board unless he obtains a general average of 75 or over, and not less than fifty percent (50%) in any one subject. After such examination the Board shall without unnecessary delay, act on same and issue license certificates to the successful candidates signed by each member of the Board; and the Board of Podiatry Examiners shall report annually to each licensed podiatrist in the State of North Carolina.

(b) The Board may waive the administration of a written examination prepared by it for all initial applicants who have successfully completed the

National Board of Podiatry Examination. The Board may administer to such applicants and require them to complete successfully an examination to test clinical competency in the practice of podiatry.

(c) Any applicant who fails to pass his examination shall within one year be entitled to reexamination upon the payment of an amount not to exceed three hundred fifty dollars ($350.00), but not more than two reexaminations shall be allowed any one applicant prior to filing a new application. Should he fail to pass his third examination, he shall file a new application before he can again be examined. (1919, c. 78, s. 4; C.S., s. 6767; 1963, c. 1195, s. 2; 1967, c. 1217, s. 5; 1975, c. 672, s. 1; 1981, c. 659, ss. 3, 4; 1983, c. 217, s. 6; 1991, c. 457, s. 2.)

§ 90-202.7. Applicants licensed in other states.

If an applicant for licensure is already licensed in another state to practice podiatry, the Board shall issue a license to practice podiatry to the applicant upon evidence that:

(1) The applicant is currently an active, competent practitioner in good standing; and

(2) The applicant has practiced at least five years immediately preceding his or her application with at least three of those five years being in a state that grants similar reciprocity to North Carolina podiatrists; and

(3) The applicant currently holds a valid license in another state; and

(4) No disciplinary proceeding or unresolved complaint is pending anywhere at the time a license is to be issued by this State; and

(5) The licensure requirements in the other state are equivalent to or higher than those required by this State, and the licensure requirements of that other state grant similar reciprocity to podiatrists licensed in North Carolina.

Any license issued upon the application of any podiatrist from any other state shall be subject to all of the provisions of this Article with reference to the license issued by the North Carolina State Board of Podiatry Examiners upon examination of applicants, and the rights and privileges to practice the profession of podiatry under any license so issued shall be subject to the same duties, obligations, restrictions and conditions as imposed by this Article on podiatrists originally examined by the North Carolina State Board of Podiatry Examiners. (1919, c. 78, s. 6; C.S., s. 6768; 1967, c. 1217, s. 6; 1975, c. 672, s. 1; 1981, c. 659, s. 5; 1983, c. 217, s. 7; 1991, c. 457, s. 3.)

§ 90-202.8. Revocation of certificate; grounds for; suspension of certificate.

(a) The North Carolina State Board of Podiatry Examiners, in accordance with Chapter 150B (Administrative Procedure Act) of the General Statutes, shall have the power and authority to: (i) refuse to issue a license to practice podiatry; (ii) refuse to issue a certificate of renewal of a license to practice podiatry; (iii) revoke or suspend a license to practice podiatry; and (iv) invoke such other disciplinary measures, censure, or probative terms against a licensee as it deems fit and proper; in any instance or instances in which the Board is satisfied that such applicant or licensee:

(1) Has engaged in any act or acts of fraud, deceit or misrepresentation in obtaining or attempting to obtain a license or the renewal thereof;

(2) Is a chronic or persistent user of alcohol intoxicants or habit-forming drugs or narcotics to the extent that the same impairs his ability to practice podiatry;

(3) Has been convicted of any of the criminal provisions of this Article or has entered a plea of guilty or nolo contendere to any charge or charges arising therefrom;

(4) Has been convicted of or entered a plea of guilty or nolo contendere to any felony charge or to any misdemeanor charge involving moral turpitude;

(5) Has been convicted of or entered a plea of guilty or nolo contendere to any charge of violation of any state or federal narcotic or barbiturate law;

(6) Has engaged in any act or practice violative of any of the provisions of this Article or violative of any of the rules and regulations promulgated and adopted by the Board, or has aided, abetted or assisted any other person or entity in the violation of the same;

(7) Is mentally, emotionally, or physically unfit to practice podiatry or is afflicted with such a physical or mental disability as to be deemed dangerous to the health and welfare of his patients. An adjudication of mental incompetency in a court of competent jurisdiction or a determination thereof by other lawful means shall be conclusive proof of unfitness to practice podiatry unless or until such person shall have been subsequently lawfully declared to be mentally competent;

(8) Has advertised services in a false, deceptive, or misleading manner;

(9) Has permitted the use of his name, diploma or license by another person either in the illegal practice of podiatry or in attempting to fraudulently obtain a license to practice podiatry;

(10) Has engaged in such immoral conduct as to discredit the podiatry profession;

(11) Has obtained or collected or attempted to obtain or collect any fee through fraud, misrepresentation, or deceit;

(12) Has been negligent in the practice of podiatry;

(13) Is not professionally competent in the practice of podiatry;

(14) Has practiced any fraud, deceit or misrepresentation upon the public or upon any individual in an effort to acquire or retain any patient or patients;

(15) Has made fraudulent or misleading statements pertaining to his skill, knowledge, or method of treatment or practice;

(16) Has committed any fraudulent or misleading acts in the practice of podiatry;

(17), (18) Repealed by Session Laws 1981, c. 659, s. 7.

(19) Has wrongfully or fraudulently or falsely held himself out to be or represented himself to be qualified as a specialist in any branch of podiatry;

(20) Has persistently maintained, in the practice of podiatry, unsanitary offices, practices, or techniques;

(21) Is a menace to the public health by reason of having a serious communicable disease;

(22) Has distributed or caused to be distributed any intoxicant, drug, or narcotic for any other than a lawful purpose; or

(23) Has engaged in any unprofessional conduct as the same may be, from time to time, defined by the rules and regulations of the Board.

(a1) The Board shall establish a grievance committee to receive complaints concerning a practitioner's business or professional practices. The committee shall consider all complaints and determine whether there is probable cause. After its review, the committee may dismiss any complaint when it appears that probable cause of a violation cannot be established. Complaints which are not dismissed shall be referred to the Board.

(b) If any person engages in or attempts to engage in the practice of podiatry while his license is suspended, his license to practice podiatry in the State of North Carolina may be permanently revoked.

(c) Action of the Board shall be subject to judicial review as provided by Chapter 150B (Administrative Procedure Act). (1919, c. 78, ss. 12, 13; C.S., s.

6772; 1953, c. 1041, ss. 17, 18; 1963, c. 1195, s. 2; 1967, c. 691, s. 45; 1973, c. 1331, s. 3; 1975, c. 672, ss. 1, 2; 1981, c. 659, ss. 6-8; 1987, c. 827, s. 1; 1991, c. 636, s. 6; 1997-456, s. 27.)

CASE NOTES

Cited in Boehm v. North Carolina Bd. of Podiatry Exmrs., 41 N.C. App. 567, 255 S.E.2d 328 (1979); Dailey v. North Carolina State Bd. of Dental Exmrs., 309 N.C. 710, 309 S.E.2d 219 (1983).

§ 90-202.9. Fees for certificates and examinations; compensation of Board.

To provide a fund in order to carry out the provisions of this Article the Board shall charge not more than one hundred dollars ($100.00) for each license issued and one hundred dollars ($100.00) for each examination. From such funds the Board shall pay its members at the rate set out in G.S. 93B-5: Provided, that at no time shall the expenses exceed the cash balance on hand. (1919, c. 78, s. 14; C.S., s. 6773; 1967, c. 1217, s. 9; 1975, c. 672, s. 1.)

§ 90-202.10. Annual fee; cancellation or renewal of license.

On or before the first day of July of each year every podiatrist engaged in the practice of podiatry in this State shall transmit to the secretary-treasurer of the said North Carolina State Board of Podiatry Examiners his signature and post-office address, the date and year of his or her certificate, together with a fee to be set by the Board of Podiatry Examiners not to exceed two hundred dollars ($200.00) and receive therefor a renewal certificate. Any license or certificate granted by said Board under or by virtue of this section shall automatically be cancelled and annulled if the holder thereof fails to secure the renewal herein provided for within a period of 30 days after the first day of July of each year, and such delinquent podiatrist shall pay a penalty for reinstatement of twenty-five dollars ($25.00) for each succeeding month of delinquency until a six-month period of delinquency exists. After a six-month period of delinquency exists or after January 1 following the July 1 deadline, the said podiatrist must appear before the North Carolina Board of Podiatry Examiners and take a new examination before being allowed to practice podiatry in the State of North Carolina. (1931, c. 191; 1963, c. 1195, s. 2; 1967, c. 1217, s. 10; 1975, c. 672, s. 1; 1977, c. 621; 1991, c. 457, s. 4.)

§ 90-202.11. Continuing education courses required.

Beginning May 1, 1976, all registered podiatrists then or thereafter licensed in the State of North Carolina shall be required to take annual courses of study in subjects relating to the practice of the profession of podiatry to the end that the utilization and application of new techniques, scientific and clinical advances, and the achievements of research will assure expansive and comprehensive care to the public. The length of study shall be prescribed by the Board but shall not exceed 25 hours in any calendar year. Attendance must be at a course or courses approved by the Board. Attendance at any course or courses of study are to be certified to the Board upon a form provided by the Board and shall be submitted by each registered podiatrist at the time he makes application to the Board for the renewal of his license and payment of his renewal fee. The Board is authorized to treat funds set aside for the purpose of continuing education as State funds for the purpose of accepting any funds made available under federal law on a matching basis for the promulgation and maintenance of programs of continuing education. This requirement may be waived by the Board in cases of certified illness or undue hardship as provided in the rules and regulations of the Board. (1975, c. 672, s. 1.)

§ 90-202.12. Free choice by patient guaranteed.

No agency of the State, county or municipality, nor any commission or clinic, nor any board administering relief, social security, health insurance or health service under the laws of the State of North Carolina shall deny to the recipients or beneficiaries of their aid or services the freedom to choose the provider of care or service which are within the scope of practice of a duly licensed podiatrist or duly licensed physician as defined in this Chapter. (1967, c. 690, s. 3; 1975, c. 672, s. 1.)

CASE NOTES

Cited in Cohn v. Wilkes Regional Medical Ctr., 113 N.C. App. 275, 437 S.E.2d 889, cert. denied, 336 N.C. 603, 447 S.E.2d 387 (1994).

§ 90-202.13. Injunctions.

The Board may appear in its own name in the superior courts in an action for injunctive relief to prevent violation of this Article and the superior courts shall have power to grant such injunctions regardless of whether criminal prosecution has been or may be instituted as a result of such violations. Actions under this section shall be commenced in the superior court district or set of districts as defined in G.S. 7A-41.1 in which the respondent resides or has his principal place of business or in which the alleged acts occurred. (1975, c. 672, s. 1; 1981, c. 659, s. 9; 1987 (Reg. Sess., 1988), c. 1037, s. 103.)

CASE NOTES

Cited in Costin v. Shell, 53 N.C. App. 117, 280 S.E.2d 42 (1981).

§ 90-202.14. Not applicable to physicians.

Nothing in this Article shall apply to a physician licensed to practice medicine or to a person acting under the supervision or at his direction in the course of such practice. (1975, c. 672, s. 1.)

ARTICLE 13.

Embalmers and Funeral Directors.

§§ 90-203 through 90-210.17: Recodified as §§ 90-210.18A through 90-210.25.

Editor's Note. — This Article was rewritten by Session Laws 1975, c. 571, effective Oct. 1, 1975, and has been recodified as Article 13A, G.S. 90-210.18A et seq.

Article 13A.

Practice of Funeral Service.

§ 90-210.18: Repealed by Session Laws 2004-192, s. 1, effective January 1, 2005.

§ 90-210.18A. Board of Funeral Service created; qualifications; vacancies; removal.

(a) The General Assembly declares that the practice of funeral service affects the public health, safety, and welfare and is subject to regulation and control in the public interest. The public interest requires that only qualified persons be permitted to practice funeral service in North Carolina and that the profession merit the confidence of the public. This Article shall be liberally construed to accomplish these ends.

(b) The North Carolina Board of Funeral Service is created and shall regulate the practice of funeral service in this State. The Board shall have nine members as follows:

(1) Four members appointed by the Governor from nominees recommended by the North Carolina Funeral Directors Association, Inc. These members shall be persons licensed under this Article.

(2) Two members appointed by the Governor from nominees recommended by the Funeral Directors & Morticians Association of North Carolina, Inc. These members shall be persons licensed under this Article.

(3) One member appointed by the Governor who is licensed under this Article and who is not affiliated with any funeral service trade association.

(4) One member appointed by the General Assembly, upon the recommendation of the President Pro Tempore of the Senate. This member shall be a person who is not licensed under this Article or employed by a person who is licensed under this Article.

(5) One member appointed by the General Assembly, upon the recommendation of the Speaker of the House of Representatives. This member shall be a person who is not licensed under this Article or employed by a person who is licensed under this Article.

Members of the Board shall serve staggered three-year terms, ending on December 31 of the last year of the term or when a successor has been duly appointed, whichever is later. No member may serve more than two complete consecutive terms.

(c) Vacancies. — A vacancy shall be filled in the same manner as the original appointment, except that all unexpired terms of Board members appointed by the General Assembly shall be filled in accordance with G.S. 120-122. Appointees to fill vacancies shall serve the remainder of the unexpired term and until their successors have been duly appointed and qualified.

(d) Removal. — The Board may remove any of its members for neglect of duty, incompetence, or unprofessional conduct. A member subject to disciplinary proceedings as a licensee shall be disqualified from participating in the official business of the Board until the charges have been resolved. (2004-192, s. 2; 2007-531, s. 1.)

Editor's Note. — Session Laws 2004-192, s. 3, provides: "To establish staggered terms of the members of the Board of Funeral Service pursuant to G.S. 90-210.18A(b), two members appointed by the Governor from nominees recommended by the North Carolina Funeral

Directors Association, Inc., shall serve two-year terms, and two members appointed by the Governor from nominees recommended by that Association shall serve three-year terms. One member appointed by the Governor from nominees recommended by the Funeral Directors & Morticians Association of North Carolina, Inc., shall serve a two-year term, and one member appointed by the Governor from nominees recommended by that Association shall serve a three-year term. The Governor shall appoint the member appointed by the Governor under G.S. 90-210.18A(b)(3) for a one-year term. The General Assembly, upon the recommendation of the President Pro Tempore of the Senate, shall appoint one member for a one-year term, and the General Assembly, upon the recommendation of the Speaker of the House of Representatives, shall appoint one member for a one-year term. After the staggered terms have been established, members appointed to the Board thereafter shall serve three-year terms."

Effect of Amendments. — Session Laws 2007-531, s. 1, effective August 31, 2007, substituted "December 31" for "June 30" in the second paragraph of subsection (b).

§ 90-210.19. Board members' oath of office.

The members of said Board, before entering upon their duties, shall take and subscribe to the oath of office prescribed for other State officers, which said oath shall be administered by a person qualified to administer such oath and shall be filed in the office of the Secretary of State. (1901, c. 338, ss. 3, 4; Rev., s. 4385; C.S., s. 6778; 1945, c. 98, s. 2; 1949, c. 951, s. 2; 1957, c. 1240, s. 2; 1969, c. 584, s. 1; 1973, c. 476, s. 128; 1975, c. 571.)

§ 90-210.20. Definitions.

(a) "Advertisement" means the publication, dissemination, circulation or placing before the public, or causing directly or indirectly to be made, published, disseminated or placed before the public, any announcement or statement in a newspaper, magazine, or other publication, or in the form of a book, notice, circular, pamphlet, letter, handbill, poster, bill, sign, placard, card, label or tag, or over any radio, television station, or electronic medium.

(b) "Board" means the North Carolina Board of Funeral Service.

(c) "Burial" includes interment in any form, cremation and the transportation of the dead human body as necessary therefor.

(c1) "Chapel" means a chapel or other facility separate from the funeral establishment premises for the primary purpose of reposing of dead human bodies, visitation or funeral ceremony that is owned, operated, or maintained by a funeral establishment under this Article, and that does not use the word "funeral" in its name, on a sign, in a directory, in advertising or in any other manner; in which or on the premises of which there is not displayed any caskets or other funeral merchandise; in which or on the premises of which there is not located any preparation room; and which no owner, operator, employee, or agent thereof represents the chapel to be a funeral establishment.

(c2) "Dead human bodies", as used in this Article includes fetuses beyond the second trimester and the ashes from cremated bodies.

(d) "Embalmer" means any person engaged in the practice of embalming.

(e) "Embalming" means the preservation and disinfection or attempted preservation and disinfection of dead human bodies by application of chemicals externally or internally or both and the practice of restorative art including the restoration or attempted restoration of the appearance of a dead human body. Embalming shall not include the washing or use of soap and water to cleanse or prepare a dead human body for disposition by the authorized agents, family, or friends of the deceased who do so privately without pay or as part of the ritual washing and preparation of dead human bodies prescribed by religious practices; provided, that no dead human body shall be handled in a manner inconsistent with G.S. 130A-395.

(f) "Funeral directing" means engaging in the practice of funeral service except embalming.

(g) "Funeral director" means any person engaged in the practice of funeral directing.

(h) "Funeral establishment" means every place or premises devoted to or used in the care, arrangement and preparation for the funeral and final disposition of dead human bodies and maintained for the convenience of the public in connection with dead human bodies or as the place for carrying on the practice of funeral service.

(i) "Funeral service licensee" means a person who is duly licensed and engaged in the practice of funeral service.

(j) "Funeral service" means the aggregate of all funeral service licensees and their duties and responsibilities in connection with the funeral as an organized, purposeful, time-limited, flexible, group-centered response to death.

(k) "Practice of funeral service" means engaging in the care or disposition of dead human bodies or in the practice of disinfecting and preparing by embalming or otherwise dead human bodies for the funeral service, transportation, burial or cremation, or in the practice of funeral directing or embalming as presently known, whether under these titles or designations or otherwise. "Practice of funeral service" also means engaging in making arrangements for funeral service, selling funeral supplies to the public or making financial arrangements for the rendering of such services or the sale of such supplies.

(*l*) "Resident trainee" means a person who is engaged in preparing to become licensed for the practice of funeral directing, embalming or funeral service under the personal supervision and instruction of a person duly licensed for the practice of funeral directing, embalming or funeral service in the State of North Carolina under the provisions of this Chapter, and who is duly registered as a resident trainee with the Board. (1957, c. 1240, s. 2; 1975, c. 571; 1979, c. 461, s. 6; 1987, c. 430, s. 2; c. 879, s. 6.2; 1997-399, s. 1; 2001-294, s. 2; 2003-420, ss. 1, 3; 2007-531, s. 2.)

Editor's Note. — Subsections (e1) and (c1) were redesignated as subsections (c1) and (c2), respectively, at the direction of the Revisor of Statutes to maintain alphabetical order.

Effect of Amendments. — Session Laws 2007-531, s. 2, effective August 31, 2007, in subsection (e), added the last sentence; in subsection (e1), substituted "Chapel" for "Funeral chapel" and deleted "or other licensee" preceding "under this Article"; and in subsection (h), substituted "practice" for "profession."

CASE NOTES

Cited in Butler v. City Council of Clinton, 160 N.C. App. 68, 584 S.E.2d 103, 2003 N.C. App. LEXIS 1672 (2003); N.C. Bd. of Mortuary Sci. v. Crown Mem'l Park, L.L.C., 162 N.C. App. 316, 590 S.E.2d 467, 2004 N.C. App. LEXIS 113, appeal dismissed, 358 N.C. 235, 595 S.E.2d 154 (2004).

§ **90-210.21:** Repealed by Session Laws 1987, c. 430, s. 3.

§ 90-210.22. Required meetings of the Board.

The Board shall hold at least four meetings in each year. In addition, the Board may meet as often as the proper and efficient discharge of its duties shall require. Five members shall constitute a quorum. (1901, c. 338, ss. 5, 6, 7, 8; Rev., s. 4387; C.S., s. 6780; 1949, c. 951, s. 3; 1957, c. 1240, s. 2; 1969, c. 584, s. 2; 1973, c. 476, s. 128; 1975, c. 571; 1991 (Reg. Sess., 1992), c. 901, s. 4; 2003-420, s. 4.)

§ 90-210.23. Powers and duties of the Board.

(a) The Board is authorized to adopt and promulgate such rules and regulations for transaction of its business and for the carrying out and enforcement of the provisions of this Article as may be necessary and as are consistent with the laws of this State and of the United States.

(b) The Board shall elect from its members a president, a vice-president and a secretary, no two offices to be held by the same person. The president and vice-president and secretary shall serve for one year and until their successors shall be elected and qualified. The Board shall have authority to engage adequate staff as deemed necessary to perform its duties.

(c) The members of the Board shall serve without compensation provided that such members shall be reimbursed for their necessary traveling expenses and the necessary expenses incident to their attendance upon the business of the Board, and in addition thereto they shall receive per diem and expense reimbursement as provided in G.S. 93B-5 for every day actually spent by such member upon the business of the Board. All expenses, salaries and per diem provided for in this Article shall be paid from funds received under the provisions of this Article and shall in no manner be an expense to the State.

(d) Every person licensed by the Board and every resident trainee shall furnish all information required by the Board reasonably relevant to the practice of the profession or business for which the person is a licensee or resident trainee. Every funeral service establishment and its records and every place of business where the practice of funeral service or embalming is carried on and its records shall be subject to inspection by the Board during normal hours of operation and periods shortly before or after normal hours of operation and shall furnish all information required by the Board reasonably relevant to the business therein conducted. Every licensee, resident trainee, embalming facility, and funeral service establishment shall provide the Board with a current post-office address which shall be placed on the appropriate register and all notices required by law or by any rule or regulation of the Board to be mailed to any licensee, resident trainee, embalming facility, or funeral service establishment shall be validly given when mailed to the address so provided.

(d1) The Board is empowered to hold hearings in accordance with the provisions of this Article and of Chapter 150B to subpoena witnesses and to administer oaths to or receive the affirmation of witnesses before the Board.

In any show cause hearing before the Board held under the authority of Chapter 150B of the General Statutes where the Board imposes discipline against a licensee, the Board may recover the costs, other than attorneys' fees, of holding the hearing against all respondents jointly, not to exceed two thousand five hundred dollars ($2,500).

(e) The Board is empowered to regulate and inspect, according to law, funeral service establishments and embalming facilities, their operation, and the licenses under which they are operated, and to enforce as provided by law the rules, regulations, and requirements of the Division of Health Services and of the city, town, or county in which the funeral service establishment or embalming facility is maintained and operated. Any funeral establishment or embalming facility that, upon inspection, is found not to meet all of the requirements of this Article shall pay a reinspection fee to the Board for each additional inspection that is made to ascertain that the deficiency or other violation has been corrected. The Board is also empowered to enforce compliance with the standards set forth in Funeral Industry Practices, 16 C.F.R. 453 (1984), as amended from time to time.

(f) The Board may establish, supervise, regulate and control programs for the resident trainee. It may approve schools of mortuary science or funeral service, graduation from which is required by this Article as a qualification for the granting of any license, and may establish essential requirements and standards for such approval of mortuary science or funeral service schools.

(g) Schools for teaching mortuary science which are approved by the Board shall have extended to them the same privileges as to the use of bodies for dissecting while teaching as those granted in this State to medical colleges, but such bodies shall be obtained through the same agencies which provide bodies for medical colleges.

(h) The Board shall adopt a common seal.

(h1) The Board shall have the power to acquire, hold, rent, encumber, alienate, and otherwise deal with real property in the same manner as a private person or corporation, subject only to approval of the Governor and the Council of State. Collateral pledged by the Board for an encumbrance is limited to the assets, income, and revenues of the Board.

(h2) The Board may employ legal counsel and clerical and technical assistance, and fix the compensation therefor, and incur such other expenses as may be deemed necessary in the performance of its duties and the enforcement of the provisions of this Article or as otherwise required by law and as may be necessary to carry out the powers herein conferred.

(i) The Board may perform such other acts and exercise such other powers and duties as may be provided elsewhere in this Article or otherwise by law and as may be necessary to carry out the powers herein conferred. (1901, c. 338, ss. 5, 6, 7, 8, 11; Rev., ss. 4386, 4387, 4389; C.S., ss. 6779, 6780, 6783; 1949, c. 951, s. 3; 1957, c. 1240, s. 2; 1969, c. 584, s. 2; 1973, c. 476, s. 128; 1975, c. 571; 1979, c. 461, ss. 8, 9; 1987, c. 827, s. 1; 1991, c. 528, s. 3; 1993, c. 164, s. 1; 1997-399, ss. 2, 3; 2003-420, s. 5(a), (b); 2007-531, s. 3.)

Effect of Amendments. — Session Laws 2007-531, s. 3, effective August 31, 2007, designated the former last paragraph of subsection (d) as subsection (d1) and added the second paragraph of subsection (d1).

§ 90-210.24. Inspector.

(a) The Board may appoint one or more agents who shall serve at the pleasure of the Board and who shall have the title "Inspector of the North Carolina Board of Funeral Service." No person is eligible for appointment as inspector unless at the time of the appointment the person is licensed under this Article as a funeral service licensee.

(b) To determine compliance with the provisions of this Article and regulations promulgated under this Article, inspectors may

(1) Enter the office, establishment or place of business of any funeral service licensee, funeral director or embalmer in North Carolina, and any office, establishment or place in North Carolina where the practice of funeral service or embalming is carried on, or where that practice is advertised as being carried on, or where a funeral is being conducted or a body is being embalmed, to inspect the records, office, establishment, or facility, or to inspect the practice being carried on or license or registration of any licensee and any resident trainee operating therein;

(2) Enter any hospital, nursing home, or other institution from which a dead human body has been removed by any person licensed under this Article or their designated representative to inspect records pertaining to the removal and its authorization; and

(3) May inspect criminal and probation records of licensees and applicants for licenses under this Article to obtain evidence of their character.

Inspectors may serve papers and subpoenas issued by the Board or any office or member thereof under authority of this Article, and shall perform other duties prescribed or ordered by the Board.

(c) Upon request by the Board, the Attorney General of North Carolina shall provide the inspectors with appropriate identification cards, signed by the Attorney General or his designated agent.

(d) The Board may prescribe an inspection form to be used by the inspectors in performing their duties. (1975, c. 571; 1979, c. 461, s. 10; 1993, c. 164, s. 2; 1997-399, s. 4; 2003-420, ss. 1, 6.)

§ 90-210.25. Licensing.

(a) Qualifications, Examinations, Resident Traineeship and Licensure. —

(1) To be licensed for the practice of funeral directing under this Article, a person must:
  a. Be at least 18 years of age.
  b. Be of good moral character.
  c. Be a graduate of a Funeral Director Program at a mortuary science college approved by the Board or a school of mortuary science accredited by the American Board of Funeral Service Education. Have completed a minimum of 32 semester hours or 48 quarter hours of instruction, including the subjects set out in sub-part e.1. of this subdivision, as prescribed by a mortuary science college approved by the Board or a school of mortuary science accredited by the American Board of Funeral Service Education.
  d. Have completed 12 months of resident traineeship as a funeral director, pursuant to the procedures and conditions set out in G.S. 90-210.25(a)(4), either before or after satisfying the educational requirement under sub-subdivision c. of this subdivision.
  e. Have passed an oral or written funeral director examination on the following subjects:
    1. Psychology, sociology, pathology, funeral directing, business law, funeral law, funeral management, and accounting.
    2. Repealed by Session Laws 1997-399, s. 5.
    3. Laws of North Carolina and rules of the Board and other agencies dealing with the care, transportation and disposition of dead human bodies.

(2) To be licensed for the practice of embalming under this Article, a person must:
  a. Be at least 18 years of age.
  b. Be of good moral character.
  c. Be a graduate of a mortuary science college approved by the Board.
  d. Have completed 12 months of resident traineeship as an embalmer pursuant to the procedures and conditions set out in G.S. 90-210.25(a)(4), either before or after satisfying the educational requirement under sub-subdivision c. of this subdivision.
  e. Have passed an oral or written embalmer examination on the following subjects:
    1. Embalming, restorative arts, chemistry, pathology, microbiology, and anatomy.
    2. Repealed by Session Laws 1997-399, s. 6.
    3. Laws of North Carolina and rules of the Board and other agencies dealing with the care, transportation and disposition of dead human bodies.

(3) To be licensed for the practice of funeral service under this Article, a person must:

a. Be at least 18 years of age.
b. Be of good moral character.
c. Be a graduate of and receive an associate degree from a mortuary science college approved by the Board or a school of mortuary science accredited by the American Board of Funeral Service Education. Have completed a minimum of 60 semester hours or 90 quarter hours of instruction, including the subjects set out in sub-part e.1. of this subdivision, as prescribed by a mortuary science college approved by the Board or a school of mortuary science accredited by the American Board of Funeral Service Education.
d. Have completed 12 months of resident traineeship as a funeral service licensee, pursuant to the procedures and conditions set out in G.S. 90-210.25(a)(4), either before or after satisfying the educational requirement under sub-subdivision c. of this subdivision.
e. Have passed an oral or written funeral service examination on the following subjects:
    1. Psychology, sociology, funeral directing, business law, funeral law, funeral management, and accounting.
    2. Embalming, restorative arts, chemistry, pathology, microbiology, and anatomy.
    3. Repealed by Session Laws 1997-399, s. 7.
    4. Laws of North Carolina and rules of the Board and other agencies dealing with the care, transportation and disposition of dead human bodies.

(4)a. A person desiring to become a resident trainee shall apply to the Board on a form provided by the Board. The application shall state that the applicant is not less than 18 years of age, of good moral character, and is the graduate of a high school or the equivalent thereof, and shall indicate the licensee under whom the applicant expects to train. A person training to become an embalmer may serve under either a licensed embalmer or a funeral service licensee. A person training to become a funeral director may serve under either a licensed funeral director or a funeral service licensee. A person training to become a funeral service licensee shall serve under a funeral service licensee. The application must be sustained by oath of the applicant and be accompanied by the appropriate fee. When the Board is satisfied as to the qualifications of an applicant it shall instruct the secretary to issue a certificate of resident traineeship.

b. Within 30 days of a resident trainee leaving the proctorship of the licensee under whom the trainee has worked, the licensee shall file with the Board an affidavit showing the length of time served with the licensee by the trainee, and the affidavit shall be made a matter of record in the Board's office. The licensee shall deliver a copy of the affidavit to the trainee.

c. A person who has not completed the traineeship and wishes to do so under a licensee other than the one whose name appears on the original certificate may reapply to the Board for approval.

d. A certificate of resident traineeship shall be signed by the resident trainee and upon payment of the renewal fee shall be renewable one year after the date of original registration; but the certificate may not be renewed more than two times. The Board shall mail to each registered trainee at his last known address a notice that the renewal fee is due and that, if not paid within 30 days of the notice, the certificate will be canceled. A late fee, in addition to the renewal fee, shall be charged for a late renewal, but the renewal of the registration of any resident trainee who is engaged in the active military service of the United States at the time renewal is due may, at the discretion of the Board, be held in abeyance for the duration of that service without penalties. No credit shall be allowed for the 12-month period of resident traineeship that shall have been completed more than five years preceding the examination for a license.

e. All registered resident trainees shall report to the Board at least once every month during traineeship upon forms provided by the Board listing the work which has been completed during the preceding month of resident traineeship. The data contained in the reports shall be certified as correct by the licensee under whom the trainee has served during the period and by the licensed person who is managing the funeral service establishment. Each report shall list the following:
   1. For funeral director trainees, the conduct of any funerals during the relevant time period,
   2. For embalming trainees, the embalming of any bodies during the relevant time period,
   3. For funeral service trainees, both of the activities named in 1 and 2 of this subsection, engaged in during the relevant time period.

f. To meet the resident traineeship requirements of G.S. 90-210.25(a)(1), G.S. 90-210.25(a)(2) and G.S. 90-210.25(a)(3) the following must be shown by the affidavit(s) of the licensee(s) under whom the trainee worked:
   1. That the funeral director trainee has, under supervision, assisted in directing at least 25 funerals during the resident traineeship,
   2. That the embalmer trainee has, under supervision, assisted in embalming at least 25 bodies during the resident traineeship,
   3. That the funeral service trainee has, under supervision, assisted in directing at least 25 funerals and, under supervision, assisted in embalming at least 25 bodies during the resident traineeship.

g. The Board may suspend or revoke a certificate of resident traineeship for violation of any provision of this Article.

h. Each sponsor for a registered resident trainee must during the period of sponsorship be actively employed with a funeral establishment. The traineeship shall be a primary vocation of the trainee.

i. Only one resident trainee may register and serve at any one time under any one person licensed under this Article.

j., k. Repealed by Session Laws 1991, c. 528, s. 4.

l. The Board shall register no more than one resident trainee at a funeral establishment that served 100 or fewer families during the 12 months immediately preceding the date of the application, and shall register no more than one resident trainee for each additional 100 families served at the funeral establishment during the 12 months immediately preceding the date of the application.

(5) The Board by regulation may recognize other examinations that the Board deems equivalent to its own.

a. All licenses shall be signed by the president and secretary of the Board and the seal of the Board affixed thereto. All licenses shall be issued, renewed or duplicated for a period not exceeding one year upon payment of the renewal fee, and all licenses, renewals or duplicates thereof shall expire and terminate the thirty-first day of December following the date of their issue unless sooner revoked and canceled; provided, that the date of expiration may be changed by unanimous consent of the Board and upon 90 days' written notice of such change to all persons licensed for the practice of funeral directing, embalming and funeral service in this State.

b. The holder of any license issued by the Board who shall fail to renew the same on or before February 1 of the calendar year for which the license is to be renewed shall have forfeited and surrendered the license as of that date. No license forfeited or surrendered pursuant to the preceding sentence shall be reinstated by the Board unless it is shown to the Board that the applicant has, throughout the period of forfeiture, engaged full time in another state of the United States or the District of Columbia in the practice to which his North Carolina license applies and has completed for each such year continuing education substantially equivalent in the opinion of the Board to that required of North Carolina licensees; or has completed in North Carolina a total number of hours of accredited continuing education computed by multiplying five times the number of years of forfeiture; or has passed the North Carolina examination for the forfeited license. No additional resident traineeship shall be required. The applicant shall be required to pay all delinquent annual renewal fees and a reinstatement fee. The Board may waive the provisions of this section for an applicant for a forfeiture which occurred during his service in the armed forces of the United States provided he applies within six months following severance therefrom.

c. All licensees now or hereafter licensed in North Carolina shall take continuing education courses in subjects relating to the practice of the profession for which they are licensed, to the end that the benefits of learning and reviewing skills will be utilized and applied to assure proper service to the public.

d. As a prerequisite to the annual renewal of a license, the licensee must complete, during the year immediately preceding renewal, at least five hours of continuing education courses, of which the Board may require licensees to take up to two hours specified by the Board. All continuing education courses must be approved by the Board prior to enrollment. A licensee who completes more than five hours in a year may carry over a maximum of five hours as a credit to the following year's requirement. A licensee who is issued an initial license on or after July 1 does not have to satisfy the continuing education requirement for that year.

e. The Board shall not renew a license unless fulfillment of the continuing education requirement has been certified to it on a form provided by the Board, but the Board may waive this requirement for renewal in cases of certified illness or undue hardship or where the licensee lives outside of North Carolina and does not practice in North Carolina, and the Board shall waive the requirement for all licensees who were licensed on or before December 31, 2003, and have been licensed in North

Carolina for a continuous period of 25 years or more, for all licensees who are licensed on or after January 1, 2004, who have been licensed for a continuous period of 25 years or more and have attained the age of 60 years, and for all licensees who are, at the time of renewal, members of the General Assembly.

f. The Board shall cause to be established and offered to the licensees, each calendar year, at least eight hours of continuing education courses. The Board may charge licensees attending these courses a reasonable registration fee in order to meet the expenses thereof and may also meet those expenses from other funds received under the provisions of this Article.

g. Any person who having been previously licensed by the Board as a funeral director or embalmer prior to July 1, 1975, shall not be required to satisfy the requirements herein for licensure as a funeral service licensee, but shall be entitled to have such license renewed upon making proper application therefor and upon payment of the renewal fee provided by the provisions of this Article. Persons previously licensed by the Board as a funeral director may engage in funeral directing, and persons previously licensed by the Board as an embalmer may engage in embalming. Any person having been previously licensed by the Board as both a funeral director and an embalmer may upon application therefor receive a license as a funeral service licensee.

h. The Department of Justice may provide a criminal record check to the Board for a person who has applied for a new or renewal license, or certification through the Board. The Board shall provide to the Department of Justice, along with the request, the fingerprints of the applicant, any additional information required by the Department of Justice, and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The Board shall keep all information pursuant to this subdivision privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this subdivision.

(a1) Inactive Licenses. — Any person holding a license issued by the Board for funeral directing, for embalming, or for the practice of funeral service may apply for an inactive license in the same category as the active license held. The inactive license is renewable annually. Continuing education is not required for the renewal of an inactive license. The holder of an inactive license may not engage in any activity requiring an active license. The holder of an inactive license may apply for an active license in the same category, and the Board shall issue an active license if the applicant has completed a total number of hours of accredited continuing education equal to five times the number of years the applicant held the inactive license. No application fee is required for the reinstatement of an active license pursuant to this subsection. The holder of an inactive license who returns to active status shall surrender the inactive license to the Board.

(a2) In order to engage in the practice of funeral directing or funeral service, such a licensee must own, be employed by, or otherwise be an agent of a licensed funeral establishment; except that such a licensee may practice funeral directing or funeral service if:

(1) Employed by a college of mortuary science; or

(2) The licensee:

a. Maintains all of his or her business records at a location made known to the Board and available for inspection by the Board under the same terms and conditions as the business records of a licensed funeral establishment;

b. Complies with rules and regulations imposed on funeral establishments and the funeral profession that are designed to protect consumers, to include, but not be limited to, the Federal Trade Commission's laws and rules requiring General Price Lists and Statements of Goods and Services; and

c. Pays to the Board the funeral establishment license fee required by law and set by the Board.

Nothing in this subdivision shall preclude a licensee from arranging cremations and cremating human remains while employed by a crematory.

(b) Persons Licensed under the Laws of Other Jurisdictions. —

(1) The Board shall grant licenses to funeral directors, embalmers and funeral service licensees, licensed in other states, territories, the District of Columbia, and foreign countries, when it is shown that the applicant holds a valid license as a funeral director, embalmer or funeral service licensee issued by the other jurisdiction, has demonstrated knowledge of the laws and rules governing the profession in North Carolina and has submitted proof of his good moral character; and either that the applicant has continuously practiced the profession in the other jurisdiction for at least three years immediately preceding his application, or the Board has determined that the licensing requirements for the other jurisdiction are substantially similar to those of North Carolina.

(2) The Board shall periodically review the mortuary science licensing requirements of other jurisdictions and shall determine which licensing requirements are substantially similar to the requirements of North Carolina.

(3) The Board may issue special permits, to be known as courtesy cards, permitting nonresident funeral directors, embalmers and funeral service licensees to remove bodies from and to arrange and direct funerals and embalm bodies in this State, but these privileges shall not include the right to establish a place of business in or engage generally in the business of funeral directing and embalming in this State. Except for special permits issued by the Board for teaching continuing education programs and for work in connection with disasters, no special permits may be issued to nonresident funeral directors, embalmers, and funeral service licensees from states that do not issue similar courtesy cards to persons licensed in North Carolina pursuant to this Article.

(c) Registration, Filing and Transportation. —

(1) The holder of any license granted by this State for those within the funeral service profession or renewal thereof provided for in this Article shall cause registration to be filed in the office of the board of health of the county or city in which he practices his profession, or if there be no board of health in such county or city, at the office of the clerk of the superior court of such county. All such licenses, certifi-

cates, duplicates and renewals thereof shall be displayed in a conspicuous place in the funeral establishment where the holder renders service.

(2) It shall be unlawful for any railway agent, express agency, baggage master, conductor or other person acting as such, to receive the dead body of any person for shipment or transportation by railway or other public conveyance, to a point outside of this State, unless the body is accompanied by a burial-transit permit.

(3) The "transportation or removal of a dead human body" shall mean the removal of a dead human body for a fee from the location of the place of death or discovery of death or the transportation of the body to or from a medical facility, funeral establishment or facility, crematory or related holding facility, place of final disposition, or place designated by the Medical Examiner for examination or autopsy of the dead human body.

(4) Any individual, not otherwise exempt from this subsection, shall apply for and receive a permit from the Board before engaging in the transportation or removal of a dead human body in this State. Unless otherwise exempt from this subsection, no corporation or other business entity shall engage in the transportation or removal of a dead human body unless it has in its employ at least one individual who holds a permit issued under this section. No individual permit holder shall engage in the transportation or removal of a dead human body for more than one person, firm, or corporation without first providing the Board with written notification of the name and physical address of each such employer.

(5) The following persons shall be exempt from the permit requirements of this section but shall otherwise be subject to subdivision (9) of this subsection and any rules relating to the proper handling, care, removal, or transportation of a dead human body:
  a. Licensees under this Article and their employees.
  b. Employees of common carriers.
  c. Except as provided in sub-subdivision (6)c. of this section, employees of the State and its agencies and employees of local governments and their agencies.
  d. Funeral directors licensed in another state and their employees.

(6) The following persons shall be exempt from this section:
  a. Emergency medical technicians, rescue squad workers, volunteer and paid firemen, and law enforcement officers while acting within the scope of their employment.
  b. Employees of public or private hospitals, nursing homes, or long-term care facilities, while handling a dead human body within such facility or while acting within the scope of their employment.
  c. State and county medical examiners and their investigators.
  d. Any individual transporting cremated remains.
  e. Any individual transporting or removing a dead human body of their immediate family or next of kin.
  f. Any individual who has exhibited special care and concern for the decedent.

(7) Individuals eligible to receive a permit under this section for the transportation or removal of a dead human body for a fee, shall:
  a. Be at least 18 years of age.
  b. Possess and maintain a valid drivers license issued by this State and provide proof of all liability insurance required for the registration of any vehicle in which the person intends to engage in the business of the removal or transportation of a dead human body.

c. Affirmatively state under oath that the person has read and understands the statutes and rules relating to the removal and transportation of dead human bodies and any guidelines as may be adopted by the Board.

d. Provide three written character references on a form prescribed by the Board, one of which must be from a licensed funeral director.

e. Be of good moral character.

(8) The permit issued under this section shall expire on December 31 of each year. The application fee for the individual permit shall not exceed one hundred twenty-five dollars ($125.00). A fee, not to exceed one hundred dollars ($100.00), in addition to the renewal fee not to exceed seventy-five dollars ($75.00), shall be charged for any application for renewal received by the Board after February 1 of each year.

(9) No person shall transport a dead human body in the open cargo area or passenger area of a vehicle or in any vehicle in which the body may be viewed by the public. Any person removing or transporting a dead human body shall either cover the body, place it upon a stretcher designed for the purpose of transporting humans or dead human bodies in a vehicle, and secure such stretcher in the vehicle used for transportation, or shall enclose the body in a casket or container designed for common carrier transportation, and secure the casket or container in the vehicle used for transportation. No person shall fail to treat a dead human body with respect at all times. No person shall take a photograph or video recording of a dead human body without the consent of a member of the deceased's immediate family or next of kin or other authorizing agent.

(10) The Board may adopt rules under this section including permit application procedures and the proper procedures for the removal, handling, and transportation of dead human bodies. The Board shall consult with the Office of the Chief Medical Examiner before initiating rule making under this section and before adopting any rules pursuant to this section. Nothing in this section prohibits the Office of the Chief Medical Examiner from adopting policies and procedures regarding the removal, transportation, or handling of a dead human body under the jurisdiction of that office that are more stringent than the laws in this section or any rules adopted under this section. Any violation of this section or rules adopted under this section may be punished by the Board by a suspension or revocation of the permit to transport or remove dead human bodies or by a term of probation. The Board may, in lieu of any disciplinary measure, accept a penalty not to exceed five thousand dollars ($5,000) per violation.

(11) Each applicant for a permit shall provide the Board with the applicant's home address, name and address of any corporation or business entity employing such individual for the removal or transportation of dead human bodies, and the make, year, model, and license plate number of any vehicle in which a dead human body is transported. A permittee shall provide written notification to the Board of any change in the information required to be provided to the Board by this section or by the application for a permit within 30 days after such change takes place.

(12) If any person shall engage in or hold himself out as engaging in the business of transportation or removal of a dead human body without first having received a permit under this section, the person shall be guilty of a Class 2 misdemeanor.

(13) The Board shall have the authority to inspect any place or premises that the business of removing or transporting a dead human body is

carried out and shall also have the right of inspection of any vehicle and equipment used by a permittee for the removal or transportation of a dead human body.

(d) Establishment Permit. —

(1) No person, firm or corporation shall conduct, maintain, manage or operate a funeral establishment unless a permit for that establishment has been issued by the Board and is conspicuously displayed in the establishment. Each funeral establishment at a specific location shall be deemed to be a separate entity and shall require a separate permit and compliance with the requirements of this Article.

(2) A permit shall be issued when:

a. It is shown that the funeral establishment has in charge a person, known as a manager, licensed for the practice of funeral directing or funeral service, who shall not be permitted to manage more than one funeral establishment. The manager shall be charged with overseeing the daily operation of the funeral establishment. If the manager leaves the employment of the funeral establishment and is the only licensee employed who is eligible to serve as manager, the funeral establishment may operate without a manager for a period not to exceed 30 days so long as: (i) the funeral establishment retains one or more licensees to perform all services requiring a license under this Article; (ii) the licensees are not practicing under the exception authorized by G.S. 90-210.25(a2) and would otherwise be eligible to serve as manager; and (iii) the funeral establishment registers the name of the licensees with the Board.

b. The Board receives a list of the names of all part-time and full-time licensees employed by the establishment.

c. It is shown that the funeral establishment satisfies the requirements of G.S. 90-210.27A.

d. The Board receives payment of the permit fee.

(3) Applications for funeral establishment permits shall be made on forms provided by the Board and filed with the Board by the owner, a partner, a member of the limited liability company, or an officer of the corporation by January 1 of each year, and shall be accompanied by the application fee or renewal fee, as the case may be. All permits shall expire on December 31 of each year. If the renewal application and renewal fee are not received in the Board's office on or before February 1, a late renewal fee, in addition to the regular renewal fee, shall be charged.

(4) The Board may place on probation, refuse to issue or renew, suspend, or revoke a permit when an owner, partner, manager, member, operator, or officer of the funeral establishment violates any provision of this Article or any regulations of the Board, or when any agent or employee of the funeral establishment, with the consent of any person, firm or corporation operating the funeral establishment, violates any of those provisions, rules or regulations. In any case in which the Board is entitled to place a funeral establishment permittee on a term of probation, the Board may also impose a penalty of not more than five thousand dollars ($5,000) in conjunction with the probation. In any case in which the Board is entitled to suspend, revoke, or refuse to renew a permit, the Board may accept from the funeral establishment permittee an offer to pay a penalty of not more than five thousand dollars ($5,000). The Board may either accept a penalty or revoke or refuse to renew a license, but not both. Any penalty under this subdivision may be in addition to any penalty

assessed against one or more licensed individuals employed by the funeral establishment.

(5) Funeral establishment permits are not transferable. A new application for a permit shall be made to the Board within 30 days of a change of ownership of a funeral establishment.

(d1) Embalming Outside Establishment. — An embalmer who engages in embalming in a facility other than a funeral establishment or in the residence of the deceased person shall, no later than January 1 of each year, register the facility with the Board on forms provided by the Board.

(e) Revocation; Suspension; Compromise; Disclosure. —

(1) Whenever the Board finds that an applicant for a license or a person to whom a license has been issued by the Board is guilty of any of the following acts or omissions and the Board also finds that the person has thereby become unfit to practice, the Board may suspend or revoke the license or refuse to issue or renew the license, in accordance with the procedures set out in Chapter 150B of the General Statutes:

a. Conviction of a felony or a crime involving fraud or moral turpitude.

a1. Denial, suspension, or revocation of an occupational or business license by another jurisdiction.

b. Fraud or misrepresentation in obtaining or renewing a license or in the practice of funeral service.

c. False or misleading advertising as the holder of a license.

d. Solicitation of dead human bodies by the licensee, his agents, assistants, or employees; but this paragraph shall not be construed to prohibit general advertising by the licensee.

e. Employment directly or indirectly of any resident trainee agent, assistant or other person, on a part-time or full-time basis, or on commission, for the purpose of calling upon individuals or institutions by whose influence dead human bodies may be turned over to a particular licensee.

f. The payment or offer of payment of a commission by the licensee, his agents, assistants or employees for the purpose of securing business except as authorized by Article 13D of this Chapter.

g. Gross immorality, including being under the influence of alcohol or drugs while practicing funeral service.

h. Aiding or abetting an unlicensed person to perform services under this Article, including the use of a picture or name in connection with advertisements or other written material published or caused to be published by the licensee.

i. Failing to treat a dead human body with respect at all times.

j. Violating or cooperating with others to violate any of the provisions of this Article or Articles 13D, 13E, or 13F of Chapter 90 of the General Statutes, any rules and regulations of the Board, or the standards set forth in Funeral Industry Practices, 16 C.F.R. 453 (1984), as amended from time to time.

k. Violation of any State law or municipal or county ordinance or regulation affecting the handling, custody, care or transportation of dead human bodies.

l. Refusing to surrender promptly the custody of a dead human body or cremated remains upon the express order of the person lawfully entitled to the custody thereof.

m. Knowingly making any false statement on a certificate of death or violating or cooperating with others to violate any provision of Article 4 or 16 of Chapter 130A of the General Statutes or any rules or regulations promulgated under those Articles as amended from time to time.

n. Indecent exposure or exhibition of a dead human body while in the custody or control of a licensee.

In any case in which the Board is entitled to suspend, revoke or refuse to renew a license, the Board may accept from the licensee an offer to pay a penalty of not more than five thousand dollars ($5,000). The Board may either accept a penalty or revoke or refuse to renew a license, but not both.

(2) Where the Board finds that a licensee is guilty of one or more of the acts or omissions listed in subdivision (e)(1) of this section but it is determined by the Board that the licensee has not thereby become unfit to practice, the Board may place the licensee on a term of probation in accordance with the procedures set out in Chapter 150B of the General Statutes. In any case in which the Board is entitled to place a licensee on a term of probation, the Board may also impose a penalty of not more than five thousand dollars ($5,000) in conjunction with the probation. The Board may also require satisfactory completion of remedial or educational training as a prerequisite to license reinstatement or for completing the term of probation.

No person licensed under this Article shall remove or cause to be embalmed a dead human body when he or she has information indicating crime or violence of any sort in connection with the cause of death, nor shall a dead human body be cremated, until permission of the State or county medical examiner has first been obtained. However, nothing in this Article shall be construed to alter the duties and authority now vested in the office of the coroner.

No funeral service establishment shall accept a dead human body from any public officer (excluding the State or county medical examiner or his agent), or employee or from the official of any institution, hospital or nursing home, or from a physician or any person having a professional relationship with a decedent, without having first made due inquiry as to the desires of the persons who have the legal authority to direct the disposition of the decedent's body. If any persons are found, their authority and directions shall govern the disposal of the remains of the decedent. Any funeral service establishment receiving the remains in violation of this subsection shall make no charge for any service in connection with the remains prior to delivery of the remains as stipulated by the persons having legal authority to direct the disposition of the body. This section shall not prevent any funeral service establishment from charging and being reimbursed for services rendered in connection with the removal of the remains of any deceased person in case of accidental or violent death, and rendering necessary professional services required until the persons having legal authority to direct the disposition of the body have been notified.

When and where a licensee presents a selection of funeral merchandise to the public to be used in connection with the service to be provided by the licensee or an establishment as licensed under this Article, a card or brochure shall be directly associated with each item of merchandise setting forth the price of the service using said merchandise and listing the services and other merchandise included in the price, if any. When there are separate prices for the merchandise and services, such cards or brochures shall indicate the price of the merchandise and of the items separately priced.

At the time funeral arrangements are made and prior to the time of rendering the service and providing the merchandise, a funeral director or funeral service licensee shall give or cause to be given to the person or persons making such arrangements a written statement duly signed by a licensee of said funeral establishment showing the price of the service as selected and what services are included therein, the price of each of the supplemental items of services or merchandise requested, and the amounts involved for each of the items for which the funeral establishment will advance moneys as an accommodation to the person making arrangements, insofar as any of the above items can be specified at that time. If fees charged by a finance company for expediting payment of life insurance proceeds to the establishment will be passed on to the person or persons responsible for payment of the funeral expenses, information regarding the fees, including the total dollar amount of the fee, shall be disclosed in writing. The statement shall have printed, typed or stamped on the face thereof: "This statement of disclosure is provided under the requirements of North Carolina G.S. 90-210.25(e)." The Board may prescribe other disclosures that a licensee shall give to consumers upon finding that the disclosure is necessary to protect public health, safety, and welfare.

(e1) The taking or recovery of human tissue at a funeral establishment by any person is prohibited. The prohibition does not apply to any of the following:

(1) A licensee under this Article that performs embalming or otherwise prepares a dead human body in the ordinary course of business.

(2) The Chief Medical Examiner or anyone acting under the Chief Medical Examiner's authority.

(3) An autopsy technician who takes or recovers tissue from a dead human body if all of the following apply:

  a. The taking or recovery is the subject of an academic research program.

  b. The academic research program has appropriate Institutional Review Board supervision.

  c. The academic research program has obtained informed consent of the donor or the person legally authorized to provide consent.

No funeral establishment or person licensed under this Article shall permit the taking or recovery of human tissue from a dead human body in its custody or control for human transplantation purposes or for research purposes, except that a funeral establishment or person licensed under this Article may permit an autopsy technician to take or recover tissue at a funeral establishment pursuant to subdivision (3) of this subsection. No funeral establishment or any of its licensees, agents, or employees shall accept, solicit, or offer to accept any payment, gratuity, commission, or compensation of any kind for referring potential tissue donors to a tissue bank or tissue broker or to an eye bank or eye broker. For purposes of this subsection, the term "tissue" does not include an eye.

(f) Unlawful Practices. — If any person shall practice or hold himself or herself out as practicing the profession or art of embalming, funeral directing or practice of funeral service or operating a funeral establishment without having complied with the provisions of this Article, the person shall be guilty of a Class 2 misdemeanor.

(g) Whenever it shall appear to the Board that any person, firm or corporation has violated, threatens to violate or is violating any provisions of this Article, the Board may apply to the courts of the State for a restraining order and injunction to restrain these practices. If upon application the court finds that any provision of this Article is being violated, or a violation is threatened, the court shall issue an order restraining and enjoining the violations, and this relief may be granted regardless of whether criminal prosecution is instituted under the provisions of this subsection. The venue for actions brought under this subsection shall be the superior court of any county in which the acts are alleged to have been committed or in the county where the defendant in the action resides. (1901, c. 338, ss. 9, 10, 14; Rev., ss. 3644, 4388; 1917, c. 36; 1919, c. 88; C.S., ss. 6781, 6782; 1949, c. 951, s. 4; 1951, c. 413;

1957, c. 1240, ss. 2, 21/2; 1965, cc. 719, 720; 1967, c. 691, s. 48; c. 1154, s. 2; 1969, c. 584, ss. 3, 3a, 4; 1975, c. 571; 1979, c. 461, ss. 11-21; 1981, c. 619, ss. 1-4; 1983, c. 69, s. 5; 1985, c. 242; 1987, c. 430, ss. 4-11; c. 827, s. 1; c. 879, s. 6.2; 1991, c. 528, ss. 4, 5; 1993, c. 539, s. 638; 1994, Ex. Sess., c. 24, s. 14(c); 1997-399, ss. 5-13; 2001-294, s. 3; 2002-147, s. 9; 2003-420, ss. 1, 7; 2007-297, s. 1; 2007-531, s. 4.)

Effect of Amendments. — Session Laws 2007-297, s. 1, effective July 28, 2007, and applicable to deaths occurring on or after that date, added subsection (e1).

Session Laws 2007-531, s. 4, effective August 31, 2007, in subdivision (a)(4)b, substituted "Within 30 days of a resident trainee leaving" for "When a resident trainee leaves"; in subsection (a1), rewrote the fourth sentence, deleted "in North Carolina" preceding "a total number of hours" in the fifth sentence; in subdivision (c)(6)a, added "while acting within the scope of their employment"; in subdivision (d)(2)a, added the last two sentences; in subdivision (d)(4), inserted "place on probation, refuse to issue or renew" in the first sentence and added the last four sentences; added subdivision (e)(1)a1; in subdivision (e)(1)j inserted "or Articles 13D, 13E, or 13F of Chapter 90 of the General Statutes, any"; in subdivision (e)(1)l, inserted "or cremated remains"; in subdivision (e)(1)m, added "or violating or cooperating with others ... time to time" at the end; in subdivision (e)(2), added the last sentence; in the last paragraph of subsection (e), added the second and last sentence; and in subsection (f), inserted "or herself," and "or operating a funeral establishment," deleted "licensing" preceding "provisions," and substituted "the person shall be" for "he shall be."

Legal Periodicals. — For comment on the statutory standard of care for North Carolina health care providers, see 1 Campbell L. Rev. 111 (1979).

CASE NOTES

Cited in Duggins v. North Carolina State Bd. of Certified Pub. Accountant Exmrs., 294 N.C. 120, 240 S.E.2d 406 (1978); Strickland v. Tant, 41 N.C. App. 534, 255 S.E.2d 325 (1979); Dumouchelle v. Duke Univ., 69 N.C. App. 471, 317 S.E.2d 100 (1984).

OPINIONS OF ATTORNEY GENERAL

Advertising of Discounts or Promotions. — To the extent that the Board of Mortuary Science interprets and applies subdivision (e)(1)f to ban advertising of discounts or promotions, it can do so lawfully only as permitted by the First Amendment. See opinion of Attorney General to Michael L. Weisel, Counsel to the North Carolina State Board of Mortuary Science, 2000 N.C. AG LEXIS 8 (12/15/2000).

§ 90-210.25A: Recodified as G.S. 65-77 by Session Laws 2003-420, s. 8(b), effective October 1, 2003.

§ 90-210.26. Good moral character.

Evidence of good moral character may be shown by the affidavits of three persons who have been acquainted with the applicant for three years immediately preceding the submission of the affidavit. (1979, c. 461, s. 22.)

§ 90-210.27: Repealed by Session Laws 1987, c. 430, s. 12.

§ 90-210.27A. Funeral establishments.

(a) Every funeral establishment shall contain a preparation room which is strictly private, of suitable size for the embalming of dead bodies. Each preparation room shall:

(1) Contain one standard type operating table.

(2) Contain facilities for adequate drainage.

(3) Contain a sanitary waste receptacle.
(4) Contain an instrument sterilizer.
(5) Have wall-to-wall floor covering of tile, concrete, or other material which can be easily cleaned.
(6) Be kept in sanitary condition and subject to inspection by the Board or its agents at all times.
(7) Have a placard or sign on the door indicating that the preparation room is private.
(8) Have a proper ventilation or purification system to maintain a nonhazardous level of airborne contamination.

(b) No one is allowed in the preparation room while a dead human body is being prepared except licensees, resident trainees, public officials in the discharge of their duties, members of the medical profession, officials of the funeral home, next of kin, or other legally authorized persons.

(c) Every funeral establishment shall contain a reposing room for dead human bodies, of suitable size to accommodate a casket and visitors.

(d) Repealed by Session Laws 1997-399, s. 14.

(e) If a funeral establishment is solely owned by a natural person, that person must be licensed by the Board as a funeral director or a funeral service licensee. If it is owned by a partnership, at least one partner must be licensed by the Board as a funeral director or a funeral service licensee. If it is owned by a corporation, the president, vice-president, or the chairman of the board of directors must be licensed by the Board as a funeral director or a funeral service licensee. If it is owned by a limited liability company, at least one member must be licensed by the Board as a funeral director or a funeral service licensee. The licensee required by this subsection must be actively engaged in the operation of the funeral establishment.

(f) If a funeral establishment uses the name of a living person in the name under which it does business, that person must be licensed by the Board as a funeral director or a funeral service licensee.

(g) No funeral establishment shall own, operate, or maintain a chapel without first having registered the name, location, and ownership thereof with the Board; own or maintain more than two chapels, or own or maintain a chapel outside of a radius of 50 miles from the funeral establishment. A duly licensed person may use a chapel for making arrangements for funeral services, selling funeral merchandise to the public by photograph, video, or computer based presentation, or making financial arrangements for the rendering of the service or sale of supplies, provided that the uses are secondary and incidental to and do not interfere with the reposing of dead human bodies, visitation, or funeral ceremony.

(h) All public health laws and rules apply to funeral establishments. In addition, all funeral establishments must comply with all of the standards established by the rules adopted by the Board.

(i) No funeral establishment shall use an unregistered or misleading name. Misleading names include, but are not limited to, names in the plural form when there is only one funeral establishment, the use of names of deceased individuals, unless the establishment is licensed using the name at the time the new application is made, the use of names of individuals not associated with the establishment, and the use of the word "crematory" or "crematorium" in the name of a funeral establishment that does not own a crematory. If an owner of a funeral establishment owns more than one funeral establishment, the owner may not use the word "crematory" or "crematorium" in the name of more than one of its funeral establishments; except that each funeral home having a crematory on the premises may contain the term "crematory" or "crematorium" in its name.

(j) A funeral establishment will not use any name other than the name by which it is properly registered with the Board. (1987, c. 430, s. 13; c. 879, s. 6.2; 1997-399, s. 14; 2001-294, s. 4; 2003-420, s. 9(a), (b); 2007-531, s. 5.)

Effect of Amendments. — Session Laws 2007-531, s. 5, effective August 31, 2007, rewrote subsection (g); and in subsection (i), inserted "the use of names of deceased individuals, unless the establishment is licensed using the name at the time the new application is made, the use of names of individuals not associated with the establishment."

§ 90-210.28. Fees.

The Board may set and collect fees, not to exceed the following amounts:

Establishment permit	
Application	$400.00
Annual renewal	250.00
Late renewal	150.00
Establishment and embalming facility reinspection fee	100.00
Courtesy card	
Application	100.00
Annual renewal	75.00
Out-of-state licensee	
Application	250.00
Embalmer, funeral director, funeral service	
Application—North Carolina-Resident	200.00
-Non-Resident	250.00
Annual Renewal-embalmer or funeral director	75.00
Total fee, embalmer and funeral director when both are held by the same person	100.00
-funeral service	100.00
Inactive Status	50.00
Reinstatement fee	50.00
Resident trainee permit	
Application	50.00
Voluntary change in supervisor	50.00
Annual renewal	35.00
Late renewal	25.00
Duplicate license certificate	25.00
Chapel registration	
Application	150.00
Annual renewal	100.00
Late renewal	75.00

The Board shall provide, without charge, one copy of the current statutes and regulations relating to Funeral Service to every person applying for and paying the appropriate fees for licensing pursuant to this Article. The Board may charge all others requesting copies of the current statutes and regulations, and the licensees or applicants requesting additional copies, a fee equal to the costs of production and distribution of the requested documents. (1979, c. 461, s. 22; 1981, c. 619, s. 5; 1985, c. 447, ss. 1, 2; 1987, c. 710; 1989 (Reg. Sess., 1990), c. 968; 1997-399, s. 15; 2001-294, s. 5; 2007-531, s. 6.)

Effect of Amendments. — Session Laws 2007-531, s. 6, effective August 31, 2007, on Fees table, adjusted the amounts, substituted "reinspection" for "inspection"; and in the last paragraph substituted "Funeral Service" for "Mortuary Science."

§ 90-210.29. Students.

(a) Students who are enrolled in duly accredited mortuary science colleges in North Carolina may engage in the practices defined in this Article if the practices are part of their academic training and if the practices are under the supervision of a licensed instructor of mortuary science or a licensee designated by the mortuary science college upon registration with the Board.

(b) Repealed by Session Laws 2001-294, s. 6, effective December 1, 2001. (1979, c. 461, s. 22; 2001-294, s. 6.)

§ 90-210.29A. Identification of bodies before burial or cremation.

The funeral director or person otherwise responsible for the final disposition of a dead body shall, prior to the interment or entombment of the dead body, affix on the ankle or wrist of the dead body, or, if cremated, on the inside of the temporary container or urn containing the remains of the dead body, a tag of durable, noncorroding material permanently marked with the name of the deceased, the date of death, the social security number of the deceased, the county and state of death, and the site of interment or entombment. (1995, c. 312, s. 1; 2003-420, s. 10.)

§ 90-210.29B. Examination scores not public record.

The examination scores of applicants for licensure shall not be subject to the provisions of Chapter 132 of the General Statutes. The Board shall release to any person requesting examination scores whether or not the applicant has obtained a passing score at the time of the request. (2007-484, s. 43.9; 2007-531, s. 7.)

Editor's Note. — Session Laws 2007-531, s. 7, enacted this section as G.S. 90-210.29A-1; it was recodified as G.S. 90-210.29B by Session Laws 2007-484, s. 43.9.

Session Laws 2007-531, s. 27, made this section effective August 31, 2007.

Article 13B.

Funeral and Burial Trust Funds.

§§ 90-210.30 through 90-210.39: Repealed by 1991 (Regular Session, 1992), c. 901, s. 1.

Cross References. — For present provisions pertaining to the subject matter of the repealed article, see Article 13D of this chapter (G.S. 90-210.60 et seq.).

Article 13C.

Cremations.

§§ 90-210.40 through 90-210.54: Recodified as Article 13F of Chapter 90, G.S. 90-210.120 through 90-210.134.

Editor's Note. — Session Laws 2003-240, s. 2 revised this Article as G.S. 90-210.40 through 90-210.54. It has been recodified as Article 13F of Chapter 90, G.S. 90-210.120 through 90-210.134, at the direction of the Revisor of Statutes. Historical citations and case annotations to sections in former Article 13C have been added to corresponding sections in Article 13F.

§§ 90-210.55 through 90-210.59: Reserved for future codification purposes.

Article 13D.

Preneed Funeral Funds.

§ 90-210.60. Definitions.

As used in this Article, unless the context requires otherwise:

(1) "Board" means the North Carolina Board of Funeral Service as created pursuant to Article 13A of Chapter 90 of the General Statutes;

(2) "Financial institution" means a bank, trust company, savings bank, or savings and loan association authorized by law to do business in this State;

(3) "Insurance company" means any corporation, limited liability company, association, partnership, society, order, individual or aggregation of individuals engaging in or proposing or attempting to engage as principals in any kind of insurance business, including the exchanging of reciprocal or interinsurance contracts between individuals, partnerships, and corporations;

(3a) "Legal representation" means the person authorized by G.S. 130A-420 who would be otherwise authorized to dispose of the remains of the preneed funeral contract beneficiary.

(4) "Prearrangement insurance policy" means a life insurance policy, annuity contract, or other insurance contract, or any series of contracts or agreements in any form or manner, issued by an insurance company authorized by law to do business in this State, which, whether by assignment or otherwise, has for a purpose the funding of a preneed funeral contract or an insurance-funded funeral or burial prearrangement, the insured or annuitant being the person for whose service the funds were paid;

(5) "Preneed funeral contract" means any contract, agreement, or mutual understanding, or any series or combination of contracts, agreements, or mutual understandings, whether funded by trust deposits or prearrangement insurance policies, or any combination thereof, which has for a purpose the furnishing or performance of funeral services, or the furnishing or delivery of personal property, merchandise, or services of any nature in connection with the final disposition of a dead human body, to be furnished or delivered at a time determinable by the death of the person whose body is to be disposed of, but does not mean the furnishing of a cemetery lot, crypt, niche, or mausoleum;

(6) "Preneed funeral contract beneficiary" means the person upon whose death the preneed funeral contract will be performed; this person may also be the purchaser of the preneed funeral contract;

(7) "Preneed funeral funds" means all payments of cash made to any person, partnership, association, corporation, or other entity upon any preneed funeral contract or any other agreement, contract, or prearrangement insurance policy, or any series or combination of preneed funeral contracts or any other agreements, contracts, or prearrangement insurance policies, but excluding the furnishing of cemetery lots, crypts, niches, and mausoleums, which have for a purpose or which by operation provide for the furnishing or performance of funeral or burial services, or the furnishing or delivery of personal property, merchandise, or services of any nature in connection with the final

disposition of a dead human body, to be furnished or delivered at a time determinable by the death of the person whose body is to be disposed of, or the providing of the proceeds of any insurance policy for such use;

(8) "Preneed funeral planning" means offering to sell or selling preneed funeral contracts, or making other arrangements prior to death for the providing of funeral services or merchandise;

(9) "Preneed licensee" means a funeral establishment which has applied for and has been granted a license to sell preneed funeral contracts under the Article. Such license is also referred to in this Article as a "preneed funeral establishment license." (1969, c. 187, s. 1; 1983, c. 657, s. 1; 1985, c. 12, s. 1; 1991 (Reg. Sess., 1992), c. 901, s. 2; 1993, c. 553, s. 27; 1997-399, s. 23; 2001-294, ss. 7, 8; 2003-420, s. 1; 2007-531, s. 7.1.)

Editor's Note. — Session Laws 1991 (Reg. Sess., 1992), c. 901, ss. 1 and 2, repealed former Article 13B and added this article. Where appropriate, the historical citations and annotations under sections of repealed Article 13B have been placed under corresponding sections of this article.

Effect of Amendments. — Session Laws 2007-531, s. 7.1, effective August 31, 2007, added subdivision (3a).

§ 90-210.61. Deposit or application of preneed funeral funds.

(a) Preneed funeral funds are subject to the provisions of this Article and shall be deposited or applied as follows:

(1) If the preneed funeral contract purchaser chooses to fund the preneed funeral contract by a trust deposit or deposits, the preneed licensee shall deposit all funds in an insured account in a financial institution, in trust, in the preneed licensee's name as trustee within five business days. The preneed licensee, at the time of making the deposit as trustee, shall furnish to the financial institution the name of each preneed funeral contract purchaser and the amount of payment on each for which the deposit is being made. The preneed licensee may establish an individual trust fund for each preneed funeral contract or a common trust fund for all preneed funeral contracts. The trust accounts shall be carried in the name of the preneed licensee as trustee, but accounting records shall be maintained for each individual preneed funeral contract purchaser showing the amounts deposited and invested, and interest, dividends, increases, and accretions earned. Except as provided in this Article, all interest, dividends, increases, or accretions earned by the funds shall remain with the principal. The trust fund may be charged with applicable taxes and for reasonable charges paid by the trustee to itself or others for the preparation of fiduciary tax returns. Penalties charged by a financial institution for early withdrawals caused by a transfer pursuant to G.S. 90-210.63 shall be paid by the preneed licensee. Penalties charged as a result of other early withdrawals as permitted by this Article shall be paid from the trust fund, and the financial institution shall give the preneed funeral contract purchaser prompt notice of these penalties.

(2) Notwithstanding any other provision of law, if a preneed funeral contract is funded by a trust deposit or trust deposits, a preneed licensee may retain, free of the trust, up to ten percent (10%) of any payments made on a preneed funeral contract, provided that the preneed licensee fully discloses in writing in advance to the preneed

funeral contract purchaser the percentage of the payments to be retained. If there is no substitution pursuant to G.S. 90-210.63(a), the preneed licensee shall give credit for the amount retained upon the death of the preneed funeral contract beneficiary and performance of the preneed funeral contract.

(3) If the preneed funeral contract purchaser chooses to fund the contract by a prearrangement insurance policy, the preneed licensee shall apply all funds received for this purpose to the purchase of the prearrangement insurance policy within five business days. The preneed licensee shall notify the insurance company of the name of each preneed funeral contract purchaser and the amount of each payment when the prearrangement insurance policy or policies are purchased.

(b) Except as provided by this Article or by the preneed funeral contract, all payments made by the purchaser of a preneed funeral contract or prearrangement insurance policy shall remain trust funds within a financial institution or as paid insurance premiums with an insurance company, as the case may be, until the death of the preneed funeral contract beneficiary and until full performance of the preneed funeral contract.

(c) Each preneed licensee may establish and maintain with a financial institution of its choice, a preneed funeral fund clearing account. Preneed funeral funds received by a preneed licensee may be deposited and held in such an account until disbursed by the preneed licensee to fund a preneed funeral contract pursuant to subdivisions (a)(1) or (a)(3) of this section. This account shall be used solely for the receipt and disbursement of preneed funeral funds.

(d) Funds deposited in trust under a revocable standard preneed funeral contract may, with the written permission of the preneed funeral contract purchaser, be withdrawn by the trustee and used to purchase a prearrangement insurance policy. Except as provided in this subsection, no funds deposited in trust in a financial institution pursuant to this Article shall be withdrawn by the trustee to purchase a prearrangement insurance policy.

(e) Except as provided by G.S. 90-210.61(c), at no time before making a deposit or purchasing a prearrangement insurance policy may a preneed licensee, or its agents or employees, deposit in its own account or the account of any other person any monies coming into its hands for the purpose of purchasing services, merchandise, or prearrangement insurance policies under the provisions of this Article. (1969, c. 187, ss. 2, 4; 1981 (Reg. Sess., 1982), c. 1336, s. 1; 1983, c. 657, ss. 2, 4; 1985, c. 12, ss. 1-3; 1987, c. 430, ss. 15, 16; c. 879, s. 6.2; 1989, c. 485, s. 16; c. 738, s. 2; 1991 (Reg. Sess., 1992), c. 901, s. 2.)

CASE NOTES

Cited in N.C. Bd. of Mortuary Sci. v. Crown Mem'l Park, L.L.C., 162 N.C. App. 316, 590 S.E.2d 467, 2004 N.C. App. LEXIS 113, appeal dismissed, 358 N.C. 235, 595 S.E.2d 154 (2004).

OPINIONS OF ATTORNEY GENERAL

Prepayment for Burial Services Voluntarily Made. — See opinion of Attorney General to Mr. John R. Tropman, Deputy Commissioner of Banks, 40 N.C.A.G. 51 (1970) (issued under prior law).

Preneed Sale of "Garden Mausoleums and Interment Crypts" Within Provisions of Former Article 13B. — See opinion of Attorney General to Mr. John R. Tropman, Deputy Commissioner, State Banking Commission, 40 N.C.A.G. 52 (1970) (issued under prior law).

§ 90-210.62. Types of preneed funeral contracts; forms.

(a) A preneed licensee may offer standard preneed funeral contracts and inflation-proof preneed funeral contracts. A standard preneed funeral contract applies the trust funds or insurance proceeds to the purchase price of funeral services and merchandise at the time of death of the contract beneficiary without protection against potential future price increases. An inflation-proof contract establishes an agreement between the preneed licensee and the purchaser for funeral services and merchandise without regard to potential future price increases. Upon written disclosure to the purchaser of a preneed funeral contract, inflation-proof contracts may permit the preneed licensee to retain all of the preneed funeral contract trust funds on deposit, and all insurance proceeds, even those in excess of the retail cost of goods and services provided, when the preneed licensee has fully performed the preneed funeral contract. Preneed funeral contracts may be revocable or irrevocable, at the option of the preneed funeral contract purchaser.

(b) The Board may prescribe forms for preneed funeral contracts consistent with this Article. All contracts must be in writing on forms prescribed by the Board. Any use or attempted use of any oral preneed funeral contract or any written contract in a form not prescribed by the Board shall be deemed a violation of this Article. (1991 (Reg. Sess., 1992), c. 901, s. 2; 2007-531, s. 8.)

Effect of Amendments. — Session Laws 2007-531, s. 8, effective August 31, 2007, in subsection (a), substituted "protection against potential future" for "a guarantee against" in the second sentence, substituted "an agreement between the preneed licensee and the purchaser" for "a fixed price" and inserted "potential future" in the third sentence; and rewrote subsection (b).

CASE NOTES

Cited in N.C. Bd. of Mortuary Sci. v. Crown Mem'l Park, L.L.C., 162 N.C. App. 316, 590 S.E.2d 467, 2004 N.C. App. LEXIS 113, appeal dismissed, 358 N.C. 235, 595 S.E.2d 154 (2004).

§ 90-210.63. Substitution of licensee.

(a) If the preneed funeral contract is irrevocable, the preneed funeral contract purchaser, or after his death the preneed funeral contract beneficiary or his legal representative, upon written notice to the financial institution or insurance company and the preneed licensee who is a party to the preneed funeral contract, may direct the substitution of a different funeral establishment to furnish funeral services and merchandise.

(1) If the substitution is made after the death of the preneed funeral contract beneficiary, a funeral establishment providing any funeral services or merchandise need not be a preneed licensee under this Article to receive payment for such services or merchandise. The original contracting preneed licensee shall be entitled to payment for any services or merchandise provided pursuant to G.S. 90-210.65(d). If the substitution is made before the death of the preneed funeral contract beneficiary, the substitution must be to a preneed licensee. If the preneed funeral contract is funded by a trust deposit or deposits, the financial institution shall immediately pay the funds held to the original contracting preneed licensee.

(2) The original contracting preneed licensee shall immediately pay all funds received to the successor funeral establishment designated. Regardless of whether the substitution is made before or after the death of the preneed funeral contract beneficiary, the original contracting preneed licensee shall not be required to give credit for the

amount retained pursuant to G.S. 90-210.61(a)(2), except when there was a substitution under G.S. 90-210.68(d1) and (e). Upon making payments pursuant to this subsection, the financial institution and the original contracting preneed licensee shall be relieved from all further contractual liability thereon.

(3) If the preneed funeral contract is funded by a prearrangement insurance policy, the insurance company shall not pay any of the funds until the death of the preneed funeral contract beneficiary, and the insurance company shall pay the funds in accordance with the terms of the policy.

(b) The person giving notice of the substitution of a preneed licensee and the successor preneed licensee shall enter into a new preneed funeral contract for the funds transferred, and this Article shall apply, including the duty of the successor preneed licensee to deposit all of the funds in a financial institution if the death of the preneed funeral contract beneficiary has not occurred. Nothing in this subsection shall be construed to permit the use of the transferred funds to purchase a prearrangement insurance policy, nor to permit an irrevocable preneed funeral contract to be made revocable or to result in the payment of any of the transferred funds to the preneed funeral contract purchaser or to the preneed funeral contract beneficiary or his estate, except as provided by G.S. 90-210.64(b). (1991 (Reg. Sess., 1992), c. 901, s. 2; 1993, c. 242, s. 1; 1997-399, s. 24; 2003-420, s. 11.)

§ 90-210.63A. Amendment of preneed funeral contracts.

(a) Unless otherwise provided by this Article, preneed funeral contracts may be modified by mutual consent of the contracting preneed funeral establishment and the preneed contract purchaser, or after the death of the preneed contract purchaser, the preneed contract beneficiary or his or her legal representative.

(b) When the preneed contract purchaser and preneed contract beneficiary are the same, the preneed contract purchaser may designate one or more individuals to change the arrangements or performing funeral establishment, or may designate that the arrangements or performing funeral establishment may not be changed without an order from the clerk of superior court in the county where probate proceedings are instituted upon a finding that the change is in the best interest of the estate.

(c) If the preneed purchaser, or after his or her death, the preneed contract beneficiary or his or her legal representative, and the contracting preneed funeral establishment agree to modify any goods or services selected under an inflation-proof contract, the preneed licensee shall not be required to guarantee the price of the modified goods and services at the time of death and all other funeral goods and service selected shall remain guaranteed. If the modifications increase the purchase price, the provisions of G.S. 90-210.64(b) shall apply as if the modified contract had been executed on the original date. If the modifications decrease the purchase price, the preneed licensee shall refund all monies according to the provisions of G.S. 90-210.64(d). (2007-531, s. 9.)

Editor's Note. — Session Laws 2007-531, s. 27, made this section effective August 31, 2007.

§ 90-210.64. Death of preneed funeral contract beneficiary; disposition of funds.

(a) After the death of a preneed funeral contract beneficiary and full performance of the preneed funeral contract by the preneed licensee, the preneed licensee shall promptly complete a certificate of performance and present it to the financial institution that holds funds in trust under G.S. 90-210.61(a)(1) or to the insurance company that issued a preneed insurance policy pursuant to G.S. 90-210.61(a)(3). Upon receipt of the certificate of performance or similar claim form, the financial institution shall pay the trust funds to the contracting preneed licensee and the insurance company shall pay the insurance proceeds according to the terms of the policy. Within 10 days after receiving payment, the preneed licensee shall file a copy of the certificate of performance or other claim form to the Board.

(b) Unless otherwise specified in the preneed funeral contract, the preneed licensee shall have no obligation to deliver merchandise or perform any services for which payment in full has not yet been deposited with a financial institution or that will not be provided by the proceeds of a prearrangement insurance policy. Any such amounts received which do not constitute payment in full shall be refunded to the estate of the deceased preneed funeral contract beneficiary or credited against the cost of merchandise or services contracted for by a representative of the deceased. Any balance remaining after payment for the merchandise and services as set forth in the preneed funeral contract shall be paid to the estate of the preneed funeral contract beneficiary or the prearrangement insurance policy beneficiary named to receive any such balance. Provided, however, unless the parties agree to the contrary, there shall be no refund to the estate of the preneed funeral contract beneficiary of an inflation-proof preneed funeral contract except as required by G.S. 90-210.63A(c).

(c) In the event that any person other than the contracting preneed licensee performs any funeral service or provides any merchandise as a result of the death of the preneed funeral contract beneficiary, the financial institution shall pay the trust funds to the contracting preneed licensee and the insurance company shall pay the insurance proceeds according to the terms of the policy. The preneed licensee shall, subject to the provisions of G.S. 90-210.65(d), immediately pay the monies so received to the other provider.

(d) When the balance of a preneed funeral fund is one hundred dollars ($100.00) or less and is payable to the estate of a deceased preneed funeral contract beneficiary and there has been no representative of the estate appointed, the balance due may be paid directly to a beneficiary or to the beneficiaries of the estate. If the balance of a preneed funeral fund exceeds one hundred dollars ($100.00) or is not payable to the estate, the balance must be paid into the office of the clerk of superior court in the county where probate proceedings could be filed for the deceased preneed funeral contract beneficiary.

(e) Upon the fulfillment of a preneed contract, all of the following items shall be completed within 30 days:

(1) The contracting preneed licensee must submit a certificate of performance or similar claim form to the financial institution holding the preneed trust funds and close the preneed account.

(2) The proceeds of this trust account shall be distributed according to the terms of the preneed contract.

(3) A completed copy of the certificate of performance or similar claim form evidencing the final disposition of any financial institution preneed trust account funds must be filed with the Board by the contracting licensee. (1991 (Reg. Sess., 1992), c. 901, s. 2; 1997-399, s. 25; 2001-294, s. 9; 2003-420, s. 12; 2007-531, s. 10.)

Effect of Amendments. — Session Laws 2007-531, s. 10, effective August 31, 2007, in subsection (a), substituted "shall file" for "shall mail" in the last sentence; and in subsection (b), added "except as required by G.S. 90-210.63A(c)" at the end.

§ 90-210.65. Refund of preneed funeral funds.

(a) Within 30 days of receipt of a written request from the purchaser of a revocable preneed funeral contract who has trust funds deposited with a financial institution pursuant to G.S. 90-210.61(a), the financial institution shall refund to the preneed funeral contract purchaser the entire amount held by the financial institution.

(b) Within 30 days of receipt of a written notice of cancellation of any prearrangement insurance policy purchased pursuant to G.S. 90-210.61(a)(3), the issuing insurance company shall pay such amounts to such person or persons as is provided under the terms of the prearrangement insurance policy.

(c) After making refund pursuant to this section and giving notice of the refund to the preneed licensee, the financial institution or insurance company shall be relieved from all further liability.

(d) Notwithstanding any other provision of this Article, if a preneed funeral contract is revoked or transferred following the death of the preneed funeral contract beneficiary, the purchaser of the preneed funeral contract may be charged according to the contracting preneed licensee's price lists for any services performed or merchandise provided prior to revocation or transfer.

(e) This section shall not apply to irrevocable preneed funeral contracts. Irrevocable preneed funeral contracts may only be revoked or any proceeds refunded by the order of a court of competent jurisdiction, except as follows:

(1) The Board may order an irrevocable contract revoked when the preneed contract beneficiary is no longer domiciled in this State and has submitted a written copy to the Board of a new preneed funeral contract executed under the laws of the state where the preneed contract beneficiary is domiciled. Upon receipt of the Board's order, the original contracting preneed licensee shall immediately follow the provisions of G.S. 90-210.63 to transfer the funds to the successor firm.

(2) Irrevocable preneed funeral contracts purchased pursuant to G.S. 90-210.61(a)(3) shall also be revocable when the underlying insurance policy lapses or is otherwise cancelled and the lapsed or cancelled policy no longer provides any funding for the preneed funeral contract. (1969, c. 187, s. 3; 1981 (Reg. Sess., 1982), c. 1336, s. 2; 1983, c. 657, s. 3; 1985, c. 12, ss. 1, 2; 1991 (Reg. Sess., 1992), c. 901, s. 2; 2003-420, s. 13; 2007-531, s. 11.)

Effect of Amendments. — Session Laws 2007-531, s. 11, effective August 31, 2007, rewrote subsection (e).

OPINIONS OF ATTORNEY GENERAL

Courts of Competent Jurisdiction. — All trial divisions within the General Court of Justice are courts of competent jurisdiction for the purposes of subsection (e). See opinion of Attorney General to Mr. William R. Hoke, Attorney for the North Carolina State Board of Mortuary Science, — N.C.A.G. — (November 3, 1995).

Revocation of Contract. — In order for a court to revoke an irrevocable preneed funeral contract a civil action must be initiated by the filing of a complaint with the necessary parties being the purchaser, the preneed funeral home licensee and, if other than the purchaser, the preneed funeral contract beneficiary. See opinion of Attorney General to Mr. William R. Hoke, Attorney for the North Carolina State Board of Mortuary Science, — N.C.A.G. — (November 3, 1995).

Incompetent Purchaser or Benefi-

ciary. — If a purchaser or beneficiary of a preneed funeral contract has been adjudicated incompetent, the clerk of the superior court is a "court of competent jurisdiction" and a hearing should be held in order for the clerk to make findings establishing that it is in the best interest of the ward to revoke the contract. See opinion of Attorney General to Mr. William R. Hoke, Attorney for the North Carolina State Board of Mortuary Science, — N.C.A.G. — (November 3, 1995).

§ 90-210.66. Recovery fund.

(a) There is established the Preneed Recovery Fund. The Fund shall be administered by the Board. The purpose of the Fund is to reimburse purchasers of preneed funeral contracts who have suffered financial loss as a result of the malfeasance, misfeasance, default, failure or insolvency of any licensee under this Article, and includes refunds due a preneed funeral contract beneficiary from a preneed licensee who has retained any portion of the preneed funeral contract payments pursuant to G.S. 90-210.61(a)(2).

(b) From the fee for each preneed funeral contract as required by G.S. 90-210.67(d), the Board shall deposit two dollars ($2.00) into the Fund. The Board may suspend the deposits into the Fund at any time and for any period for which the Board determines that a sufficient amount is available to meet likely disbursements and to maintain an adequate reserve.

(c) All sums received by the Board pursuant to this section shall be held in a separate account known as the Preneed Recovery Fund. Deposits to and disbursements from the Fund account shall be subject to rules established by the Board.

(d) The Board shall adopt rules governing management of the Fund, the presentation and processing of applications for reimbursement, and subrogation or assignment of the rights of any reimbursed applicant.

(e) The Board may expend monies in the Fund for the following purposes:

(1) To make reimbursements on approved applications;

(2) To purchase insurance to cover losses as deemed appropriate by the Board and not inconsistent with the purposes of the Fund;

(3) To invest such portions of the Fund as are not currently needed to reimburse losses and maintain adequate reserves, as are permitted to be made by fiduciaries under State law; and

(4) To pay the expenses of the Board for administering the Fund, including employment of legal counsel to prosecute subrogation claims.

(f) Reimbursements from the Fund shall be made only to the extent to which such losses are not bonded or otherwise covered, protected or reimbursed and only after the applicant has complied with all applicable rules of the Board.

(g) The Board shall investigate all applications made and may reject or allow such claims in whole or in part to the extent that monies are available in the Fund. The Board shall have complete discretion to determine the order and manner of payment of approved applications. All payments shall be a matter of privilege and not of right, and no person shall have any right in the Fund as a third-party beneficiary or otherwise. No attorney may be compensated by the Board for prosecuting an application for reimbursement.

(h) In the event reimbursement is made to an applicant under this section, the Board shall be subrogated in the reimbursed amount and may bring any action it deems advisable against any person, including a preneed licensee. The Board may enforce any claims it may have for restitution or otherwise and may employ and compensate consultants, agents, legal counsel, accountants and any other persons it deems appropriate.

(i) The Fund shall apply to losses arising after July 9, 1992, regardless of the date of the underlying preneed funeral contract. (1991 (Reg. Sess., 1992), c. 901, s. 2; 1997-399, s. 26.)

§ 90-210.67. Application for license.

(a) No person may offer or sell preneed funeral contracts or offer to make or make any funded funeral prearrangements without first securing a license from the Board. Notwithstanding any other provision of law, any person who offers to sell or sells a casket, to be furnished or delivered at a time determinable by the death of the person whose body is to be disposed of in the casket, shall first comply with the provisions of this Article. There shall be two types of licenses: a preneed funeral establishment license and a preneed sales license. Only funeral establishments holding a valid establishment permit pursuant to G.S. 90-210.25(d) shall be eligible for a preneed funeral establishment license. Employees and agents of such entities, upon meeting the qualifications to engage in preneed funeral planning as established by the Board, shall be eligible for a preneed sales license. The Board shall establish the preneed funeral planning activities that are permitted under a preneed sales license. The Board shall adopt rules establishing such qualifications and activities no later than 12 months following the ratification of this act [Session Laws 1991 (Reg. Sess., 1992), c. 901, s. 2]. Preneed sales licensees may sell preneed funeral contracts, prearrangement insurance policies, and make funded funeral prearrangements only on behalf of one preneed funeral establishment licensee; provided, however, they may sell preneed funeral contracts, prearrangement insurance policies, and make funeral prearrangements for any number of licensed preneed funeral establishments that are wholly owned by or affiliated with, through common ownership or contract, the same entity; provided further, in the event they engage in selling prearrangement insurance policies, they shall meet the licensing requirements of the Commissioner of Insurance. Every preneed funeral contract shall be signed by a person licensed as a funeral director or funeral service licensee pursuant to Article 13A of Chapter 90 of the General Statutes.

Application for a license shall be in writing, signed by the applicant and duly verified on forms furnished by the Board. Each application shall contain at least the following: the full names and addresses (both residence and place of business) of the applicant, and every partner, member, officer and director thereof if the applicant is a partnership, limited liability company, association, or corporation and any other information as the Board shall deem necessary. A preneed funeral establishment license shall be valid only at the address stated in the application or at a new address approved by the Board.

(b) An application for a preneed funeral establishment license shall be accompanied by a nonrefundable application fee of not more than four hundred dollars ($400.00). The Board shall set the amounts of the application fees and renewal fees, by rule. A funeral establishment receiving a new preneed establishment license after January 1, 2008, or whose preneed establishment license has lapsed or was terminated for any reason after January 1, 2008, shall obtain a surety bond in an amount not less than fifty thousand dollars ($50,000) for five years, or upon demonstrating that it is solvent, no less than one year from the date the original license is issued. The Board may extend the bonding requirement in the event there is a claim paid from the bond.

If the license is granted, the application fee shall be applied to the annual license fee for the first year or part thereof. Upon receipt of the application and payment of the application fee, the Board shall issue a renewable preneed funeral establishment license unless it determines that the applicant has violated any provision of G.S. 90-210.69(c) or has made false statements or representations in the application, or is insolvent, or has conducted or is about to conduct, its business in a fraudulent manner, or is not duly authorized to transact business in this State. The license shall expire on December 31 and each preneed funeral establishment licensee shall pay annually to the Board on or before that date a license renewal fee of not more than two hundred fifty dollars ($250.00). On or before the first day of February immediately following expiration, a license may be renewed without paying a late fee. After that date, a license may be renewed by paying a late fee of not more than one hundred dollars ($100.00) in addition to the annual renewal fee.

(c) An application for a preneed sales license shall be accompanied by a nonrefundable application fee of not more than fifty dollars ($50.00). The Board shall set the amounts of the application fees and renewal fees by rule, but the fees shall not exceed fifty dollars ($50.00). If the license is granted, the application fee shall be applied to the annual license fee for the first year or part thereof. Upon receipt of the application and payment of the application fee, the Board shall issue a renewable preneed sales license provided the applicant has met the qualifications to engage in preneed funeral planning as established by the Board unless it determines that the applicant has violated any provision of G.S. 90-210.69(c). The license shall expire on December 31 and each preneed sales licensee shall pay annually to the Board on or before that date a license renewal fee of not more than fifty dollars ($50.00). On or before the first day of February, a license may be renewed without paying a late fee. After that date, a license may be renewed by paying a late fee of not more than twenty-five dollars ($25.00) in addition to the annual renewal fee.

(d) Any person selling a preneed funeral contract, whether funded by a trust deposit or a prearrangement insurance policy, shall remit to the Board, within 10 days of the sale, a fee not to exceed twenty dollars ($20.00) for each sale and a copy of each contract. The person shall pay a late fee of not more than twenty-five dollars ($25.00) for each late filing and payment. The fees shall not be remitted in cash.

(d1) The Board may also set and collect a fee of not more than twenty-five dollars ($25.00) for the late filing of a certificate of performance and a fee of not more than one hundred and fifty dollars ($150.00) for the late filing of an annual report.

(e), (f). Repealed by Session Laws 2003-420, s. 14, effective October 1, 2003. (1969, c. 187, s. 5; 1981, c. 671, ss. 16, 17; 1983, c. 657, s. 4; 1985, c. 12, ss. 1, 2; 1991 (Reg. Sess., 1992), c. 901, s. 2; 1995 (Reg. Sess., 1996), c. 665, s. 1; 1997-399, s. 27; 2001-294, s. 10; 2003-420, s. 14; 2007-531, s. 12.)

Effect of Amendments. — Session Laws 2007-531, s. 12, effective August 31, 2007, in subsection (b), rewrote the first paragraph, and in the second paragraph, substituted "two hundred fifty dollars ($250.00)" for "one hundred fifty dollars ($150.00)."

CASE NOTES

Constitutionality. — Provision of G.S. 90-210.67(a) that prohibited persons from offering or selling preneed funeral contracts without holding a license issued by the North Carolina Board of Mortuary Science was rationally related to the State's need to protect consumers, and the appellate court held that the statute did not violate the substantive due process or equal protection rights of a cemetery owner that was sued by the Board after it learned that the owner was selling preneed caskets without a license. N.C. Bd. of Mortuary Sci. v. Crown Mem'l Park, L.L.C., 162 N.C. App. 316, 590 S.E.2d 467, 2004 N.C. App. LEXIS 113, appeal dismissed, 358 N.C. 235, 595 S.E.2d 154 (2004).

§ 90-210.68. Licensee's books and records; notice of transfers, assignments and terminations.

(a) Every preneed licensee shall keep for examination by the Board accurate accounts, books, and records in this State of all preneed funeral contract and prearrangement insurance policy transactions, copies of all agreements, insurance policies, instruments of assignment, the dates and amounts of payments made and accepted thereon, the names and addresses of the contracting parties, the persons for whose benefit funds are accepted, and the names of the financial institutions holding preneed funeral trust funds and insurance companies issuing prearrangement insurance policies. The Board, its inspectors appointed pursuant to G.S. 90-210.24 and its examiners, which the Board may appoint to assist in the enforcement of this Article, may during normal hours of operation and periods shortly before or after normal hours of operation, investigate the books, records, and accounts of any licensee under this Article with respect to trust funds, preneed funeral contracts, and prearrangement insurance policies. Any preneed licensee who, upon inspection, fails to meet the requirements of this subsection or who fails to keep an appointment for an inspection shall pay a reinspection fee to the Board in an amount not to exceed one hundred dollars ($100.00). The Board may require the attendance of and examine under oath all persons whose testimony it may require. Every preneed licensee shall submit a written report to the Board, at least annually, in a manner and with such content as established by the Board, of its preneed funeral contract sales and performance of such contracts. The Board may also require other reports.

(b) A preneed licensee may transfer preneed funds held by it as trustee from the financial institution which is a party to a preneed funeral contract to a substitute financial institution that is not a party to the contract. Within 10 days after the transfer, the preneed licensee shall notify the Board, in writing, of the name and address of the transferee financial institution. Before the transfer may be made, the transferee financial institution shall agree to make disclosures required under the preneed funeral contract to the Board or its inspectors or examiners. If the contract is revocable, the licensee shall notify the contracting party of the intended transfer.

(c) If any preneed licensee transfers or assigns its assets or stock to a successor funeral establishment or terminates its business as a funeral establishment, the preneed licensee and assignee shall notify the Board at least 15 days prior to the effective date of the transfer, assignment or termination: provided, however, the successor funeral establishment must be a preneed licensee or shall be required to apply for and be granted such license by the Board before accepting any preneed funeral contracts, whether funded by trust deposits or preneed insurance policies. Provided further, a successor funeral establishment shall be liable to the preneed funeral contract purchasers for the amount of contract payments retained by the assigning or transferring funeral home pursuant to G.S. 90-210.61(a)(2).

(d) Financial institutions that accept preneed funeral trust funds and insurance companies that issue prearrangement insurance policies shall, upon request by the Board or its inspectors or examiners, disclose any information regarding preneed funeral trust accounts held or prearrangement insurance policies issued by it for a preneed licensee.

Financial institutions that accept preneed funeral trust funds and insurance companies that assign policy proceeds or designate a preneed funeral establishment as beneficiary shall also forward an account balance to the contracting preneed funeral establishment at the end of each calendar year.

(d1) When a preneed funeral establishment license lapses or is terminated for any reason, the preneed licensee shall immediately divest of all the unperformed preneed funeral contracts and shall transfer them and any amounts retained under G.S. 90-210.61(a)(2) to another preneed funeral establishment licensee pursuant to the procedures of subsection (e) of this section.

(e) In the event that any preneed licensee is unable or unwilling or is for any reason relieved of its responsibility to perform as trustee or to perform any preneed funeral contract, the Board shall order the contract and any amounts retained pursuant to G.S. 90-210.61(a)(2) to be assigned to a substitute preneed licensee provided that neither the substitute preneed licensee or preneed contract purchaser, or after the death of the preneed contract purchaser, the preneed contract beneficiary or his or her legal representative, shall be obligated to perform the agreement without executing a new preneed funeral contract. Any lapse or transfer of a preneed contract pursuant to this section shall not be grounds to revoke an irrevocable preneed funeral contract.

(f) The substitute preneed licensee under subsections (d1) and (e) of this section shall be liable to the preneed funeral contract purchasers for the amount of contract payments that had been retained by, and that the substitute preneed licensee has received from, the assigning preneed licensee. (1969, c. 187, s. 6; 1983, c. 657, ss. 4, 5; 1985, c. 12, s. 1; 1991 (Reg. Sess., 1992), c. 901, s. 2; 1993, c. 164, s. 3; 1997-399, s. 28; 2007-531, ss. 13, 14.)

Effect of Amendments. — Session Laws 2007-531, ss. 13 - 14, effective August 31, 2007, in subsection (d) added the second paragraph; and rewrote subsection (e).

CASE NOTES

Cited in N.C. Bd. of Mortuary Sci. v. Crown Mem'l Park, L.L.C., 162 N.C. App. 316, 590 S.E.2d 467, 2004 N.C. App. LEXIS 113, appeal dismissed, 358 N.C. 235, 595 S.E.2d 154 (2004).

§ 90-210.69. Rulemaking; enforcement of Article; judicial review; determination of penalty amount.

(a) The Board is authorized to adopt rules for the carrying out and enforcement of the provisions of this Article. The Board may perform such other acts and exercise such other powers and duties as are authorized by this Article and by Article 13A of this Chapter to carry out its powers and duties.

(b) The Board may administer oaths and issue subpoenas requiring the attendance of persons and the production of papers and records in any investigation conducted by it. Members of the Board's staff or the sheriff or other appropriate official of any county of this State shall serve all notices, subpoenas and other papers given to them by the Board for service in the same manner as process issued by any court of record. Any person who does not obey a subpoena issued by the Board shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined or imprisoned in the discretion of the court.

(c) In accordance with the provisions of Chapter 150B of the General Statutes, if the Board finds that a licensee, an applicant for a license or an applicant for license renewal is guilty of one or more of the following, the Board may refuse to issue or renew a license or may suspend or revoke a license or place the holder thereof on probation upon conditions set by the Board, with revocation upon failure to comply with the conditions:

(1) Offering to engage or engaging in activities for which a license is required under this Article but without having obtained such a license.
(2) Aiding or abetting an unlicensed person, firm, partnership, association, corporation or other entity to offer to engage or engage in such activities.
(3) A crime involving fraud or moral turpitude by conviction thereof.
(4) Fraud or misrepresentation in obtaining or receiving a license or in preneed funeral planning.
(5) False or misleading advertising.
(6) Violating or cooperating with others to violate any provision of this Article, the rules and regulations of the Board, or the standards set forth in Funeral Industry Practices, 16 C.F.R. 453 (1984), as amended from time to time.

(7) Denial, suspension, or revocation of an occupational or business license by another jurisdiction.

In any case in which the Board is authorized to take any of the actions permitted under this subsection, the Board may instead accept an offer in compromise of the charges whereby the accused shall pay to the Board a penalty of not more than five thousand dollars ($5,000). In any case in which the Board is entitled to place a licensee on a term of probation, the Board may also impose a penalty of not more than five thousand dollars ($5,000) in conjunction with such probation.

(d) Any proceedings pertaining to or actions against a funeral establishment under this Article may be in addition to any proceedings or actions permitted by G.S. 90-210.25(d)(4). Any proceedings pertaining to or actions against a person licensed for funeral directing or funeral service may be in addition to any proceedings or actions permitted by G.S. 90-210.25 (e)(1) and (2).

(e) Judicial review shall be pursuant to Article 4 of Chapter 150B of the General Statutes.

(f) In determining the amount of any penalty imposed or assessed under Article 13 of Chapter 90 of the General Statutes, the Board shall consider:

(1) The degree and extent of harm to the public health, safety, and welfare, or to property, or the potential for harm.

(2) The duration and gravity of the violation.

(3) Whether the violation was committed willfully or intentionally or reflects a continuing pattern.

(4) Whether the violation involved elements of fraud or deception either to the public or to the Board, or both.

(5) The violator's prior disciplinary record with the Board.

(6) Whether and the extent to which the violator profited by the violation. (1969, c. 187, s. 7; 1983, c. 657, s. 4; 1985, c. 12, s. 1; 1991 (Reg. Sess., 1992), c. 901, s. 2; 1997-399, ss. 29, 30; 2001-294, s. 11; 2004-203, s. 7; 2007-531, s. 15.)

Effect of Amendments. — Session Laws 2007-531, s. 15, effective August 31, 2007, added subdivision (c)(7).

§ 90-210.70. Penalties.

(a) Anyone who embezzles or who fraudulently, or knowingly and willfully misapplies, or in any manner converts preneed funeral funds to his own use, or for the use of any partnership, corporation, association, or entity for any purpose other than as authorized by this Article; or anyone who takes, makes away with or secretes, with intent to embezzle or fraudulently or knowingly and willfully misapply or in any manner convert preneed funeral funds for his own use or the use of any other person for any purpose other than as authorized by this Article shall be guilty of a felony. If the value of the preneed funeral funds is one hundred thousand dollars ($100,000) or more, violation of this section is a Class C felony. If the value of the preneed funeral funds is less than one hundred thousand dollars ($100,000), violation of this section is a Class H felony. Each such embezzlement, conversion, or misapplication shall constitute a separate offense and may be prosecuted individually. Upon conviction, all licenses issued under this Article shall be revoked.

(b) Any person who willfully violates any other provision of this Article shall be guilty of a Class 1 misdemeanor. Each such violation shall constitute a separate offense and may be prosecuted individually.

(c) If a corporation or limited liability company embezzles or fraudulently or knowingly and willfully misapplies or converts preneed funeral funds as provided in subsection (a) hereof or otherwise violates any provision of this

Article, the officers, directors, members, agents, or employees responsible for committing the offense shall be fined or imprisoned as herein provided.

(d) The Board shall have the power to investigate violations of this section and shall deliver all evidence of violations of subsection (a) of this section to the district attorney in the county where the offense occurred. The Board shall, with the fees collected under this Article, employ legal counsel and other staff to monitor preneed trusts, investigate complaints, audit preneed trusts, and be responsible for delivering evidences to the district attorney when there is evidence that a felony has been committed by a licensee. The record of complaints, auditing, and enforcement shall be presented in an annual report from the Board to the General Assembly.

(e) Whenever it shall appear to the Board that any person, firm, or corporation has violated, threatens to violate, or is violating any provisions of this Article, the Board may apply to the courts of the State for a restraining order and injunction to restrain these practices. If upon application the court finds that any provision of this Article is being violated, or a violation is threatened, the court shall issue an order restraining and enjoining the violations, and this relief may be granted regardless of whether criminal prosecution is instituted under the provisions of this subsection. The venue for actions brought under this subsection shall be the superior court of any county in which the acts are alleged to have been committed or in the county where the defendant in the action resides. (1969, c. 187, s. 8; 1985, c. 12, s. 1; 1991 (Reg. Sess., 1992), c. 901, s. 2; 1993 (Reg. Sess., 1994), c. 767, s. 28; 1997-399, ss. 31, 32; 1997-443, s. 19.25(o); 2003-420, s. 15.)

§ 90-210.71. Nonregulation of insurance sales.

The provisions of this Article do not regulate the issuance and sale of insurance policies, but apply only to the underlying preneed funeral contracts. (1991 (Reg. Sess., 1992), c. 901, s. 2.)

§ 90-210.72. Nonapplication to certain funeral contracts.

This Article does not apply to contracts for funeral services or merchandise sold as preneed burial insurance policies pursuant to Part 13 of Article 10 of Chapter 143B of the North Carolina General Statutes or to replacements or conversions of such policies pursuant to G.S. 90-210.106. (1991 (Reg. Sess., 1992), c. 901, s. 2.)

§ 90-210.73. Not public record.

The names and addresses of the purchasers and beneficiaries of preneed funeral contracts filed with the Board shall not be subject to Chapter 132 of the General Statutes. (1997-399, s. 33.)

§§ 90-210.74 through 90-210.79: Reserved for future codification purposes.

ARTICLE 13E.

Mutual Burial Associations.

§ 90-210.80. Duties of Board; meetings.

It shall be the duty of the North Carolina Board of Funeral Service to supervise, pursuant to this Article, all burial associations authorized by this

Article to operate in North Carolina, to determine that such associations are operated in conformity with this Article and the rules adopted pursuant to this Article; to prosecute violations of this Article or rules adopted pursuant thereto; and to protect the interest of members of mutual burial associations.

The North Carolina Board of Funeral Service, after a public hearing, may promulgate reasonable rules and regulations for the enforcement of this Article and in order to carry out the intent thereof. The Board is authorized and directed to adopt specific rules to provide for the orderly transfer of a member's benefits in cash or merchandise and services from the funeral director sponsoring the member's association to the funeral establishment which furnishes a funeral service, or merchandise, or both, for the burial of the member, provided that any funeral establishment to which the member's benefits are transferred in accordance with such rules shall, if located in North Carolina, be a funeral establishment registered and permitted under the provisions of G.S. 90-210.25 or shall, if located in any other state, territory or foreign country, be a funeral establishment recognized by and operating in conformity with the laws of such other state, territory or foreign country. One or more burial associations operating in North Carolina may merge into another burial association operating in North Carolina and two or more burial associations operating in North Carolina may consolidate into a new burial association provided that any such plan of merger or plan of consolidation shall be adopted and carried out in accordance with rules adopted by the Board pursuant to this Article.

All rules heretofore adopted by the North Carolina Mutual Burial Association Commission or the North Carolina Board of Funeral Service in accordance with prior law and which have not been amended, rescinded, revoked or otherwise changed, or which have not been nullified or made inoperative or unenforceable because of any statute enacted after the adoption of any such rule, shall remain in full force and effect until amended, rescinded, revoked or otherwise changed by action of the North Carolina Board of Funeral Service as set out above, or until nullified or made inoperative or unenforceable because of statutory enactment or court decision.

Members of the Board shall receive, when attending such regular or special meetings such per diem, expense allowance and travel allowance as are allowed other commissions and boards of the State. The legal adviser to the Board shall be entitled to actual expenses when attending regular or special meetings of the Board held other than in Raleigh. All expenses of the Board shall be paid from funds coming to the Board pursuant to this Article or appropriated for this purpose. (1967, c. 1197, s. 2; 1971, c. 1151; 1973, c. 1147, s. 1; 1975, c. 837; 1987, c. 864, s. 12; 1997-313, ss. 3, 5; 1999-425, s. 1; 2003-420, ss. 1, 17(b).)

Editor's Note. — This section was formerly G.S. 58-241.8. It was recodified as G.S. 143B-472.2 by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

Session Laws 2003-420, s. 17(b), recodified former G.S. 143B-472.2 through 143B-472.29 as present G.S. 90-210.80 through 90-210.107 in Article 13E of Chapter 90. The Revisor of Statutes is authorized to make changes to statutory cross-references that will reflect the results of the codification. Historical citations and case annotations to sections in former G.S. 143B-472.2 through 143B-472.29 have been added to corresponding sections in new Article 13E as recodified.

CASE NOTES

Editor's Note. — *The cases below were decided under former G.S. 143B-472.2.*

Modification Permitting Selection of Funeral Director by Decedent's Representatives. — Modification in statute and regulations which would permit the selection of a funeral director by representatives of decedent was a reasonable change and would seem to be within the general purpose for which the association was formed. Present-day society is so mobile that provisions which will facilitate transfer of benefits would appear to be in the public interest. Adair v. Orrell's Mut. Burial Ass'n, 19 N.C. App. 492, 199 S.E.2d 129 (1973), aff'd, 284 N.C. 534, 201 S.E.2d 905, appeal dismissed, 417 U.S. 927, 94 S. Ct. 2637, 41 L. Ed. 2d 231 (1974), decided under former § 58-224.2.

§ 90-210.81. Requirements as to rules and bylaws.

All burial associations now operating within the State of North Carolina shall have and maintain rules and bylaws embodying the following:

Article 1. The name of this association shall be ____________, which shall indicate that said association is a mutual burial association.

Article 2. The objects and purposes for which this association is formed and the purposes for which it has been organized, and the methods and plan of operation of this association shall be to provide a plan for each member of this association for the payment of one funeral benefit for each member, which shall consist of a funeral benefit in cash or merchandise and service, with no free embalming or free ambulance service included in this benefit. No other free service or any other thing free shall be held out, promised or furnished, in any case. Such funeral benefit shall be in the amount of one hundred dollars ($100.00) of cash or merchandise and service, without free embalming or free ambulance service, for persons of the age of 10 years and over, or in the amount of fifty dollars ($50.00) for persons under the age of 10 years; provided, however, that any member of this association of the age of 10 years or more may purchase a double benefit (for a total benefit of two hundred dollars ($200.00)), and provided further, however, that any member of this association under the age of 10 years may purchase a double benefit (for a total benefit of one hundred dollars ($100.00)) or a quadruple benefit (for a total benefit of two hundred dollars ($200.00)); however, any additional benefit (as set out herein) shall be based on the assessment rate, as provided in Article 6 of this section, at the attained age of applicant at the time the additional benefit takes effect. The purchase of an additional benefit shall not be available to any member who cannot fulfill the requirements as set forth in Article 3 of this section.

Provided, further, that mutual burial associations organized and operating pursuant to this Article may offer for sale to its members in good standing, funeral benefits payable only in cash in excess of two hundred dollars ($200.00), but those sales shall be subject to all applicable insurance laws of this State and shall in no manner be subject to the provisions of this Article or impair whatsoever funds heretofore or hereafter collected and held by that Association pursuant to this Article. All mutual burial association policies heretofore or hereafter sold in this State in an amount of two hundred dollars ($200.00) or less shall continue to be administered by the Board of Funeral Service and shall be subject to all provisions of this Article.

Article 3. Any person who has passed his or her first birthday, and who has not passed his or her sixty-fifth birthday, and who is in good health and not under treatment of any physician, nor confined in any institution for the treatment of mental or other disease, may become a member of this burial association by the payment by such person, or for such person, of a membership fee in accordance with the provisions of this Article and the first assessment due on the membership issued for such member in accordance with the provisions of Article 6 herein. The membership fee for any person joining prior to July 1, 1975, is twenty-five cents (25¢). The membership fee of any person joining after July 1, 1975, is twenty-five cents (25¢) for each one hundred dollars ($100.00) of benefits provided in such membership, with a minimum membership fee of twenty-five cents (25¢). The payment of the membership fee, without the payment of the first quarterly assessment due on the membership, shall not authorize the issuance of a certificate of membership,

ship in this burial association, and a certificate of membership for such person shall not be issued until the first such assessment is paid. Any member of this association joining after July 1, 1975, and who shall thereafter purchase an increased benefit shall pay an additional membership fee in accordance with this Article so that the total membership fee paid by such person shall equal twenty-five [cents] (25¢) for each one hundred dollars ($100.00) of benefits in such member's membership; provided, that any member with a fifty-dollar ($50.00) benefit who increases his benefit from fifty dollars ($50.00) to one hundred dollars ($100.00) shall not be required to pay any additional membership fee. The payment of any additional membership fee, without the payment of the first additional assessment due for the increased benefit, shall not make such member eligible for any additional benefit, and such member shall not be eligible for any additional benefit until the first such additional assessment due for such additional benefit is paid. Notwithstanding the foregoing, the provisions of the last paragraph of Article 6, hereinafter set out, shall control the increase of benefits from fifty dollars ($50.00) to one hundred dollars ($100.00) for any member of this association joining under the age of 10 whose benefits in force upon such member attaining his or her tenth birthday are in the amount of fifty dollars ($50.00).

Applicant's birthday must be written in the application and subject to verification by any record the Board of Funeral Service may deem necessary to prove or establish a true date of the birth of any applicant.

Article 4. The annual meeting of the association shall be held at ________ (here insert the place, date and hour); each member shall have one vote at said annual meeting and 15 members of the association shall constitute a quorum. There shall be elected at the annual meeting of said association a board of directors of seven members, each of whom shall serve for a period of from one to five years as the membership may determine and until his or her successor shall have been elected and qualified. Any member of the board of directors who shall fail to maintain his or her membership, as provided in the rules and bylaws of said association, shall cease to be a member of the board of directors and a director shall be appointed by the president of said association for the unexpired term of such disqualified member. There shall be at least an annual meeting of the board of directors, and such meeting shall be held immediately following the annual meeting of the membership of the association. The directors of the association may, by a majority vote, hold other meetings of which notice shall be given to each member by mailing such notice five days before the meeting to be held. At the annual meetings of the directors of the association, the board of directors shall elect a president, a vice-president, and a secretary-treasurer. The president and vice-president shall be elected from among the directors, but the secretary-treasurer may be selected from the director membership or from the membership of the association, it being provided that it is not necessary that the secretary-treasurer shall be a member of the board of directors. Among other duties that the secretary-treasurer may perform, he shall be chargeable with keeping an accurate and faithful roll of the membership of this association at all times and he shall be chargeable with the duty of faithfully preserving and faithfully applying all moneys coming into his hands by virtue of his said office. The president, vice-president and secretary-treasurer shall constitute a board of control who shall direct the affairs of the association in accordance with these Articles and bylaws of the association, and subject to such modification as may be made or authorized by an act of the General Assembly. The secretary-treasurer shall keep a record of all assessments made, dues collected and benefits paid. The books of the association, together with all records and bank accounts shall be at all times open to the inspection of the Board of Funeral Service or its duly constituted auditors or representatives. It shall be the duty of the secretary or secretary-treasurer of each association to keep the books of the association posted up-to-date so that the financial standing of the association may be readily ascertained by the Board of Funeral Service or any auditor or representative employed by it. Upon the failure of any secretary or secretary-treasurer to comply with this provision, it shall be the duty of the Board of Funeral Service to take charge of the books of the association and do whatever work is necessary to bring the books up-to-date. The actual costs of said work may be charged the burial association and shall be paid from the thirty percent (30%) allowed by law for the operation of the burial association.

Whenever in the opinion of the Board of Funeral Service, it is necessary to audit the books of any burial association more than once in any calendar year, the Board of Funeral Service shall have authority to assess such burial association the actual cost of any audit in excess of one per calendar year, provided that no more than one audit may be deemed necessary unless a discrepancy exists at the last regular audit. Such cost shall be paid from the thirty percent (30%) allowed by law for the operation of the burial association.

Every burial association shall file with the Board of Funeral Service an annual report of its financial condition on a form furnished to it by the Board of Funeral Service. Such report shall be filed on or before February 15 of each calendar year and shall cover the complete financial condition of the burial association for the immediate preceding calendar year. The Board of Funeral Service shall levy and collect a penalty of twenty-five dollars ($25.00) for each day after February 15 that the report called for herein is not filed. The Board may, in its discretion, grant any reasonable extension of the above filing date without the penalty provided in this section. Such penalty shall be paid from the thirty percent (30%) allowed by law for the operation of the burial association. Any secretary or secretary-treasurer who fails to file such financial report on or before February 15 of each calendar year or on or before the last day of any period of extension for the filing of such report granted by the Board to the burial association of such secretary or secretary-treasurer shall be guilty of a Class 3 misdemeanor. Each day after February 15, or the last day of any period of extension for the filing of the report granted by the Board to the burial association of such secretary or secretary-treasurer, that said report is not filed by the secretary or secretary-treasurer of a burial association, shall constitute a separate offense.

Article 5. Upon the death of any officer, his successor shall be elected by the board of directors for the unexpired term. The president, vice-president and secretary-treasurer shall be elected for a term of from one to five years, and shall hold office until his successor is elected and qualified, subject to the power of the board of directors to remove any officer for good cause shown; provided, that any officer removed by the board of directors shall have the right of appeal to the membership of the association, such appeal to be heard at the next ensuing annual meeting of said membership.

Article 6. Each member shall be assessed according to the following schedule for the benefit indicated (or in multiples thereof for additional benefit) at the age of entry of the member.

Assessment Rate for Age Groups:

First to tenth birthday ($50.00) benefit	five cents (5¢)
Tenth to thirtieth birthday ($100.00) benefit	ten cents (10¢)
Thirtieth to fiftieth birthday ($100.00) benefit	twenty cents (20¢)
Fiftieth to sixty-fifth birthday ($100.00) benefit	thirty cents (30¢)

(Ages shall be defined as having passed a certain birthday instead of nearest birthday.) Assessment shall always be made on the entire membership in good standing.

Any member joining under the age of 10 shall, upon attaining his or her tenth birthday, pay thereafter the assessment for a member age 10 as set out above.

Any member joining under the age of 10 whose benefits in force upon such member attaining his or her tenth birthday are in the amount of fifty dollars ($50.00) shall, if such member is in good standing upon attaining his or her tenth birthday, thereafter have benefits in force in the amount of one hundred dollars ($100.00) without the necessity of making application for such increased benefit. Assessments made thereafter for such member shall be the same as an assessment for a member age 10 as set out above. Such one-hundred-dollar ($100.00) benefit shall be in full force and effect for any such member in good standing immediately upon such member attaining his or her tenth birthday even though the increased assessment provided for herein shall not yet be due and payable, it being the intent of this Article that, notwithstanding any other provisions in these Articles, any member in good standing with a fifty-dollar ($50.00) benefit shall immediately upon attainment of his or her tenth birthday have a one-hundred-dollar ($100.00) benefit in force whether or not the increased assessment is then due and payable by such member in accordance with the assessment period of this association.

Article 7. No benefit will be paid for natural death occurring within 30 days from the date of the certificate of membership, which certificate shall express the true date such person becomes a member of this association, and the certificate issued shall be in acknowledgment of membership in this association. Benefits will be paid for death caused by accidental means occurring any time after date of membership certificate. No benefits will be paid in case of suicidal death of any member within one year from the date of the membership certificate. No agent or other person shall have authority to issue membership certificates in the field, but such membership certificates shall be issued at the home office of the association by duly authorized officers: the president, vice-president or secretary, and a record thereof duly made.

Article 8. Any member failing to pay any assessment within 30 days after notice shall be in bad standing, and unless and until restored, shall not be entitled to benefits. Notice shall be presumed duly given when mailed, postage paid, to the last known address of such members: Provided, moreover, that notice to the head of a family shall be construed as notice to the entire membership of such family in said association. Any member or head of a family changing his or her address shall give notice to the secretary-treasurer in writing of such change, giving the old address as well as the new, and the head of a family notifying the secretary-treasurer of change in address shall list with the secretary in such notice all the members of his or her family having membership in said association. Any member in bad standing may, within 90 days after the date of an assessment notice, be reinstated to good standing by the payment of all delinquent dues and assessments: Provided such person shall at the same time submit to the secretary-treasurer satisfactory evidence of good health, in writing, and no benefit will be paid for natural death occurring within 30 days after reinstatement. In case of death caused by accidental means, benefit will be in force immediately after reinstatement. Any person desiring to discontinue his membership for any reason shall communicate such desire to the secretary-treasurer immediately and surrender his or her certificate of membership. Any adult member who is the head of a family and who, with his family, has become in bad standing, shall furnish to the secretary-treasurer satisfactory evidence of the good health of each member desired to be reinstated in writing.

Article 9. The benefits herein provided are for the purpose of furnishing a funeral and burial benefit, in cash or merchandise and service, for a deceased member. The funeral and burial benefit, if furnished in merchandise and service, shall be in keeping with and similar to the merchandise and service sold and furnished at the same price by reputable funeral directors of this or other like communities.

Article 10. It is understood and stipulated that the benefits provided for shall be payable only to a funeral establishment which provides a funeral service for a deceased member and which, if located in North Carolina, is a funeral establishment registered under the provisions of G.S. 90-210.25 or which, if located in any other state, territory or foreign country, is a funeral establishment recognized by and operating in conformity with the laws of such other state, territory or foreign country. Upon the death of any member, it shall be the duty of the person or persons making the funeral arrangements for such deceased member to notify the secretary of the member's burial association of the death of such member. The person or persons making the funeral arrangements for such deceased member shall have 30 days from the date of the death of such member in which to make demand upon the burial association for the funeral benefits to which such member is entitled.

The benefits provided for are to be paid by the burial association to the funeral director providing such funeral and burial service either in cash or in merchandise and service as elected by the person or persons making the funeral arrangements for such deceased member. If the burial association shall fail, on demand, to provide the benefits to which the deceased member was entitled to the funeral establishment which provided the funeral service for the deceased member, then the benefits shall be paid in cash to the representative of the deceased member qualified under law to receive such benefits.

Article 11. Assessments shall be made as provided in G.S. 90-210.96. Whenever possible, assessments will be made at definitely stated intervals so as to reduce the cost of collection and to prevent lapse.

Article 12. In the event the proceeds of the annual assessments imposed on the entire membership for one year, as provided in G.S. 90-210.96, do not prove sufficient at any time to yield the benefit provided for in these bylaws, then the secretary-treasurer shall notify the Board of Funeral Service who shall be authorized, unless the membership is increased to that point where such assessments are sufficient, to cause liquidation of said association, and may transfer all members in good standing to a like organization or association.

Article 13. (a) All legitimate operating expenses of the association shall be paid out of the assessments, but in no case shall the entire expenses exceed thirty percent (30%) of the total of the assessments collected and the investment income of the burial association in one calendar year.

(b) Each burial association shall establish and maintain a reserve account for the payment of member's benefits. On the thirty-first day of December following July 1, 1975, each burial association shall transfer to such burial association's reserve account established in accordance with this Article all funds which such burial association is maintaining on that date in an account designated by such burial association as either a surplus account or a reserve account. Thereafter, beginning on January 1, 1976, each burial association shall place in such reserve account five percent (5%) of the assessments collected from and after that date and five percent (5%) of the investment income of the association earned from and after that date. These sums shall continue to be placed in the association's reserve account until the association's reserve account shall equal twenty-one dollars ($21.00) per member. Thereafter if the reserve account shall fall below twenty-one dollars ($21.00) per member, such sums shall again be deposited in the account until such time as the reserve account shall again be equal to twenty-one dollars ($21.00) per member. If the reserve account shall at any time exceed twenty-one dollars ($21.00) per member, amounts in excess of twenty-one dollars ($21.00) per member may be withdrawn from the reserve account.

Article 14. Special meetings of the association membership may be called by the secretary-treasurer when by him deemed necessary or advisable, and he shall call a meeting when petitioned to do so by sixty-six and two-thirds percent (66⅔%) of the members of said association who are in good standing.

Article 15. The secretary-treasurer shall, upon satisfactory evidence that membership was granted to any person not qualified at the time of entry as provided under Article 3 of these bylaws, refund any amounts paid as assessment, and shall remove the name from the membership roll.

Article 16. Any member may pay any number of assessments in advance, in which case such member will not be further assessed until a like number of assessments shall have been levied against the remaining membership.

Article 17. No person may maintain active membership in two or more separate burial associations. Any person who is found to have membership in two or more separate burial associations shall forfeit all benefits and fees paid in all associations of which he is a member except in the association which he first joined and of which he is still then a member. A person is not a member of an association for purposes of this Article if he has discontinued his membership in such association or if such association has been placed in liquidation.

Article 18. Each year, before the annual meeting of the membership of this association, the association shall cause to be published in a newspaper of general circulation in the county in which such association has its principal place of business, or shall cause to be mailed to each member in good standing a statement showing total income collected, expenses paid and burial benefits provided for by such association during the next preceding year.

Article 19. These rules and bylaws shall not be modified, canceled or abridged by any association or other authority except by act of the General Assembly of North Carolina. (1941, c. 130, s. 4; 1943, c. 272, ss. 1, 2; 1945, c. 125, s. 1; 1947, c. 100, s. 1; 1949, c. 201, ss. 1, 2; 1953, c. 1201; 1955, c. 259, ss. 3, 4; 1967, c. 1197, s. 4; 1969, c. 1041, ss. 2, 3; 1973, c. 688; 1975, c. 837; 1977, c. 748, ss. 1, 2, 6; 1981, c. 989, s. 4; 1987, c. 864, ss. 12, 50; 1991, c. 62, s. 1; 1991 (Reg. Sess., 1992), c. 1007, s. 39; 1993, c. 539, s. 1042; c. 553, ss. 48, 49; 1994, Ex. Sess., c. 24, s. 14(c); 1997-313, ss. 4-6; 1999-425, s. 2; 2003-420, ss. 1, 17(b).)

Editor's Note. — This section was formerly G.S. 58-241.9. It was recodified as G.S. 143B-472.3 by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

Session Laws 2003-420, ss. 1 and 17(b), effective October 1, 2003, recodified former G.S. 143B-472.3 as this section; and substituted "Board of Funeral Service" for "Board of Mortuary Science" wherever that term appeared.

CASE NOTES

Editor's Note. — *The cases below were decided under former G.S. 143B-472.3.*

The General Assembly may reserve the right to amend bylaws and regulations of a mutual burial association which it created so as to bind the association and its members. Adair v. Orrell's Mut. Burial Ass'n, 284 N.C. 534, 201 S.E.2d 905, appeal dismissed, 417 U.S. 927, 94 S. Ct. 637, 41 L. Ed. 2d 231 (1974), decided under former § 58-226.

Members are bound by subsequent legislation making changes in the rules and bylaws of burial associations, and changes so made are not offensive to the constitutional provision against the passage of a law which impairs the obligation of a contract. Spearman v. United Mut. Burial Ass'n, 225 N.C. 185, 33 S.E.2d 895 (1945), decided under former § 58-226.

And Statutory Changes Subsequent to Issuance of Certificate Did Not Impair Contract. — Where the provisions of former G.S. 58-226 and the certificate issued to the member by her burial association contained an express reservation of power by the General Assembly to modify, cancel, or abridge the rules and bylaws of the association, this was ample notice to both of the reservation of power by the General Assembly, and the statutory changes subsequent to the issuance of the certificate did not result in impairment of the contract in violation of Art. I, § 10, clause 1, of the United States Constitution. Adair v. Orrell's Mut. Burial Ass'n, 284 N.C. 534, 201 S.E.2d 905, appeal dismissed, 417 U.S. 927, 94 S. Ct. 637, 41 L. Ed. 2d 231 (1974), decided under former § 58-226.

Payment of Benefits to Funeral Director of Another Association Who Renders Services. — When funeral services are provided by a funeral director of any mutual burial association in good standing in North Carolina for a decedent who was a member of another such association, the benefits of the decedent are not forfeited, but are required to be paid in cash to the funeral director who actually renders the services. Adair v. Orrell's Mut. Burial Ass'n, 19 N.C. App. 492, 199 S.E.2d 129 (1973), aff'd, 284 N.C. 534, 201 S.E.2d 905, appeal dismissed, 417 U.S. 927, 94 S. Ct. 637, 41 L. Ed. 2d 231 (1974), decided under former § 58-226.

§ 90-210.82. Limitation of soliciting agents; licensing and qualifications; officers exempt from license; issuance of membership certificates.

Each burial association shall have for each funeral home sponsoring the said burial association not more than five agents or representatives soliciting members other than the secretary-treasurer and president, and before any agent or representative shall or may represent any burial association in North Carolina, he or she shall first apply to the Board of Funeral Service for a license, and the Board of Funeral Service shall have full power and authority to issue such license upon proof satisfactory to such Board that such person is capable of soliciting burial association memberships, is of good moral character and recommended by the association in behalf of which such membership solicitations are to be made. The Board of Funeral Service may reject the application of any person who does not meet the requirements as to capacity and moral fitness. The Board of Funeral Service may, upon proof satisfactory to it that said licensed agent has violated any section of this law, revoke said license. Upon the issuing of a license to solicit membership in any burial association, such person shall be required to pay in cash, at the time of issuing license to such applicant, to the Board of Funeral Service, the sum of five dollars ($5.00); moneys derived from this fee or charge, are to be and remain in the department or office of such Board of Funeral Service, for supervision of burial associations in this State, subject to withdrawal for expenses of supervision by authority of the Board of Funeral Service. It shall not be necessary that the president or secretary-treasurer of any burial association obtain a license for soliciting membership in the association of which such person is president or secretary-treasurer. Membership certificates shall not be issued by a solicitor in the field, but shall be reported to the office of the association and there issued and a record made of such issuance at the time such certificate is so issued. (1941, c. 130, s. 5; 1945, c. 125, s. 2; 1947, c. 100, s. 2; 1949, c. 201, s. 3; 1975, c. 837; 1987, c. 864, s. 12; 1997-313, ss. 5, 6, 7; 2003-420, ss. 1, 17(b).)

Editor's Note. — This section was formerly G.S. 58-241.10. It was recodified as G.S. 143B-472.4 by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

Session Laws 2003-420, ss. 1 and 17(b), effective October 1, 2003, recodified former G.S. 143B-472.4 as this section; and substituted "Board of Funeral Service" for "Board of Mortuary Science" wherever that term appeared.

§ 90-210.83. Assessments against associations.

In order to meet the expenses of the supervision of the burial associations, the Board of Funeral Service shall prepare an annual budget for the office of the Board of Funeral Service. Thereafter, the Board of Funeral Service shall assess each burial association one hundred dollars ($100.00) and shall prorate the remaining amount of this budget, over and above any other funds made available to it for this purpose, and assess each association on a pro rata basis in accordance with the number of members of each association. Each burial association shall remit to the Board of Funeral Service its pro rata part of the total assessment, which expense shall be included in the thirty per centum (30%) expense allowance as provided in G.S. 90-210.81. This assessment shall be made on the first day of July of each and every year and said assessment shall be paid within 30 days thereafter. If any association shall fail or refuse to pay such assessment within 30 days, the Board of Funeral Service is authorized to transfer all memberships and assets of every kind and description to the nearest association that is found by the Board of Funeral Service to be in good sound financial condition. (1941, c. 130, s. 6; 1943, c. 272, s. 3; 1945, c. 125, s. 3; 1947, c. 100, s. 3; 1949, c. 201, s. 4; 1951, c. 901, s. 1; 1955, c. 259, ss. 1, 2; 1967, c. 985, s. 1; 1969, c. 1006, s. 2; 1973, c. 1476, s. 1; 1975, c. 837; 1977, c. 748, s. 3; 1981, c. 989, s. 6; 1983, c. 717, s. 12; 1987, c. 864, ss. 12, 14; 1997-313, ss. 5, 6, 7; 2003-420, ss. 16, 17(b).)

Editor's Note. — This section was formerly G.S. 58-241.11. It was recodified as G.S. 143B-472.5 by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

Session Laws 2003-420, ss. 16 and 17(b), effective October 1, 2003, recodified and rewrote former G.S. 143B-472.5 as present G.S. 90-210.83.

§ 90-210.84. Unlawful to operate without written authority of Board.

It shall be unlawful for any person, firm or corporation, association or organization to organize, operate, or in any way solicit members for a burial association, or for participation in any plan, scheme, or device similar to burial associations, without the written authority of the Board of Funeral Service, and any person, firm or corporation violating the provisions of this section shall be guilty of a Class 1 misdemeanor; provided, however, the Board of Funeral Service shall not withhold authority for the organization or operation of a bona fide burial association, meeting the requirements of this Article, unless it shall be found and established to the satisfaction of the Board of Funeral Service that the person or persons applying for authority to organize and operate such bona fide burial association is disqualified or does not meet the requirements of this Article. (1941, c. 130, s. 7; 1975, c. 837; 1987, c. 864, s. 12; 1993, c. 539, s. 1043; 1994, Ex. Sess., c. 24, s. 14(c); 1997-313, s. 5; 2003-420, ss. 1, 17(b).)

Editor's Note. — This section was formerly G.S. 58-241.12. It was recodified as G.S. 143B-472.6 by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

Session Laws 2003-420, ss. 1 and 17(b), effective October 1, 2003, recodified former G.S. 143B-472.6 as this section; and substituted "Board of Funeral Service" for "Board of Mortuary Science" wherever that term appeared.

§ 90-210.85. Revocation of license.

In the event it is proven to the satisfaction of the Board of Funeral Service that any burial association is being operated not in conformity with any provision of this Article, then it shall become the duty of the Board of Funeral Service upon hearing to revoke the license of said burial association and transfer said burial association, its membership and all its assets of every kind and description to another burial association that is found by the Board of Funeral Service to be in good sound financial condition; provided, that if said burial association gives notice of appeal as provided for in G.S. 90-210.94, then said burial association may continue to operate as before the revocation and until final adjudication. (1945, c. 125, s. 4; 1975, c. 837; 1987, c. 864, ss. 12, 15; 1997-313, s. 5; 2003-420, ss. 1, 17(b).)

Editor's Note. — This section was formerly G.S. 58-241.13. It was recodified as G.S. 143B-472.7 by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

Session Laws 2003-420, ss. 1 and 17(b), effective October 1, 2003, recodified former G.S. 143B-472.7 as this section; and substituted "Board of Funeral Service" for "Board of Mortuary Science" wherever that term appeared.

§ 90-210.86. Deposit or investment of funds of mutual burial associations.

Funds belonging to each mutual burial association over and above the amount determined by the Board of Funeral Service to be necessary for operating capital shall be invested in:

(1) Deposits in any bank or trust company in this State.
(2) Obligations of the United States of America.
(3) Obligations of any agency or instrumentality of the United States of America if the payment of interest and principal of such obligations is fully guaranteed by the United States of America.
(4) Obligations of the State of North Carolina.
(5) Bonds and notes of any North Carolina local government or public authority, subject to such restrictions as the Board of Funeral Service may impose.
(6) Shares of or deposits in any savings and loan association organized under the laws of this State and shares of or deposits in any federal savings and loan association having its principal office in this State, provided that any such savings and loan association is insured by the United States of America or any agency thereof or by any mutual deposit guaranty association authorized by the Commissioner of Insurance of North Carolina to do business in North Carolina pursuant to Article 7A of Chapter 54 of the General Statutes.
(7) Obligations of the Federal Intermediate Credit Banks, the Federal Home Loan Banks, Fannie Mae, the Banks for Cooperatives, and the Federal Land Banks, maturing no later than 18 months after the date of purchase.

Violation of the provisions of this section shall, after hearing, be cause for revocation or suspension of license to operate a mutual burial association. (1957, c. 820, s. 1; 1975, c. 837; 1987, c. 864, s. 12; 1997-313, s. 5; 2001-487, s. 14(l); 2003-420, ss. 1, 17(b).)

Editor's Note. — This section was formerly G.S. 58-241.14. It was recodified as G.S. 143B-472.8 by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

Session Laws 2003-420, ss. 1 and 17(b), effective October 1, 2003, recodified former G.S. 143B-472.8 as this section; and substituted "Board of Funeral Service" for "Board of Mortuary Science" wherever that term appeared.

Article 7A of Chapter 54, referred to in this section, was repealed by Session Laws 1981, c. 282. See now Article 12 of Chapter 54B.

§ 90-210.87. Unclaimed funds of defunct burial association.

All unclaimed funds of any burial association that is no longer in operation shall be disposed of in accordance with Chapter 116B. (1969, c. 1083; 1975, c. 837; 1979, 2nd Sess., c. 1311, s. 7; 1987, c. 864, s. 12; 2003-420, s. 17(b).)

Editor's Note. — This section was formerly G.S. 58-241.15. It was recodified as G.S. 143B-472.9 by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

Session Laws 2003-420, ss. 1 and 17(b), effective October 1, 2003, recodified former G.S. 143B-472.9 as this section.

§ 90-210.88. Penalty for failure to operate in substantial compliance with bylaws.

If any burial association or other organization or official thereof, or any person operates or allows to be operated a burial association on any plan, scheme or bylaws not in substantial compliance with the bylaws set forth in G.S. 90-210.81, the Board of Funeral Service may revoke any authority or license granted for the operation of such burial association, and any person, firm or corporation or association convicted of the violation of this section shall be guilty of a Class 1 misdemeanor. (1941, c. 130, s. 8; 1975, c. 837; 1987, c. 864, ss. 12, 16; 1993, c. 539, s. 1044; 1994, Ex. Sess., c. 24, s. 14(c); 1997-313, s. 5; 2003-420, ss. 1, 17(b).)

Editor's Note. — This section was formerly G.S. 58-241.16. It was recodified as G.S. 143B-472.10 by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

Session Laws 2003-420, ss. 1 and 17(b), effective October 1, 2003, recodified former G.S. 143B-472.10 as this section; and substituted "Board of Funeral Service" for "Board of Mortuary Science" wherever that term appeared.

§ 90-210.89. Penalty for wrongfully inducing person to change membership.

Any burial association official, agent or representative thereof or any person who shall use fraud or make any promise not part of the printed bylaws, or who shall offer any rebate, gratuity or refund to cause a member of one association to change membership to another association, shall be guilty of a Class 1 misdemeanor. (1941, c. 130, s. 9; 1975, c. 837; 1987, c. 864, s. 12; 1993, c. 539, s. 1045; 1994, Ex. Sess., c. 24, s. 14(c); 2003-420, s. 17(b).)

Editor's Note. — This section was formerly G.S. 58-241.17. It was recodified as G.S. 143B-472.11 by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

Session Laws 2003-420, s. 17(b), effective October 1, 2003, recodified former G.S. 143B-472.11 as this section.

§ 90-210.90. Penalty for making false and fraudulent entries.

Any person or burial association official who makes or allows to be made any false entry on the books of the association with intent to deceive or defraud any member thereof, or with intent to conceal from the Board of Funeral Service or its deputy or agent, or any auditor authorized to examine the books of such association, under the supervision of the Board of Funeral Service, shall be guilty of a Class 1 misdemeanor. (1941, c. 130, s. 10; 1945, c. 125, s. 5; 1975, c. 837; 1987, c. 864, s. 12; 1993, c. 539, s. 1046; 1994, Ex. Sess., c. 24, s. 14(c); 1997-313, ss. 5, 6; 2003-420, ss. 1, 17(b).)

Editor's Note. — This section was formerly G.S. 58-241.18. It was recodified as G.S. 143B-472.12 by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

Session Laws 2003-420, ss. 1 and 17(b), effective October 1, 2003, recodified former G.S. 143B-472.12 as this section; and substituted "Board of Funeral Service" for "Board of Mortuary Science" wherever that term appeared.

§ 90-210.91. Accepting applications without collecting fee and first assessment.

Any burial association official, agent or representative, or any other person who shall accept any application for membership in any association without collecting the membership fee and first assessment due thereon from any such person making such an application for membership, shall be guilty of a Class 1 misdemeanor.

Any burial association official, agent or representative, or any other person who shall accept an application for an additional benefit from a member of a burial association without collecting the additional membership fee and the additional assessment due thereon from any such person making such an application for an additional benefit shall be guilty of a Class 1 misdemeanor. (1941, c. 130, s. 11; 1975, c. 837; 1987, c. 864, s. 12; 1993, c. 539, s. 1047; 1994, Ex. Sess., c. 24, s. 14(c); 2003-420, s. 17(b).)

Editor's Note. — This section was formerly G.S. 58-241.19. It was recodified as G.S. 143B-472.13 by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

Session Laws 2003-420, s. 17(b), effective October 1, 2003, recodified former G.S. 143B-472.13 as this section.

§ 90-210.92. Removal of secretary-treasurer for failure to maintain proper records.

Any burial association secretary-treasurer who fails to maintain records to the minimum standards required by the Board of Funeral Service shall be by such Board removed from office and another elected in his stead, such election to be immediate and by the board of directors of said burial association upon notice of such removal. (1941, c. 130, s. 12; 1975, c. 837; 1987, c. 864, s. 12; 1997-313, s. 5; 2003-420, ss. 1, 17(b).)

Editor's Note. — This section was formerly G.S. 58-241.20. It was recodified as G.S. 143B-472.14 by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

Session Laws 2003-420, ss. 1 and 17(b), effective October 1, 2003, recodified former G.S. 143B-472.14 as this section; and substituted "Board of Funeral Service" for "Board of Mortuary Science" wherever that term appeared.

§ 90-210.93. Free services; failure to make proper assessments, etc., made a misdemeanor.

Any person or persons who offer free funeral services or free embalming, free ambulance service or any other thing free of charge, acting for any burial association, directly or indirectly, or who so acting shall in any way fail to assess for the amount needed to pay death losses and allowable expenses, shall be guilty of a Class 1 misdemeanor. (1941, c. 130, s. 13; 1967, c. 1197, s. 5; 1975, c. 837; 1987, c. 864, s. 12; 1993, c. 539, s. 1048; 1994, Ex. Sess., c. 24, s. 14(c); 2003-420, ss. 1, 17(b).)

Editor's Note. — This section was formerly G.S. 58-241.21. It was recodified as G.S. 143B-472.15 by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

Session Laws 2003-420, ss. 1 and 17(b), effective October 1, 2003, recodified former G.S. 143B-472.15 as this section.

§ 90-210.94. Right of appeal upon revocation or suspension of license.

Upon the revocation or suspension of any license or authority by the Board of Funeral Service, under any of the provisions of this Article, the said association or individual whose license or authority has been revoked or suspended shall have the right of appeal from the action of the Board of Funeral Service in revoking or suspending such license or authority to the Superior Court of Wake County or to the superior court of the county in which the said association or the said individual is domiciled or, upon agreement of the parties to the appeal, to any other superior court of the State. The association or individual appealing from the order of the Board of Funeral Service shall give notice of appeal in writing to the Board of Funeral Service, with a copy of such notice to the clerk of the superior court to which the appeal is taken, within 10 days of the date of notice of the order revoking or suspending the said license or authority and shall pay such appeal fees to the clerk of superior court as are required by law. Within 30 days after receipt of the notice of appeal, the Board of Funeral Service shall file with the clerk of the superior court of the county in which the appeal is to be heard the decision of the Board of Funeral Service. Upon receipt of such decision, the clerk of superior court shall place the matter upon the civil issue docket of the superior court and the same shall be heard de novo. Pending such appeal, the burial association or individual whose license or authority has been suspended or revoked shall continue to operate or function as before the revocation or suspension and until final adjudication by the superior court. (1941, c. 130, s. 14; 1943, c. 272, s. 4; 1957, c. 820, s. 3; 1973, c. 108, s. 20; 1975, c. 837; 1987, c. 864, s. 12; 1997-313, s. 5; 2003-420, ss. 1, 17(b).)

Editor's Note. — This section was formerly G.S. 58-241.22. It was recodified as G.S. 143B-472.16 by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

Session Laws 2003-420, ss. 1 and 17(b), effective October 1, 2003, recodified former G.S. 143B-472.16 as this section; and substituted "Board of Funeral Service" for "Board of Mortuary Science" wherever that term appeared.

§ 90-210.95. Bond of secretary or secretary-treasurer of burial associations.

The secretary or secretary-treasurer of each burial association shall, before entering upon the duties of his office, and for the faithful performance thereof, execute a bond payable to the Board of Funeral Service as trustee for the burial association in some bonding company licensed to do business in this State, to be approved by the Board of Funeral Service. Said bond shall be in an amount not less than one thousand dollars ($1,000), nor more than ten thousand dollars ($10,000), in the discretion of the Board, for those associations whose assets, as determined by the Board's audit, are ten thousand dollars ($10,000) or less. For those associations whose assets, as determined by the Board's audit, are in excess of ten thousand dollars ($10,000), said bond shall be in an amount of ten thousand dollars ($10,000) plus twenty-five per centum (25%) of all assets over ten thousand dollars ($10,000); provided, however, that the bond required by this section shall not in any event exceed fifty thousand dollars ($50,000). If any association operates a branch or subsidiary and the officers of both associations are the same, for purposes of this section, it shall be treated as one association. Any burial association, with the consent of the Board of Funeral Service, may give a bond secured by a deed of trust on real estate situated in North Carolina, in lieu of procuring said bond from a bonding company. The bond thus given shall not be acceptable in excess of the ad valorem tax value for the current year of the real estate securing said bond.

The deed of trust shall be recorded in the county or counties wherein the land lies and shall be deposited with the Board of Funeral Service, name the Board as trustee for the burial association and must constitute a first lien on the property secured by the deed of trust. Said deed of trust shall contain a description of the encumbered property by metes and bounds together with evidence by title insurance policy or by certificate of an attorney-at-law, certifying that said trustor is the owner of a marketable fee simple title to such lands. (1941, c. 130, s. 15; 1943, c. 272, s. 5; 1967, c. 985, s. 2; 1975, c. 837; 1987, c. 864, s. 12; 1997-313, s. 5; 2003-420, ss. 1, 17(b).)

Editor's Note. — This section was formerly G.S. 58-241.23. It was recodified as G.S. 143B-472.17 by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

Session Laws 2003-420, ss. 1 and 17(b), effective October 1, 2003, recodified former G.S. 143B-472.17 as this section; and substituted "Board of Funeral Service" for "Board of Mortuary Science" wherever that term appeared.

§ 90-210.96. Assessments.

Every burial association now or hereinafter organized shall make 12 assessments, or their equivalent, per year per member. The Board of Funeral Service shall order any association to make more than 12 assessments per year when, after notice and hearing, it shall appear to the Board of Funeral Service that the death loss of any association so requires in order to protect the interest of the members. (1943, c. 272, s. 6; 1969, c. 1041, s. 1; 1971, c. 650; 1975, c. 837; 1987, c. 864, s. 12; 1997-313, s. 5; 2003-420, ss. 1, 17(b).)

Editor's Note. — This section was formerly G.S. 58-241.24. It was recodified as G.S. 143B-472.18 by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

Session Laws 2003-420, ss. 1 and 17(b), effective October 1, 2003, recodified former G.S. 143B-472.18 as this section; and substituted "Board of Funeral Service" for "Board of Mortuary Science" wherever that term appeared.

§ 90-210.97. Making false or fraudulent statement a misdemeanor.

Any officer or employee of any burial association authorized to do business under this Article, who shall knowingly or willfully make any false or fraudulent statement or representation in or with reference to any application for membership or for the purpose of obtaining money or any benefit from any burial association transacting business under this Article, or who shall make any false financial statement to the Board of Funeral Service or to the membership of the burial association of which such person is an officer or employee shall be guilty of a Class 1 misdemeanor. (1943, c. 272, s. 6; 1975, c. 837; 1987, c. 864, s. 12; 1993, c. 539, s. 1049; 1994, Ex. Sess., c. 24, s. 14(c); 1997-313, s. 5; 2003-420, ss. 1, 17(b).)

Editor's Note. — This section was formerly G.S. 58-241.25. It was recodified as G.S. 143B-472.19 by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

Session Laws 2003-420, ss. 1 and 17(b), effective October 1, 2003, recodified former G.S. 143B-472.19 as this section; and substituted "Board of Funeral Service" for "Board of Mortuary Science" wherever that term appeared.

§ 90-210.98. Statewide organization of associations.

It shall be lawful for the several mutual burial associations of the State of North Carolina, in good standing, to organize and provide for a statewide organization of mutual burial associations, which organization shall be for the mutual and general suggestive control of mutual burial associations in the State of North Carolina. Such organization shall be known as the North Carolina Burial Association, Incorporated, and shall be composed of members who are lawfully operating burial associations in this State and who pay their dues to such association. (1941, c. 130, s. 16; 1975, c. 837; 1987, c. 864, s. 12; 2003-420, s. 17(b).)

Editor's Note. — This section was formerly G.S. 58-241.26. It was recodified as G.S. 143B-472.20 by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

Session Laws 2003-420, s. 17(b), effective October 1, 2003, recodified former G.S. 143B-472.20 as this section.

§ 90-210.99. Article deemed exclusive authority for organization, etc., of mutual burial associations.

This Article shall be deemed and held exclusive authority for the organization and operation of mutual burial associations within the State of North Carolina, and such associations shall not be subject to any other laws respecting insurance companies of any class. (1941, c. 130, s. 17; 1975, c. 837; 1987, c. 864, s. 12; 2003-420, s. 17(b).)

Editor's Note. — This section was formerly G.S. 58-241.27. It was recodified as G.S. 143B-472.21 by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

Session Laws 2003-420, s. 17(b), effective October 1, 2003, recodified former G.S. 143B-472.21 as this section.

§ 90-210.100. Operation of association in violation of law prohibited.

No person, firm or corporation shall operate as a burial association in this State unless incorporated under the laws of the State of North Carolina and unless such association shall be operated in compliance with all the provisions of this Article, and unless such association shall be licensed and approved by the Board of Funeral Service. (1941, c. 130, s. 18; 1975, c. 837; 1987, c. 864, s. 12; 1997-313, s. 5; 2003-420, ss. 1, 17(b).)

Editor's Note. — This section was formerly G.S. 58-241.28. It was recodified as G.S. 143B-472.22 by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

Session Laws 2003-420, ss. 1 and 17(b), effective October 1, 2003, recodified former G.S. 143B-472.22 as this section; and substituted "Board of Funeral Service" for "Board of Mortuary Science" wherever that term appeared.

§ 90-210.101. Member in armed forces failing to pay assessments; reinstatement.

If a member of a burial association who is in the military or naval forces of the United States fails to pay any assessment, he shall be in bad standing, and unless and until restored, shall not be entitled to benefits. However, the said member shall be reinstated in the burial association upon application made by him at any time until 12 months after his discharge from the military or naval forces of the United States, notwithstanding his physical condition and without the payment of assessments which have become due during his service in the military or naval forces of the United States. Benefits will be in force immediately after such reinstatement. (1943, c. 732, s. 2; 1975, c. 837; 1987, c. 864, s. 12; 2003-420, s. 17(b).)

Editor's Note. — This section was formerly G.S. 58-241.29. It was recodified as G.S. 143B-472.23 by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

Session Laws 2003-420, s. 17(b), effective October 1, 2003, recodified former G.S. 143B-472.23 as this section.

§ 90-210.102. Hearing by Board of dispute over liability for funeral benefits; appeal.

In case of a disagreement between the representative of a deceased member of any burial association and such deceased member's burial association a hearing may be held by the Board of Funeral Service, on request of either party, to determine whether the association is liable for the benefits set forth in the policy issued to the said deceased member of said burial association. The Board of Funeral Service shall render a decision which shall have the same force and effect as judgments rendered by courts of competent jurisdiction in North Carolina. Either party may appeal from the decision of the Board of Funeral Service. Appeal shall be to the district court division of the General Court of Justice in the county in which the burial association is located. The procedure for appeal shall be the same as the appeal procedure set forth in Article 19 of Chapter 7A of the General Statutes of North Carolina regulating appeals from the magistrate to the district court. (1947, c. 100, s. 5; 1975, c. 837; 1987, c. 864, s. 12; 1997-313, s. 5; 2003-420, ss. 1, 17(b); 2007-531, s. 16.)

Editor's Note. — This section was formerly G.S. 58-241.30. It was recodified as G.S. 143B-472.24 by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

Session Laws 2003-420, ss. 1 and 17(b), effective October 1, 2003, recodified former G.S. 143B-472.24 as this section; and substituted "Board of Funeral Service" for "Board of Mortuary Science" wherever that term appeared.

Effect of Amendments. — Session Laws 2007-531, s. 16, effective August 31, 2007, deleted the last sentence, which read "Upon appeal trial shall be de novo."

§ 90-210.103. Board authorized to subpoena witnesses, administer oaths and compel attendance at hearings.

For the purpose of holding hearings the Board of Funeral Service shall have power to subpoena witnesses, administer oaths, and compel attendance of witnesses and parties. (1957, c. 820, s. 2; 1975, c. 837; 1987, c. 864, s. 12; 1997-313, s. 5; 2003-420, ss. 1, 17(b).)

Editor's Note. — This section was formerly G.S. 58-241.31. It was recodified as G.S. 143B-472.25 by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

Session Laws 2003-420, ss. 1 and 17(b), effective October 1, 2003, recodified former G.S. 143B-472.25 as this section; and substituted "Board of Funeral Service" for "Board of Mortuary Science" wherever that term appeared.

§ 90-210.104. Authority of Board to examine financial records.

The Board of Funeral Service shall have authority to examine all records relating to a burial association's financial condition wherever such records are located, including records maintained by any corporation, building and loan association, savings and loan association, credit union, or other legal entity organized and operating pursuant to the authority contained in Chapters 53 and 54 of the General Statutes. (1977, c. 748, s. 4; 1987, c. 864, s. 12; 1997-313, s. 5; 2003-420, ss. 1, 17(b).)

Editor's Note. — This section was formerly G.S. 58-241.32. It was recodified as G.S. 143B-472.26 by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

Session Laws 2003-420, ss. 1 and 17(b), effective October 1, 2003, recodified former G.S. 143B-472.26 as this section; and substituted "Board of Funeral Service" for "Board of Mortuary Science" wherever that term appeared.

§ 90-210.105. Board authorized to freeze certain funds of Association.

Whenever in the opinion of the Board of Funeral Service it deems it necessary for the protection of the interest of members of a burial association, it shall have authority by written order to direct that the funds of any burial association on deposit in any institution organized and operating under Chapters 53 and 54 of the General Statutes be frozen and not paid out by such legal entity. Any legal entity freezing the funds of a burial association pursuant to the directive of the Board of Funeral Service shall not be liable to any burial association for freezing said account pursuant to the order of the Board. (1977, c. 748, s. 5; 1987, c. 864, s. 12; 1997-313, ss. 5, 6; 2003-420, ss. 1, 17(b).)

Editor's Note. — This section was formerly G.S. 58-241.33. It was recodified as G.S. 143B-472.27 by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

Session Laws 2003-420, ss. 1 and 17(b), effective October 1, 2003, recodified former G.S. 143B-472.27 as this section; and substituted "Board of Funeral Service" for "Board of Mortuary Science" wherever that term appeared.

§ 90-210.106. Authority of foreign or domestic mutual burial association or domestic or foreign insurance company to purchase, merge or consolidate with North Carolina mutual burial associations.

(a) Any mutual burial association or insurance company operating pursuant to the laws of this State or any other state may purchase the assets of, merge, or consolidate with a North Carolina chartered mutual burial association in accordance with the laws of this State and any rules promulgated by the Board of Funeral Service to protect the interest of members of mutual burial associations prior to the purchase, merger, or consolidation of the association.

(b) Notwithstanding any provision of Chapter 55 or Chapter 55A, any domestic or foreign insurance company which if organized in North Carolina would have to be organized under Chapter 55 may merge or consolidate with any domestic mutual burial association. When a domestic or foreign insurance company consolidates or merges with a domestic mutual burial association and sells insurance or burial benefits in excess of two hundred dollars ($200.00), it shall be subject to all of the provisions of the insurance laws of North Carolina.

(c) If the assets and liabilities of a North Carolina mutual burial association are purchased, and no merger, consolidation or dissolution is effectuated in connection with the purchase, the management and administrative operations of the North Carolina mutual burial association shall be transferred to the purchasing entity.

(d) In any purchase, merger, or consolidation pursuant to this section, the membership of the mutual burial association shall be guaranteed coverage in the amounts held by each member at the time of such purchase, merger, or consolidation. During the life of the member, this coverage shall not exceed the annual rate charged by the mutual burial association that is being purchased, merged, or consolidated. An insurance company which purchases, merges with, or consolidates with a North Carolina mutual burial association shall establish and maintain life insurance reserves in accordance with the insurance laws of North Carolina for those burial insurance policies existing at the time of the purchase, merger, or consolidation. A North Carolina mutual burial association or foreign mutual burial association which purchases, merges with, or consolidates with a North Carolina mutual burial association shall establish and maintain burial insurance reserves in accordance with the burial insurance laws of North Carolina for those burial insurance policies existing at the time of the purchase, merger, or consolidation. (1981, c. 989, s. 5; 1983, c. 766; 1987, c. 864, s. 12; 1997-313, s. 5; 2003-420, ss. 1, 17(b).)

Editor's Note. — This section was formerly G.S. 58-241.34. It was recodified as G.S. 143B-472.28 by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

Session Laws 2003-420, ss. 1 and 17(b), effective October 1, 2003, recodified former G.S. 143B-472.28 as this section; and substituted "Board of Funeral Service" for "Board of Mortuary Science" wherever that term appeared.

§ 90-210.107. Acquisition, merger, dissolution, and liquidation of mutual burial associations.

(a) Any insurance company which desires to purchase the assets of or to merge with a burial association as provided in G.S. 90-210.106 shall submit to the Board of Funeral Service and to the secretary of the association a written proposal containing the terms and conditions of the proposed purchase or merger. A proposal may be conditioned upon an increase in the assessments of an association in the manner set out in subsection (g) of this section. In such a case, the issues of purchase or merger and an increase in assessments may be considered at the same meeting of the association.

(b) Upon receipt of a written proposal:

(1) The Board shall issue an order directing the association to hold a meeting of the membership within 30 days following receipt of the order for the purpose of voting on the proposal.

(2) Within 10 days of receiving the order from the Board, the association shall give at least 10 days' written notice of the meeting to each of its members. The notice shall:
   a. State the date, time, and place of the meeting.
   b. State the purpose of the meeting.
   c. Contain or have attached the proposal submitted by the insurance company.
   d. Contain a statement limiting the time that each member will be permitted to speak to the proposal, if the association deems it advisable.
   e. Contain a written proxy form and instructions concerning the proxy prescribed by the Board.

(c) A representative of the insurance company shall be permitted to attend the meeting held by the association for the purposes of explaining the proposal and answering any questions from the members. The officers of the association may present their views concerning the proposal. Any member of the association who wishes to speak to the proposal shall be permitted to do so subject to any time limitation stated in the notice of the meeting.

(d) The secretary of the association shall record the name of every member who is present at the meeting or has issued a written proxy pursuant to G.S. 55A-7-24 and shall determine whether there is a quorum. The presence of 15 members or ten percent (10%) of the membership, whichever is greater, shall constitute a quorum. Acceptance or rejection of the proposal shall be by majority vote of the members voting. Any member who is at least 18 years of age shall be permitted to vote. A parent or guardian of any member who is under 18 years of age may vote on behalf of his or her child or ward, but only one vote may be cast on behalf of that member.

(e) The secretary of the association shall certify the result of the vote and the presence of a quorum to the Board within five days following the meeting and shall include with the certification a copy of the notice of the meeting that was sent to the members of the association.

(f) The Board shall immediately review the certification, the notice, and any other records that may be necessary to determine the adequacy of notice, the presence of a quorum, and the validity of the vote. Upon determining that the meeting and vote were regular and held following proper notice and that a majority of a quorum of the members voted in favor of the proposal, the Board shall issue an order approving the purchase or merger and directing that the purchase or merger proceed in accordance with the proposal.

(g) Any burial association whose current assessments are not, or are unlikely to be within the next three years, adequate to reach or maintain a reserve of at least twenty-one dollars ($21.00) per member or are inadequate to meet the requirements of a proposal from an insurance company to acquire the assets of or to merge with the association may increase its assessments by an amount necessary to reach and maintain the reserve or to meet the proposal. The increase shall be approved by a vote of the members of the association at a regular meeting of the association or at a special meeting called for the purpose of increasing assessments.

(1) Any officer or director of the association may call a special meeting for the purpose of increasing assessments, and the secretary shall call a special meeting for such purpose upon the request of at least ten percent (10%) of the members or upon receipt of a proposal from an insurance company that is conditioned upon an increase in assessments.

(2) Written notice setting out the date, time, place, and the purpose of the meeting shall be hand delivered or sent by first-class mail, postage prepaid, to the last known address of each member of the association at least 10 days in advance of the meeting.

(3) No vote may be had on the question of an increase in assessments unless a quorum of the members of the association is present at the meeting. A quorum shall be conclusively presumed if 15 members or ten percent (10%) of the membership of the association, whichever is greater, is present at the meeting.

(4) The proposal to increase the assessments shall be approved by an affirmative vote of a majority of the members present and voting.

(5) The secretary of the association within five days following the meeting shall certify the result of the vote and the presence of a quorum to the Board in the manner and for the purposes set out in subsections (e) and (f) of this section.

(h) Upon a written request from an association that has held a valid meeting and voted for voluntary dissolution in accordance with G.S. 90-210.81, the Board shall issue an order of liquidation for that association.

(i) Upon receipt of a request for voluntary dissolution under subsection (h) of this section or if the sponsoring funeral establishment has its permit revoked or ceases operation for any reason, the Board shall issue an order of liquidation. The Board's order may direct that the agreements for members' benefits be transferred to a financially sound mutual burial association, as well as all records, property, and unexpended balances of funds of the association to be liquidated, if the financially sound mutual burial association agrees in writing to accept the transfer. The Board's order shall direct the burial association to complete the liquidation and to file a final report with the Board no later than December 31 of the year of the liquidation. Upon receipt of the order of liquidation, the burial association shall:

(1) Cease accepting new members.
(2) Collect all debts owed to the association and pay all debts owed by the association from monies on hand, including the reserve.
(3) Distribute pro rata any remaining monies on hand and in the reserve among those who were members of the association and whose transfer could not be accomplished on the date that the liquidation order was issued by the Board. Each member's distributive share shall be determined by dividing the amount of the member's benefit by the aggregate benefits of all members of the association and then multiplying the total amount of money available for distribution by the percentage so derived. Assessments owed by the members to the association at the time of distribution shall be taken into account and shall be offset against the members' distributive shares.
(4) Issue a certificate to members in an amount that equals the difference between the distributive share issued in subdivision (3) of this subsection and the full amount of the member's association benefit. Any certificate issued shall supersede and supplant any other certificate already issued by the association. The certificate shall be on a form prescribed by the Board and shall be prepared and distributed by the association at its expense.
(5) File a final report with the Board on or before December 31 in the year in which the order of liquidation was issued. This report shall show all receipts and disbursements, including the amount distributed to each member, since the last annual report of the association was filed with the Board.

(j) A certificate issued under subsection (i) of this section may be used as a credit toward the cost of funeral services, facilities, and merchandise at any funeral establishment that agrees on forms prescribed by the Board to accept such certificates. A funeral establishment that agrees to accept certificates shall do so until the agreement with the Board expires. The Board shall maintain and distribute to the public a list of funeral establishments that will accept certificates.

(k) Upon receipt of the final report of dissolution by the association, which is required by subsection (i) of this section, the Board shall immediately review the final report and shall notify the association whether the report is complete and has been accepted. Upon acceptance of the final report by the Board, all licenses issued to soliciting agents of the association pursuant to G.S. 90-210.84 are automatically cancelled. (1999-425, s. 3; 2003-420, ss. 1, 17(b); 2007-531, s. 17.)

Editor's Note. — Session Laws 2003-420, ss. 1 and 17(b), effective October 1, 2003, recodified former G.S. 143B-472.29 as this section; and substituted "Board of Funeral Service" for "Board of Mortuary Science" wherever that term appeared.

Effect of Amendments. — Session Laws 2007-531, s. 17, effective August 31, 2007, added subdivision (b)(2)e; in subsection (d), inserted "or has issued a written proxy pursuant to G.S. 55A-7-24" in the first sentence, deleted "present and" following "vote of the members" in the third sentence; and in subsection (i) inserted "of this section or if the sponsoring funeral establishment has its permit revoked or ceases operation for any reason" in the first sentence.

§§ **90-210.108 through 90-210.119:** Reserved for future codification purposes.

Article 13F.

Cremations.

§ 90-210.120. Short title.

This Article shall be known and may be cited as the North Carolina Crematory Act. (1989 (Reg. Sess., 1990), c. 988, s. 1; 2003-420, s. 2.)

Editor's Note. — Session Laws 2003-420, effective October 1, 2003, revised Article 13C of Chapter 90, renumbering former G.S. 90-210.40 through 90-210.50 as G.S. 90-210.40 through 90-210.54. Those sections were recodified as G.S. 90-210.120 through 90-210.134 in Article 13F of Chapter 90 at the direction of the Revisor of Statutes. Historical citations and case annotations to sections in former Article 13C have been added to corresponding sections in new Article 13F as recodified.

§ 90-210.121. Definitions.

As used in this Article, unless the context requires otherwise:

(1) "Authorizing agent" means a person legally entitled to authorize the cremation of human remains in accordance with G.S. 90-210.124.

(2) "Board" means the North Carolina Board of Funeral Service.

(3) "Body parts" means limbs or other portions of the anatomy that are removed from a person or human remains for medical purposes during treatment, surgery, biopsy, autopsy, or medical research; or human bodies or any portion thereof that have been donated to science for medical purposes.

(4) "Casket" means a rigid container that is designed for the encasement of human remains and that is usually constructed of wood, metal, or other material and ornamented and lined with fabric, and which may or may not be combustible.

(5) "Certificate of cremation" means a certificate provided by the crematory manager who performed the cremation containing, at a minimum, the following information:
   a. Name of decedent;
   b. Date of cremation;
   c. Name and address of crematory; and
   d. Signature of crematory manager or person acting as crematory manager.

(6) "Cremated remains" means all human remains recovered after the completion of the cremation process, including pulverization which leaves only bone fragments reduced to unidentifiable dimensions.

(7) "Cremation" means the technical process, using intense heat and flame, that reduces human remains to bone fragments. Cremation includes the processing and may include the pulverization of the bone fragments.

(8) "Cremation chamber" means the enclosed space within which the cremation process takes place. Cremation chambers covered by this Article shall be used exclusively for the cremation of human remains.

(9) "Cremation container" means the container in which the human remains are transported to the crematory or placed therein upon arrival for storage and placement in a cremation chamber for cremation. A cremation container shall comply with all of the following standards:
   a. Be composed of readily combustible materials suitable for cremation;

b. Be able to be closed in order to provide a complete covering for the human remains;
c. Be resistant to leakage or spillage;
d. Be rigid enough for handling with ease;
e. Be able to provide protection for the health, safety, and personal integrity of crematory personnel; and
f. Be easily identifiable. The covering of the cremation container shall contain the following information:
    1. The name of the decedent;
    2. The date of death;
    3. The sex of the decedent; and
    4. The age at death of the decedent.

(10) "Cremation interment container" means a rigid outer container composed of concrete, steel, fiberglass, or some similar material in which an urn is placed prior to being interred in the ground and which is designed to withstand prolonged exposure to the elements and to support the earth above the urn.

(11) "Crematory" or "crematorium" means the building or buildings or portion of a building on a single site that houses the cremation equipment, the holding and processing facilities, the business office, and other parts of the crematory business. A crematory must comply with all applicable public health and environmental laws and rules and must contain the equipment and meet all of the standards established by the rules adopted by the Board.

(12) "Crematory licensee" means the individual or legal entity that is licensed by the Board to operate a crematory and perform cremations.

(13) "Crematory manager" means the person who is responsible for the management and operation of the crematory. A crematory manager must either be licensed to practice funeral directing or funeral service and be qualified as a crematory technician or must obtain a crematory manager permit issued by the Board. In order to receive a crematory manager permit, a person must:
a. Be at least 18 years of age.
b. Be of good moral character.
c. Be qualified as a crematory technician.

Notwithstanding any other provision of law, a crematory that is licensed by the Board prior to January 1, 2004, and as of that date is not managed by a crematory manager who is licensed to practice funeral directing or funeral service, or who has a crematory manager permit, may continue to be managed by a crematory manager who is not licensed to practice funeral directing or funeral service or who does not have a crematory manager permit so long as there is no sale, transfer, devise, bequest, gift, or any other disposal of a controlling interest in the crematory.

(13a) "Cremation society" means any person, firm, corporation, or organization that is affiliated with a crematory licensed under this Article and provides cremation information to consumers.

(14) "Crematory technician" means any employee of a crematory licensee who has a certificate confirming that the crematory technician has attended a training course approved by the Board. The Board shall recognize the cremation certificate program that is conducted by the Cremation Association of North America (CANA).

(15) "Final disposition" means the cremation and the ultimate interment, entombment, inurnment, or scattering of the cremated remains or the return of the cremated remains by the crematory licensee to the authorizing agent or such agent's designee as provided in this Article.

Upon the written direction of the authorizing agent, cremated remains may take various forms.

(16) "Holding and processing facility" means an area or areas that are designated for the retention of human remains prior to, and the retention and processing of cremated remains after, cremation; that comply with all applicable public health and environmental laws; preserve the health and safety of the crematory technician and other personnel of the crematory; and that are secure from access by anyone other than authorized persons. A holding facility and processing facility must be located in a crematory.

(17) "Human remains" means the body of a deceased person, including a separate human fetus, regardless of the length of gestation, or body parts.

(17a) "Initial container" means a receptacle for cremated remains, for which the intended use and design is to hold cremated remains, usually composed of cardboard, plastic, or similar material that can be closed in a manner so as to prevent the leakage or spillage of the cremated remains or the entrance of foreign material and is a single container of sufficient size to hold the cremated remains.

(18) "Niche" means a compartment or cubicle for the memorialization or final disposition of an urn or container containing cremated remains.

(19) "Processing" means the removal of bone fragments from the cremation chamber for the reduction in size, labeling and packaging, and placing in an urn or initial container.

(20) "Pulverization" means the reduction of identifiable or unidentifiable bone fragments after the completion of the cremation to granulated particles by mechanical means.

(21) "Scattering area" means an area permitted by North Carolina law including, but not limited to, an area designated by a cemetery and located on dedicated cemetery property where cremated remains that have been removed from their container can be mixed with or placed on top of the soil or ground cover.

(22) Repealed by Session Laws 2007-531, s. 18, effective August 31, 2007.

(23) "Urn" means a receptacle designed to permanently encase the cremated remains. (1989 (Reg. Sess., 1990), c. 988, s. 1; 1997-399, s. 16; 2003-420, s. 2; 2007-531, s. 18.)

Editor's Note. — This section was former G.S. 90-210.41. It was revised by Session Laws 2003-420, s. 2, and has been recodified as G.S. 90-210.121 at the direction of the Revisor of Statutes.

Effect of Amendments. — Session Laws 2007-531, s. 18, effective August 31, 2007, added subdivisions (13a) and (17a); in subdivision (19), substituted "initial container" for "temporary container"; and deleted subdivision (22) relating to the definition of "Temporary container."

§ 90-210.122. Crematory Authority established.

(a) The North Carolina Crematory Authority is established as a Committee within the Board. The Crematory Authority shall suggest rules to the Board for the carrying out and enforcement of the provisions of this Article.

(b) The Crematory Authority shall initially consist of five members appointed by the Governor and two members of the Board appointed by the Board. The Governor may consider a list of recommendations from the Cremation Association of North Carolina.

(c) The initial terms of the members of the Crematory Authority shall be staggered by the appointing authorities so that the terms of three members (two of which shall be appointees of the Governor) expire December 31, 1991, the terms of two members (both of which shall be appointees of the Governor) expire December 31, 1992, and the terms of the remaining two members (one of which shall be an appointee of the Governor) expire December 31, 1993.

As the terms of the members appointed by the Governor expire, their successors shall be elected from among a list of nominees in an election conducted by the Board in which all licensed crematory operators are eligible to vote. The Board shall conduct the election for members of the Crematory Authority and shall prescribe the procedures and establish the time and date for nominations and elections to the Crematory Authority. A nominee who receives a majority of the votes cast shall be declared elected. The Board shall appoint the successors to the two positions for which it makes initial appointments pursuant to this section.

The terms of the elected members of the Crematory Authority shall be three years. The terms of the members appointed by the Board, including the members initially appointed pursuant to this subsection, shall be coterminous with their terms on the Board. Any vacancy occurring in an elective seat shall be filled for the unexpired term by majority vote of the remaining members of the Crematory Authority. Any vacancy occurring in a seat appointed by the Governor shall be filled by the Governor. Any vacancy occurring in a seat appointed by the Board shall be filled by the Board.

(d) The members of the Crematory Authority shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 93B-5 for all time actually spent upon the business of the Crematory Authority. All expenses, salaries and per diem provided for in this Article shall be paid from funds received and shall in no manner be an expense to the State.

(e) The Crematory Authority shall select from its members a chairman, a vice chairman and a secretary who shall serve for one year or until their successors are elected and qualified. No two offices may be held by the same person. The Crematory Authority, with the concurrence of the Board, shall have the authority to engage adequate staff as deemed necessary to perform its duties.

(f) The Crematory Authority shall hold at least one meeting in each year. In addition, the Crematory Authority may meet as often as the proper and efficient discharge of its duties shall require. Four members shall constitute a quorum. (1989 (Reg. Sess., 1990), c. 988, s. 1; 2003-420, s. 2; 2007-531, s. 19.)

Editor's Note. — This section was former G.S. 90-210.42. It was revised by Session Laws 2003-420, s. 2, and has been recodified as G.S. 90-210.122 at the direction of the Revisor of Statutes.

Effect of Amendments. — Session Laws 2007-531, s. 19, effective August 31, 2007, in the second paragraph of subsection (c), substituted "The Board shall conduct the election for members of the crematory Authority and shall" for "The Board may conduct the election for members of the Crematory Authority simultaneously with the election for members of the Board or at any other time. The Board shall" in the second sentence.

§ 90-210.123. Licensing and inspection.

(a) Any person doing business in this State, or any cemetery, funeral establishment, corporation, partnership, joint venture, voluntary organization, or any other entity may erect, maintain, and operate a crematory in this State and may provide the necessary employees, facilities, structure, and equipment for the cremation of human remains, provided that the person or entity has secured a license as a crematory licensee in accordance with this Article.

(b) A crematory may be constructed on or adjacent to any cemetery, on or adjacent to any funeral establishment that is zoned commercial or industrial, or at any other location consistent with local zoning and environmental regulations.

(c) Application for a license as a crematory licensee shall be made on forms furnished and prescribed by the Board. The Board shall inspect the premises, facilities, structure, and equipment to be used as a crematory, confirm that the crematory manager's and crematory technician's educational certificate is valid, and issue a renewable license to the crematory licensee if the applicant meets all the requirements and standards of the Board and the requirements of this Article.

(d) Every application for licensure shall identify the crematory manager and all crematory technicians employed by the crematory licensee providing that nothing in this Article shall prohibit the designation and identification by the crematory licensee of one individual to serve as a crematory manager and crematory technician. Each crematory licensed in North Carolina shall employ on a full-time basis at least one crematory technician. Every application for licensure and renewal thereof shall include all crematory technicians' educational certificates. The crematory licensee shall keep the Board informed at all times of the names and addresses of the crematory manager and all crematory technicians. In the event a licensee is in the process of replacing its only crematory technician at the time of license renewal, the licensee may continue to operate the crematory for a reasonable time period not to exceed 180 days.

(e) All licenses and permits shall expire on the last day of December of each year. A license or permit may be renewed without paying a late fee on or before the first day of February immediately following expiration. After that date, a license or permit may be renewed by paying a late fee as provided in G.S. 90-210.132 in addition to the annual renewal fee. Licenses and permits that remain expired six months or more require a new application for renewal. Licenses and permits are not transferable. A new application for a license or permit shall be made to the Board within 30 days following a change of ownership of more than fifty percent (50%) of the business.

(f) No person, cemetery, funeral establishment, corporation, partnership, joint venture, voluntary organization, or any other entity shall cremate any human remains, except in a crematory licensed for this express purpose and operated by a crematory licensee subject to the restrictions and limitations of this Article or unless otherwise permitted by statute.

(g) Whenever the Board finds that an owner, partner, crematory manager, member, officer, or any crematory technician of a crematory licensee or any applicant to become a crematory licensee, or that any authorized employee, agent, or representative has violated any provision of this Article, or is guilty of any of the following acts, and when the Board also finds that the crematory operator or applicant has thereby become unfit to practice, the Board may suspend, revoke, or refuse to issue or renew the license, in accordance with Chapter 150B of the General Statutes:

(1) Conviction of a felony or a crime involving fraud or moral turpitude.

(1a) Denial, suspension, or revocation of an occupational or business license by another jurisdiction.

(2) Fraud or misrepresentation in obtaining or renewing a license or in the practice of cremation.

(3) False or misleading advertising.

(4) Solicitation of dead human bodies by the licensee, his agents, assistants, or employees; but this subdivision shall not be construed to prohibit general advertising by the licensee.

(5) Employment directly or indirectly of any agent, assistant, or other person on a part- time or full-time basis or on commission for the purpose of calling upon individuals or institutions by whose influence dead human bodies may be turned over to a particular licensee.

(6) The direct or indirect payment or offer of payment of a commission by the licensee or the licensee's agent, assistant, or employees for the purpose of securing business.

(7) Gross immorality, including being under the influence of alcohol or drugs while performing cremation services.
(8) Aiding or abetting an unlicensed person to perform services under this Article, including the use of a picture or name in connection with advertisements or other written material published or caused to be published by the licensee.
(9) Failing to treat a dead human body with respect at all times.
(10) Violating or cooperating with others to violate any of the provisions of this Article or of the rules of the Board.
(11) Violation of any State law or municipal or county ordinance or regulation affecting the handling, custody, care, or transportation of dead human bodies.
(12) Refusing to surrender promptly the custody of a dead human body or cremated remains upon the express order of the person lawfully entitled to the custody thereof, except as provided in G.S. 90-210.131(e).
(13) Indecent exposure or exhibition of a dead human body while in the custody or control of a licensee.
(14) Practicing funeral directing, embalming, or funeral service without a license.

In any case in which the Board is authorized to take any of the actions permitted under this subsection, the Board may instead accept an offer in compromise of the charges whereby the accused shall pay to the Board a penalty of not more than five thousand dollars ($5,000).

(h) Where the Board finds a licensee is guilty of one or more of the acts or omissions listed in subsection (g) of this section but it is determined by the Board that the licensee has not thereby become unfit to practice, the Board may place the licensee on a term of probation in accordance with the procedures set out in Chapter 150B of the General Statutes. In any case in which the Board is entitled to place a licensee on a term of probation, the Board may also impose a penalty of not more than five thousand dollars ($5,000) in conjunction with the probation.

(i) The Board may hold hearings in accordance with the provisions of this Article and Chapter 150B of the General Statutes. The Board shall conduct any such hearing. The Board shall constitute an "agency" under Article 3A of Chapter 150B of the General Statutes with respect to proceedings initiated pursuant to this Article. The Board is empowered to regulate and inspect crematories and crematory licensees and to enforce as provided by law the provisions of this Article and the rules adopted hereunder. Any crematory that, upon inspection, is found not to meet any of the requirements of this Article shall pay a reinspection fee to the Board for each additional inspection that is made to ascertain whether the deficiency or other violation has been corrected. The Board may obtain preliminary and final injunctions whenever a violation of this Article has occurred or threatens to occur.

In addition to the powers enumerated in Chapter 150B of the General Statutes, the Board shall have the power to administer oaths and issue subpoenas requiring the attendance of persons and the production of papers and records before the Board in any hearing, investigation, or proceeding conducted by it. Members of the Board's staff or the sheriff or other appropriate official of any county of this State shall serve all notices, subpoenas, and other papers given to them by the President of the Board for service in the same manner as process issued by any court of record. Any person who neglects or refuses to obey a subpoena issued by the Board shall be guilty of a Class 1 misdemeanor. (1989 (Reg. Sess., 1990), c. 988, s. 1; 1993, c. 539, s. 639; 1997-399, s. 17; 2003-420, s. 2; 2007-531, ss. 20, 21.)

Editor's Note. — This section was former G.S. 90-210.43. It was revised by Session Laws 2003-420, s. 2, and has been recodified as G.S. 90-210.123 at the direction of the Revisor of Statutes.

Effect of Amendments. — Session Laws 2007-531, ss. 20-21, effective August 31, 2007, added subdivision (g)(1a); and added the last sentence of the first paragraph of subsection (i).

§ 90-210.124. Authorizing agent.

(a) The following person, in the priority list below, shall have the right to serve as an "authorizing agent":

(1) An individual at least 18 years of age may authorize the type, place, and method of disposition of the individual's own dead body by methods in the following order:
  a. Pursuant to a preneed funeral contract executed pursuant to Article 13D of Chapter 90 of the General Statutes or pursuant to a cremation authorization form executed pursuant to Article 13C of Chapter 90 of the General Statutes.
  b. Pursuant to a health care power of attorney to the extent provided in Article 3 of Chapter 32A of the General Statutes.
  c. Pursuant to a written will.
  d. Pursuant to a written statement other than a will signed by the individual and witnessed by two persons who are at least 18 years old.

When an individual has authorized his or her own cremation and disposition in accordance with this subsection, the individual or institution designated by that individual shall act as the authorizing agent for that individual.

(2) If a decedent has left no written authorization for the cremation and disposition of the decedent's body as permitted under subdivision (1) of this subsection, the following competent persons in the order listed may authorize the type, method, place, cremation, and disposition of the decedent's body:
  a. The surviving spouse.
  b. A majority of the surviving children who are at least 18 years of age and can be located after reasonable efforts.
  c. The surviving parents.
  d. A majority of the surviving siblings who are at least 18 years of age and can be located after reasonable efforts.
  e. A majority of the persons in the classes of the next degrees of kinship, in descending order, who, under State law, would inherit the decedent's estate if the decedent died intestate who are at least 18 years of age and can be located after reasonable efforts.
  f. A person who has exhibited special care and concern for the decedent and is willing and able to make decisions about the cremation and disposition.
  g. In the case of indigents or any other individuals whose final disposition is the responsibility of the State or any of its instrumentalities, a public administrator, medical examiner, coroner, State-appointed guardian, or any other public official charged with arranging the final disposition of the decedent may serve as the authorizing agent.
  h. In the case of individuals who have donated their bodies to science or whose death occurred in a nursing home or private institution and in which the institution is charged with making arrangements for the final disposition of the decedent, a representative of such institution may serve as the authorizing agent in the absence of any of the above.

i. In the absence of any of the above, any person willing to assume responsibility as authorizing agent, as specified in this act.

This subsection does not grant to any person the right to cancel a preneed funeral contract executed pursuant to Article 13D of Chapter 90 of the General Statutes or to cause or prohibit the substitution of a preneed licensee as authorized under G.S. 90-210.63 or permit modification of preneed contracts under G.S. 90-210.63A. If a person under this subsection is incompetent at the time of the decedent's death, the person shall be treated as if he or she predeceased the decedent. An attending physician may certify the incompetence of a person and the certification shall apply to the rights under this subsection only. Any person under this subsection may waive his or her rights under this subsection by any written statement notarized by a notary public or signed by two witnesses.

(b) A person who does not exercise his or her right to dispose of the decedent's body under subdivision (a)(2) of this section within five days of notification or 10 days from date of death, whichever is earlier, shall be deemed to have waived his or her right to authorize disposition of the decedent's body or to contest disposition in accordance with this section.

(c) An individual at least 18 years of age may, in a writing signed by the individual, authorize the cremation and disposition of one or more of the individual's body parts that has been or will be removed. If the individual does not authorize the cremation and disposition, a person listed in subdivision (a)(2) of this section may authorize the cremation and disposition as if the individual were deceased.

(d) This section does not apply to the disposition of dead human bodies as anatomical gifts under Part 3 of Article 16 of Chapter 130A of the General Statutes or the right to perform autopsies under Part 2 of Article 16 of Chapter 130A of the General Statutes. (2003-420, s. 2; 2007-531, s. 22.)

Editor's Note. — Session Laws 2003-420, s. 2, enacted this section as G.S. 90-210.44. It has been recodified as G.S. 90-210.124 at the direction of the Revisor of Statutes.

Effect of Amendments. — Session Laws 2007-531, s. 22, effective August 31, 2007, rewrote subdivision (a)(1); and in the third paragraph of subsection (a) added the language following "authorized under G.S. 90-210.63."

§ 90-210.125. Authorization to cremate.

(a) A crematory licensee shall not cremate human remains until it has received a cremation authorization form signed by an authorizing agent. The cremation authorization form shall be prescribed by the Board and shall contain at a minimum the following information:

(1) The identity of the human remains and confirmation that the human remains are in fact the individual so named.

(2) The time and date of death of the decedent.

(3) The name and address of the funeral establishment and/or the funeral director that obtained the cremation authorization.

(4) The name and address of the crematory to be in receipt of the human remains for the purpose of cremation.

(5) The name and address of the authorizing agent, the relationship between the authorizing agent and the decedent, and the date and time of signature of the authorizing agent.

(6) A representation that the authorizing agent does in fact have the right to authorize the cremation of the decedent and that the authorizing agent is not aware of any living person who has a superior priority right to that of the authorizing agent, as set forth in G.S. 90-210.124. Or, in the event that there is another living person who does have a superior priority right to that of the authorizing agent, a representa-

tion that the authorizing agent has made all reasonable efforts to contact such person, has been unable to do so, and has no reason to believe that such person would object to the cremation of the decedent.

(7) A representation that the authorizing agent has either disclosed the location of all living persons with an equal right to that of the authorizing agent, as set forth in G.S. 90-210.124, or does not know the location of any other living person with an equal right to that of the authorizing agent.

(8) Authorization for the crematory to cremate the human remains, including authorization to process or pulverize the cremated remains.

(9) A representation that the human remains do not contain a pacemaker or any other material or implant that may be potentially hazardous to the person performing the cremation.

(10) The name of the person authorized to receive the cremated remains from the crematory licensee.

(11) The manner in which final disposition of the cremated remains is to take place, if known. If the cremation authorization form does not specify final disposition in a grave, crypt, niche, or scattering area, then the form shall indicate that the cremated remains will be held by the crematory licensee for 30 days before they are disposed of, unless they are received from the crematory licensee prior to that time, in person, by the authorizing agent or his designee.

(12) The signature of the authorizing agent attesting to the accuracy of all representations contained on the cremation authorization form, except as set forth in subsection (b) of this section.

(13) If a cremation authorization form is being executed on a preneed basis, the cremation authorization form shall contain the disclosure required by G.S. 90-210.126. The authorizing agent may specify in writing religious practices that conflict with Article 13 of this Chapter. The crematory licensee and funeral director shall observe those religious practices except where they interfere with cremation in a licensed crematory as specified under G.S. 90-210.123 or the required documentation and record keeping.

(14) A licensed funeral director of the funeral establishment or crematory licensee that received the cremation authorization form shall also sign the cremation authorization form. Such individual shall not be responsible for any of the representations made by the authorizing agent, unless such individual has actual knowledge to the contrary, except for the information requested by subdivisions (a)(1), (2), (3), (4), and (9) of this section, which shall be considered to be representations of the individual. In addition, the funeral director shall warrant to the crematory that the human remains delivered to the crematory licensee are the human remains identified on the cremation authorization form with any other documentation required by this State, any county, or any municipality.

(b) An authorizing agent who signs a cremation authorization form shall be deemed to warrant the truthfulness of any facts set forth on the cremation authorization form, including that person's authority to order the cremation, except for the information required by subdivisions (a)(4) and (9) of this section, unless the authorizing agent has actual knowledge to the contrary. An authorizing agent signing a cremation authorization form shall be personally and individually liable for all damages occasioned thereby and resulting therefrom.

(c) A crematory licensee shall have the legal right to cremate human remains upon the receipt of a cremation authorization form signed by an authorizing agent. There shall be no liability for a crematory licensee that cremates human remains pursuant to such authorization, or that releases or disposes of the cremated remains pursuant to such authorization, except for such crematory licensee's gross negligence, provided that the crematory licensee performs such functions in compliance with the provisions of this Article. There shall be no liability for a funeral establishment or licensee thereof that causes a crematory licensee to cremate human remains pursuant to such authorization, except for gross negligence, provided that the funeral establishment and licensee thereof and crematory licensee perform their respective functions in compliance with the provisions of this section.

(d) After the authorizing agent has executed a cremation authorization form and prior to the commencement of the cremation, the authorizing agent may revoke the authorization and instruct the crematory licensee to cancel the cremation and to release or deliver the human remains to another crematory licensee or funeral establishment. Such instructions shall be provided to the crematory licensee in writing. A crematory licensee shall honor any instructions given to it by an authorizing agent under this section, provided that it receives such instructions prior to commencement of the cremation of the human remains. (2003-420, s. 2.)

Editor's Note. — Session Laws 2003-420, s. 2, enacted this section as G.S. 90-210.45. It has been recodified as G.S. 90-210.125 at the direction of the Revisor of Statutes.

§ 90-210.126. Preneed cremation arrangements.

(a) Any person, on a preneed basis, may authorize the person's own cremation and the final disposition of the person's cremated remains by executing, as the authorizing agent, a cremation authorization form on a preneed basis and having the form signed by two witnesses. The person shall retain a copy of this form, and a copy shall be sent to the funeral establishment and/or the crematory licensee. Any person shall have the right to transfer or cancel this authorization at any time prior to the person's death by destroying the executed cremation authorization form and providing written notice to the party or parties that received the cremation authorization form.

(b) Any cremation authorization form executed by an individual as the individual's own authorizing agent on a preneed basis shall contain the following disclosure, which shall be completed by the authorizing agent:

/ / I do not wish to allow any of my survivors the option of canceling my cremation and selecting alternative arrangements, regardless of whether my survivors deem such a change to be appropriate.

/ / I wish to allow only the survivors whom I have designated below the option of canceling my cremation and selecting alternative arrangements or continuing to honor my wishes for cremation and purchasing services and merchandise if they deem such a change to be appropriate.

(c) Except as provided in subsection (b) of this section, at the time of the death of a person who has executed, as the authorizing agent, a cremation authorization form on a preneed basis, any person in possession of the executed form, and any person charged with making arrangements for the disposition of the decedent's human remains who has knowledge of the existence of the executed form, shall use the person's best efforts to ensure that the decedent's human remains are cremated and that the final disposition of the cremated remains is in accordance with the instructions contained on the cremation authorization form.

(d) If a crematory licensee is in possession of a completed cremation authorization form, executed on a preneed basis, and the crematory licensee is in possession of the designated human remains, then the crematory licensee shall be required to cremate the human remains and dispose of the human remains according to the instructions contained on the cremation authorization form. A crematory licensee that complies with the preneed cremation authorization form under these circumstances may do so without any liability. A funeral establishment or licensee thereof that causes a crematory licensee to act in accordance with the preneed cremation authorization form under these circumstances may do so without any liability.

(e) Any preneed contract sold by, or preneed arrangements made with, a funeral establishment that includes a cremation shall specify the final disposition of the cremated remains, pursuant to G.S. 90-210.130. In the event that no different or inconsistent instructions are provided to the crematory licensee by the authorizing agent at the time of death, the crematory licensee shall be authorized to release or dispose of the cremated remains as indicated in the preneed agreement. Upon compliance with the terms of the preneed agreement, the crematory licensee, and any funeral establishment or licensee thereof who caused the crematory licensee to act in compliance with the terms of the preneed agreement, shall be discharged from any legal obligation concerning such cremated remains.

(f) The provisions of this section shall not apply to any cremation authorization form or preneed contract executed prior to the effective date of this act. Any funeral establishment, however, with the written approval of the authorizing agent or person who executed the preneed contract, may designate that such cremation authorization form or preneed contract shall be subject to this act. (2003-420, s. 2.)

Editor's Note. — Session Laws 2003-420, s. 2, enacted this section as G.S. 90-210.46. It has been recodified as G.S. 90-210.126 at the direction of the Revisor of Statutes.

§ 90-210.127. Record keeping.

(a) The crematory licensee shall furnish to the person who delivers such human remains to the crematory licensee a receipt, signed by both the crematory licensee and the person who delivers the human remains, showing the date and time of the delivery; the type of casket or cremation container that was delivered; the name of the person from whom the human remains were received and the name of the funeral establishment or other entity with whom such person is affiliated; the name of the person who received the human remains on behalf of the crematory licensee; and the name of the decedent. The crematory licensee shall retain a copy of this receipt in its permanent records for three years.

(b) Upon its release of cremated remains, the crematory licensee shall furnish to the person who receives such cremated remains from the crematory licensee a receipt, signed by both the crematory licensee and the person who receives the cremated remains, showing the date and time of the release; the name of the person to whom the cremated remains were released and the name of the funeral establishment, cemetery, or other entity with whom such person is affiliated; the name of the person who released the cremated remains on behalf of the crematory licensee; and the name of the decedent. The crematory shall retain a copy of this receipt in its permanent records for three years.

(c) A crematory licensee shall maintain at its place of business a record of all forms required by the Board of each cremation that took place at its facility for three years.

(d) The crematory licensee shall maintain a record for three years of all cremated remains disposed of by the crematory licensee in accordance with G.S. 90-210.126(d).

(e) Upon completion of the cremation, the crematory licensee shall issue a certificate of cremation.

(f) All records that are required to be maintained under this Article shall be subject to inspection by the Board or its agents upon request. (1989 (Reg. Sess., 1990), c. 988, s. 1; 1997-399, s. 18; 2003-420, s. 2.)

Editor's Note. — This section was former G.S. 90-210.44. It was revised and renumbered as G.S. 90-210.47 by Session Laws 2003-420, s. 2, and has been recodified as G.S. 90-210.127 at the direction of the Revisor of Statutes.

§ 90-210.128. Cremation containers.

(a) No crematory licensee shall make or enforce any rules requiring that any human remains be placed in a casket before cremation or that human remains be cremated in a casket, nor shall any crematory licensee refuse to accept human remains for cremation for the reason that they are not in a casket.

(b) No crematory licensee shall make or enforce any rules requiring that any cremated remains be placed in an urn or receptacle designed to permanently encase the cremated remains after the cremation process has been performed. (2003-420, s. 2.)

Editor's Note. — Session Laws 2003-420, s. 2, enacted this section as G.S. 90-210.48. It has been recodified as G.S. 90-210.128 at the direction of the Revisor of Statutes.

§ 90-210.129. Cremation procedures.

(a) In deaths certified by the attending physician, the body shall not be cremated before the crematory licensee receives a death certificate signed by the attending physician, which shall contain at a minimum the following information:

(1) Decedent's name;
(2) Date of death;
(3) Date of birth;
(4) Sex;
(5) Place of death;
(6) Facility name (if not institution, give street and number);
(7) County of death;
(8) City of death; and
(9) Time of death (if known).

(b) When required by G.S. 130A-388 and the rules adopted pursuant to that section or by successor statute and the rules pursuant to it, a cremation authorization form signed by a medical examiner shall be received by the crematory prior to cremation.

(c) In deaths coming under full investigation by the Office of the Chief Medical Examiner, a burial-transit permit/cremation authorization form must be received by the crematory before cremation.

(d) No body shall knowingly be cremated with a pacemaker or defibrillator or other potentially hazardous implant or condition in place. The authorizing agent for the cremation of the human remains shall be responsible for taking all necessary steps to ensure that any pacemaker or defibrillator or other potentially hazardous implant or condition is removed or corrected prior to cremation. If an authorizing agent informs the funeral director and the crematory licensee on the cremation authorization form of the presence of a pacemaker or defibrillator or other potentially hazardous implant or condition in the human remains, then the funeral director shall be responsible for ensuring that all necessary steps have been taken to remove the pacemaker or defibrillator or other potentially hazardous implant or to correct the hazardous condition before delivering the human remains to the crematory.

(e) Human remains shall not be cremated within 24 hours after the time of death, unless such death was a result of an infectious, contagious, or communicable and dangerous disease as listed by the Commission for Public Health, pursuant to G.S. 130A-134, and unless such time requirement is waived in writing by the medical examiner, county health director, or attending physician where the death occurred.

(f) No unauthorized person shall be permitted in view of the cremation chamber or in the holding and processing facility while any human remains are being removed from the cremation container, processed, or pulverized. Relatives of the deceased and their invitees, the authorizing agent and the agent's invitees, medical examiners, Inspectors of the North Carolina Board of Funeral Service, and law enforcement officers in the execution of their duties shall be authorized to have access to the crematory area, subject to the rules adopted by the crematory licensee governing the safety of such individuals.

(g) Human remains shall be cremated only while enclosed in a cremation container. Upon completion of the cremation, and insofar as is possible, all of the recoverable residue of the cremation process shall be removed from the cremation chamber. Insofar as is possible, all residue of the cremation process shall then be separated from any foreign residue or anything else other than bone fragments and then be processed by pulverization so as to reduce the cremated remains to unidentifiable particles. Any foreign residue and anything other than the particles of the cremated remains shall be removed from the cremated remains as far as possible and shall be disposed of by the crematory licensee. This section does not apply where law otherwise provides for commingling of human remains. The fact that there is incidental and unavoidable residue in the cremation chamber used in a prior cremation is not a violation of this subsection.

(h) The simultaneous cremation of the human remains of more than one person within the same cremation chamber is forbidden.

(i) Every crematory shall have a holding and processing facility, within the crematory, designated for the retention of human remains prior to cremation. The holding and processing facility must comply with any applicable public health laws and rules and must meet all of the standards established pursuant to rules adopted by the Board.

(j) Crematory licensees shall comply with standards established by the Board for the processing and pulverization of human remains by cremation.

(k) Nothing in this Article shall require a crematory licensee to perform a cremation that is impossible or impractical to perform.

(*l*) The cremated remains with proper identification shall be placed in an initial container or the urn selected or provided by the authorizing agent. The initial container or urn contents shall not be contaminated with any other object, unless specific authorization has been received from the authorizing agent or as provided in subsection (g) of this section.

(m) If the cremated remains are greater than the dimensions of an initial container or urn, the excess cremated remains shall be returned to the authorizing agent or its representative in a separate container or urn.

(n) If the cremated remains are to be shipped, the initial container or urn shall be packed securely in a suitable shipping container that complies with the requirements of the shipper. Cremated remains shall be shipped only by a method which has an internal tracing system available and which provides a receipt signed by the person accepting delivery, unless otherwise authorized in writing by the authorizing agent. Cremated remains shall be shipped to the proper address as stated on the cremation authorization form signed by the authorizing agent.

(o) Unless the provisions of G.S. 130A-114 apply, before cremation the crematory licensee shall receive a written statement, on a form prescribed by the Board and signed by the attending physician, acknowledging the circumstances, date, and time of the delivery of the fetal remains from the mother. If after reasonable efforts no physician can be identified with knowledge and information sufficient to complete the written statement required by this subsection, the crematory licensee shall obtain documentation of the circumstances, date, and time of delivery of the fetal remains prepared by a hospital, medical facility, law enforcement agency, or other entity. Notwithstanding any other provision of law, health care providers may release to a licensee, in accordance with the federal Standards for Privacy of Individually Identifiable Health Information under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), medical records that document the circumstances, date, and time of delivery of fetal remains. If the crematory licensee cannot identify documents sufficient to meet the requirements of this subsection, the licensee shall report to the local medical examiner pursuant to G.S. 130A-383(a).

(p) If the provisions of Article 4 of Chapter 130A of the General Statutes apply, the crematory licensee shall receive a fetal report of death as prescribed in G.S. 130A-114.

(q) Before the cremation of amputated body parts, the crematory licensee shall receive a written statement, on a form prescribed by the Board and signed by the attending physician, acknowledging the circumstances of the amputation. If after reasonable efforts no physician can be identified with knowledge and information sufficient to complete the written statement required by this subsection, the crematory licensee shall notify the local medical examiner pursuant to G.S. 130A-383(b). This section does not apply to the disposition of body parts cremated pursuant to Part 3 of Article 16 of Chapter 130A of the General Statutes. (1989 (Reg. Sess., 1990), c. 988, s. 1; 1997-399, s. 19; 2003-420, s. 2; 2007-182, s. 1.2; 2007-531, s. 23.)

Editor's Note. — This section was former G.S. 90-210.45. It was revised and renumbered as G.S. 90-210.49 by Session Laws 2003-420, s. 2, and has been recodified as G.S. 90-210.129 at the direction of the Revisor of Statutes.

Effect of Amendments. — Session Laws 2007-182, s. 1.2, effective July 5, 2007, substituted "Commission for Public Health" for "Commission of Health Services" in subsection (e).

Session Laws 2007-531, s. 23, effective August 31, 2007, in subsections (l) - (n) substituted "an initial" for "a temporary" and "initial" for "temporary" in both places each appear; and added subsections (o) through (q).

§ 90-210.130. Final disposition of cremated remains.

(a) The authorizing agent shall provide the person with whom cremation arrangements are made with a signed statement specifying the ultimate disposition of the cremated remains, if known. The crematory licensee may store or retain cremated remains as directed by the authorizing agent. Records of retention and disposition of cremated remains shall be kept by the crematory licensee pursuant to G.S. 90-210.127.

(b) The authorizing agent is responsible for the disposition of the cremated remains. If, after a period of 30 days from the date of cremation, the authorizing agent or the agent's representative has not specified the final disposition or claimed the cremated remains, the crematory licensee or the person in possession of the cremated remains may release the cremated remains to another family member upon written notification to the authorizing agent delivered by certified mail or dispose of the cremated remains only in a manner permitted in this section. The authorizing agent shall be responsible for reimbursing the crematory licensee for all reasonable expenses incurred in disposing of the cremated remains pursuant to this section. A record of such disposition shall be made and kept by the person making the disposition. Upon disposing of cremated remains in accordance with this section, the crematory licensee or person in possession of the cremated remains shall be discharged from any legal obligation or liability concerning such cremated remains.

(c) In addition to the disposal of cremated remains in a crypt, niche, grave, or scattering garden located in a dedicated cemetery, or by scattering over uninhabited public land, the sea, or other public waterways pursuant to subsection (f) of this section, cremated remains may be disposed of in any manner on the private property of a consenting owner, upon direction of the authorizing agent. If cremated remains are to be disposed of by the crematory licensee on private property, other than dedicated cemetery property, the authorizing agent shall provide the crematory licensee with the written consent of the property owner.

(d) Except with the express written permission of the authorizing agent, no person may:

(1) Dispose of or scatter cremated remains in such a manner or in such a location that the cremated remains are commingled with those of another person. This subdivision shall not apply to the scattering of cremated remains at sea or by air from individual closed containers or to the scattering of cremated remains in an area located in a dedicated cemetery and used exclusively for such purposes.

(2) Place cremated remains of more than one person in the same closed container. This subdivision shall not apply to placing the cremated remains of members of the same family in a common closed container designed for the cremated remains of more than one person with the written consent of the family.

(e) Cremated remains shall be released by the crematory licensee to the individual specified by the authorizing agent on the cremation authorization form. The representative of the crematory licensee and the individual receiving the cremated remains shall sign a receipt indicating the name of the deceased, and the date, time, and place of the receipt, and contain a representation that the handling of the final disposition will be in a proper manner. After this delivery, the cremated remains may be transported in any manner in this State, without a permit, and disposed of in accordance with the provisions of this Article.

(f) Cremated remains may be scattered over uninhabited public land, over a public waterway or sea, subject to health and environmental standards, or on the private property of a consenting owner pursuant to subsection (c) of this section. A person may utilize a boat or airplane to perform such scattering. Cremated remains shall be removed from their closed container before they are scattered. (1989 (Reg. Sess., 1990), c. 988, s. 1; 1997-399, s. 20; 2003-420, s. 2; 2007-531, s. 24.)

Editor's Note. — This section was former G.S. 90-210.46. It was revised and renumbered as G.S. 90-210.50 by Session Laws 2003-420, s. 2, and has been recodified as G.S. 90-210.130 at the direction of the Revisor of Statutes.

Effect of Amendments. — Session Laws 2007-531, s. 24, effective August 31, 2007, inserted "release the cremated remains to another family member upon written notification to the authorizing agent delivered by certified mail or" in the second sentence of subsection (b).

§ 90-210.131. Limitation of liability.

(a) Any person signing a cremation authorization form as authorizing agent shall be deemed to warrant the truthfulness of any facts set forth in the cremation authorization form, including the identity of the deceased whose remains are sought to be cremated and that person's authority to order such cremation.

(b) A crematory licensee shall have authority to cremate human remains only upon the receipt of a cremation authorization form signed by an authorizing agent. There shall be no liability of a crematory licensee that cremates human remains pursuant to such authorization or that releases or disposes of the cremated remains pursuant to such authorization. A crematory licensee and funeral establishment or licensee thereof who causes the crematory licensee to act shall have no liability for the final disposition or manner in which the cremated remains are handled after the cremated remains are released in accordance with the directions of the authorizing agent.

(c) A crematory licensee shall not be responsible or liable for any valuables delivered to the crematory licensee with human remains.

(d) A crematory licensee shall not be liable for refusing to accept a body or to perform a cremation until it receives a court order or other suitable confirmation that a dispute has been settled if:

(1) It is aware of any dispute concerning the cremation of human remains;
(2) It has a reasonable basis for questioning any of the representations made by the authorizing agent; or
(3) For any other lawful reason.

(e) If a crematory licensee is aware of any dispute concerning the release or disposition of the cremated remains, the crematory licensee may refuse to release the cremated remains until the dispute has been resolved or the crematory licensee has been provided with a court order authorizing the release or disposition of the cremated remains. A crematory licensee shall not be liable for refusing to release or dispose of cremated remains in accordance with this subsection. A crematory licensee may charge a reasonable storage fee if the dispute is not resolved within 30 days after it is received by the crematory licensee. (1989 (Reg. Sess., 1990), c. 988, s. 1; 1997-399, s. 21; 2003-420, s. 2.)

Editor's Note. — This section was former G.S. 90-210.47. It was revised and renumbered as G.S. 90-210.51 by Session Laws 2003-420, s. 2, and has been recodified as G.S. 90-210.131 at the direction of the Revisor of Statutes.

§ 90-210.132. Fees.

(a) The Board may set and collect fees not to exceed the following amounts from crematory licensees, crematory manager permit holders, and applicants:

(1) Licensee application fee.	$400.00
(2) Annual renewal fee.	150.00
(3) Late renewal fee.	75.00
(4) Reinspection fee.	100.00
(5) Per cremation fee.	10.00
(6) Late fee, per cremation.	10.00
(7) Late fee, cremation report.	75.00 per month
(8) Crematory manager permit application fee.	150.00
(9) Annual crematory manager permit renewal fee.	40.00.

(b) The funds collected pursuant to this Article shall become part of the general fund of the Board. (1989 (Reg. Sess., 1990), c. 988, s. 1; 1997-399, s. 22; 2003-420, s. 2.)

Editor's Note. — This section was former G.S. 90-210.48. It was revised and renumbered as G.S. 90-210.52 by Session Laws 2003-420, s. 2, and has been recodified as G.S. 90-210.132 at the direction of the Revisor of Statutes.

§ 90-210.133. Crematory licensee rights.

(a) A crematory licensee may adopt reasonable rules consistent with this Article for the management and operation of a crematory. Nothing in this subsection may be construed to prevent a crematory licensee from adopting rules which are more stringent than the provisions of this Article.

(b) Nothing in this Article may be construed to relieve the crematory licensee from obtaining any other licenses or permits required by law.

(c) Nothing in this Article shall prohibit or require the performance of cremations by crematory licensees or crematory managers for or directly with the public or exclusively for or through licensed funeral directors. (1989 (Reg. Sess., 1990), c. 988, s. 1; 2003-420, s. 2.)

Editor's Note. — This section was former G.S. 90-210.49. It was revised and renumbered as G.S. 90-210.53 by Session Laws 2003-420, s. 2, and has been recodified as G.S. 90-210.133 at the direction of the Revisor of Statutes.

§ 90-210.134. Rulemaking, applicability, violations, and prohibitions of Article.

(a) The Board is authorized to adopt and promulgate such rules for the carrying out and enforcement of the provisions of this Article as may be necessary and as are consistent with the laws of this State and of the United States. The Board may develop a Standard Cremation Authorization Form and procedures for its execution that shall be used by the crematory licensee subject to this Article, unless a crematory has its own form approved by the Board. A crematory licensee that uses its own approved cremation authorization form must have the cremation authorization form reapproved if changed or after amendments are made to this Article or the rules adopted by the Board related to cremation authorization forms. The Board may perform such other acts and exercise such other powers and duties as may be provided in this Article, in Article 13A of this Chapter, and otherwise by law and as may be necessary to carry out the powers herein conferred.

(b) The provisions of this Article shall not apply to the cremation of medical waste performed by the North Carolina Anatomical Commission, licensed hospitals and medical schools, and the office of the Chief Medical Examiner when the disposition of such medical waste is the legal responsibility of the institutions.

(c) A violation of any of the provisions of this Article is a Class 2 misdemeanor.

(d) No person, firm, or corporation may request or authorize cremation or cremate human remains when the person, firm, or corporation has information indicating a crime or violence of any sort in connection with the cause of death unless such information has been conveyed to the State or county medical examiner and permission from the State or county medical examiner to cremate the human remains has thereafter been obtained. (1989 (Reg. Sess., 1990), c. 988, s. 1; 1993, c. 539, s. 640; 1994 Ex. Sess., c. 24, s. 14(c); 2003-420, s. 2.)

Editor's Note. — This section was former G.S. 90-210.50. It was revised and renumbered as G.S. 90-210.54 by Session Laws 2003-420, s. 2, and has been recodified as G.S. 90-210.134 at the direction of the Revisor of Statutes.

§ 90-210.135. Cremation societies.

No person, firm, or corporation licensed as a crematory under the provisions of this Article may operate a cremation society without first registering the name of the cremation society with the Board. (2007-531, s. 25.)

Editor's Note. — The subsection (a) designation in this section as enacted by Session Laws 2007-531, s. 25, was deleted at the direction of the Revisor of Statutes.

Session Laws 2007-531, s. 27, made this section effective August 31, 2007.

Article 14.

Cadavers for Medical Schools.

§ **90-211:** Repealed by Session Laws 1973, c. 476, s. 128.

§§ **90-212 through 90-216:** Repealed by Session Laws 1975, c. 694, s. 1.

Article 14A.

Bequest of Body or Part Thereof.

§§ **90-216.1 through 90-216.5:** Repealed by Session Laws 1969, c. 84, s. 2.

Article 14B.

Disposition of Unclaimed Bodies.

§§ **90-216.6 through 90-216.11:** Repealed by Session Laws 1983, c. 891, s. 3.

Cross References. — As to disposition of unclaimed bodies, see now G.S. 130A-415 et seq.

Article 14C.

Final Disposition or Transportation of Deceased Migrant Farm Workers and Their Dependents.

§ **90-216.12:** Repealed by Session Laws 1983, c. 891, s. 4.

Cross References. — As to the final disposition or transportation of deceased migrant agricultural workers and their dependents, see now G.S. 130A-417 et seq.

Article 15.

Autopsies.

§§ **90-217 through 90-220:** Repealed by Session Laws 1983, c. 891, s. 5.

Cross References. — As to autopsies, see now G.S. 130A-398 et seq.

Article 15A.

Uniform Anatomical Gift Act.

§§ 90-220.1 through 90-220.11: Repealed by Session Laws 1983, c. 891, s. 6.

Article 15B.

Blood Banks.

§ 90-220.12. Supervision of licensed physician required; penalty for violation.

It shall be unlawful for any person, firm or corporation to engage in the selection of blood donors or in the collection, storage, processing, or transfusion of human blood, except at the direction or under the supervision of a physician licensed to practice medicine in North Carolina. Any person, firm or corporation convicted of the violation of this section shall be guilty of a Class 1 misdemeanor. (1971, c. 938; 1993, c. 539, s. 641; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 90-220.13. Selection of donors; due care required.

In the selection of donors due care shall be exercised to minimize the risks of transmission of agents that may cause hepatitis or other diseases. (1971, c. 938.)

CASE NOTES

Legislative Intent Regarding Blood Bank Standard of Care. — This piece of legislation is an unequivocal intent by the North Carolina legislature to make blood banks subject to an ordinary standard of negligence, rather than a professional standard of negligence as set forth in the medical malpractice statute, G.S. 90-21.12. Doe v. American Nat'l Red Cross, 798 F. Supp. 301 (E.D.N.C. 1992).

§ 90-220.14. Inapplicability.

Nothing in this Article shall be construed to affect the provisions of G.S. 20-16.2 and G.S. 20-139.1. (1971, c. 938.)

Article 16.

Dental Hygiene Act.

§ 90-221. Definitions.

(a) "Dental hygiene" as used in this Article shall mean the performance of the following functions: Complete oral prophylaxis, application of preventive agents to oral structures, exposure and processing of radiographs, administration of medicaments prescribed by a licensed dentist, preparation of diagnostic aids, and written records of oral conditions for interpretation by the dentist, together with such other and further functions as may be permitted by rules and regulations of the Board not inconsistent herewith.

(b) "Dental hygienist" as used in this Article, shall mean any person who is a graduate of a Board-accredited school of dental hygiene, who has been licensed by the Board, and who practices dental hygiene as prescribed by the Board.

(c) “License” shall mean a certificate issued to any applicant upon completion of requirements for admission to practice dental hygiene.

(d) “Renewal certificate” shall mean the annual certificate of renewal of license to continue practice of dental hygiene in the State of North Carolina.

(e) “Board” shall mean “The North Carolina State Board of Dental Examiners” created by Chapter 139, Public Laws of 1879, and Chapter 178, Public Laws of 1915 as continued in existence by G.S. 90-22.

(f) “Supervision” as used in this Article shall mean that acts are deemed to be under the supervision of a licensed dentist when performed in a locale where a licensed dentist is physically present during the performance of such acts, except those acts performed under direction and in compliance with G.S. 90-233(a) or G.S. 90-233(a1), and such acts are being performed pursuant to the dentist’s order, control and approval. (1945, c. 639, s. 1; 1971, c. 756, s. 1; 1981, c. 824, s. 1; 2007-124, s. 1.)

Effect of Amendments. — Session Laws 2007-124, s. 1, effective October 1, 2007, added “except those acts performed under direction and in compliance with G.S. 90-233(a) or G.S. 90-233(a1),” in the middle of subsection (f).

§ 90-222. Administration of Article.

The Board is hereby vested with the authority and is charged with the duty of administering the provisions of this Article. (1945, c. 639, s. 2.)

§ 90-223. Powers and duties of Board.

(a) The Board is authorized and empowered to:
(1) Conduct examinations for licensure,
(2) Issue licenses and provisional licenses,
(3) Issue annual renewal certificates,
(4) Renew expired licenses, and
(5) Contract with a regional or national testing agency to conduct clinical examinations. Prior to entering a contract with a regional or national testing agency, the Board shall evaluate the agency based on the following criteria:
a. The number of states that recognize the results of the testing agency’s examination.
b. The cost to the applicant of the examination.
c. How long the testing agency has been conducting examinations.
d. Whether the examination includes procedures performed on human subjects as part of the assessment of clinical competencies.

(b) The Board shall have the authority to make or amend rules and regulations not inconsistent with this Article governing the practice of dental hygiene and the granting, revocation and suspension of licenses and provisional licenses of dental hygienists.
(1) Any rule adopted under this Article shall be distributed to all licensed dentists and all licensed dental hygienists within 30 days of final approval by the Board.
(2) The Board shall issue every two years a compilation or supplement of the Dental Hygiene Act and the Board rules and regulations, and, upon written request therefor, a directory of dental hygienists to each licensed dentist and dental hygienist.

(c) The Board shall keep on file in its office at all times a complete record of the names, addresses, license numbers and renewal certificate numbers of all persons entitled to practice dental hygiene in this State.

(d) The Board shall, in addition to any other requirements for Board approval of a school or program of dental hygiene for purposes of this Article, require that any school or program in North Carolina develop and implement a procedure for advanced placement of potentially qualified persons. This procedure shall be designed to encourage and allow credit for any person who has attained special capabilities in dental work through military service, on-the-job training or working experience, or other means not otherwise qualifying the person to be immediately eligible for licensure. The procedure shall include these elements: public announcement of the procedure, a method for persons who have special capabilities through training or experience to make application to the school or program for advanced placement, personal counseling on obtaining advanced placement, administration of specially prepared written and clinical examinations for all parts of the curriculum otherwise required for graduation, exemption from course requirements when results of the examinations so indicate, and appropriate modification of curriculum requirements, when necessary, to facilitate individual advancement in education programs. The procedure for advanced placement shall not be approved by the Board unless it is fairly designed to facilitate the substitution of military or civilian training and experience for regular curricula, taking into account that the special nature of military and certain civilian training and experience may be equivalent without necessarily being identical to the courses of the school or program.

(e) The Board shall have the authority to provide for programs for impaired dental hygienists as authorized in G.S. 90-48.3. (1945, c. 639, s. 3; 1971, c. 756, s. 2; 1973, c. 871, s. 2; 1979, 2nd Sess., c. 1195, s. 14; 1987, c. 827, s. 1; 1999-382, s. 2; 2000-189, s. 7; 2006-235, s. 1.)

Editor's Note. — Session Laws 2006-235, ss. 4, 5, provide: "The North Carolina State Board of Dental Examiners shall continue to conduct clinical examinations for applicants seeking a license to practice dental hygiene until at least September 30, 2007. No applicant for a dental hygiene license shall be required to take a Board-approved regional or national independent third-party clinical examination prior to September 30, 2007.

"Notwithstanding any provision to the contrary, the North Carolina State Board of Dental Examiners may accept any application for the dental hygiene clinical examination to be conducted on June 8, 2006, if the application was received on or before March 31, 2006."

Effect of Amendments. — Session Laws 2006-235, s. 1, effective July 1, 2006, added paragraph (a)(5) and made related minor stylistic and punctuation changes.

§ 90-224. Examination.

(a) The applicant for licensure must be of good moral character, have graduated from an accredited high school or hold a high school equivalency certificate duly issued by a governmental agency or unit authorized to issue the same, and be a graduate of a program of dental hygiene in a school or college approved by the Board.

(b) The Board shall have the authority to establish in its rules and regulations:

(1) The form of application;
(2) The time and place of examination;
(3) The type of examination;
(4) The qualifications for passing the examination.

(b1) The Board also may grant a license to an applicant who is found to have passed an examination given by a Board-approved regional or national dental hygiene testing agency, provided that the Board deems the regional or national examination to be substantially equivalent to or an improvement upon the examination given by the Board, and the applicant meets the other qualifications set forth in this Article.

(c) The Department of Justice may provide a criminal record check to the Board for a person who has applied for a new or renewal license through the Board. The Board shall provide to the Department of Justice, along with the request, the fingerprints of the applicant, any additional information required by the Department of Justice, and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The Board shall keep all information pursuant to this subsection privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this subsection. (1945, c. 639, s. 4; 1971, c. 756, s. 3; 2002-147, s. 10; 2006-235, s. 2.)

Editor's Note. — Session Laws 2006-235, ss. 4, 5, provide: "The North Carolina State Board of Dental Examiners shall continue to conduct clinical examinations for applicants seeking a license to practice dental hygiene until at least September 30, 2007. No applicant for a dental hygiene license shall be required to take a Board-approved regional or national independent third-party clinical examination prior to September 30, 2007.

"Notwithstanding any provision to the contrary, the North Carolina State Board of Dental Examiners may accept any application for the dental hygiene clinical examination to be conducted on June 8, 2006, if the application was received on or before March 31, 2006."

Effect of Amendments. — Session Laws 2006-235, s. 2, effective July 1, 2006, added subsection (b1).

§ 90-224.1. Licensure by credentials.

(a) The Board may issue a license by credentials to an applicant who has been licensed to practice dental hygiene in any state or territory of the United States if the applicant produces satisfactory evidence to the Board that the applicant has the required education, training, and qualifications; is in good standing with the licensing jurisdiction; has passed the National Board Dental Hygiene Examination administered by the Joint Commission on National Dental Examinations; has passed satisfactory examinations of proficiency in the knowledge and practice of dental hygiene as determined by the Board; and meets all other requirements of this section and rules adopted by the Board. The Board may, in its discretion, refuse to issue a license by credentials to an applicant who the Board determines is unfit to practice dental hygiene.

(b) The applicant for licensure shall be of good moral character, have graduated from an accredited high school or hold a high school equivalency certificate duly issued by a governmental agency or authorized unit, and have graduated from a dental hygiene program or school accredited by the Commission on Dental Accreditation of the American Dental Association and approved by the Board.

(c) The applicant must meet all of the following conditions:

(1) Has been actively practicing dental hygiene, as defined in G.S. 90-221, under the supervision of a licensed dentist for a minimum of two years immediately preceding the date of application.

(2) Has no history of disciplinary action or pending disciplinary action in the military or in any state or territory in which the applicant is or has ever been licensed.

(3) Has no felony convictions and has no other criminal convictions that would affect the applicant's ability to render competent dental hygiene care.

(4) Has not failed a licensure examination administered by the North Carolina State Board of Dental Examiners.

(d) The applicant for licensure by credentials shall submit an application, the form of which shall be determined by the Board, pay the fee required by G.S. 90-232, successfully complete examinations in Jurisprudence and Sterilization and Infection Control, and meet other criteria or requirements established by the Board, which may include an examination or interview before the Board or its authorized agents.

(e) This section shall not be construed to include licensure by reciprocity, which is prohibited. (2002-37, s. 3.)

Cross References. — As to licensing practitioners of other states by credentials, see G.S. 90-36.

§ 90-225. License issue and display.

(a) The Board shall issue licenses to examinees who pass the Board's examination.

(b) The Board shall determine:

(1) The method and time of notifying successful candidates,

(2) The time and form for issuing licenses, and

(3) The place license must be displayed. (1945, c. 639, s. 5; 1971, c. 756, s. 4.)

§ 90-225.1. Continuing education courses required.

All dental hygienists licensed under G.S. 90-225 shall be required to attend Board-approved courses of study in subjects relating to dental hygiene. The Board shall have authority to consider and approve courses, or providers of courses, to the end that those attending will gain (i) information on existing and new methods and procedures used by dental hygienists, (ii) information leading to increased safety and competence in their dealings with patients and supervising dentists, and (iii) information on other matters, as they develop, that are of continuing importance to the practice of dental hygiene as a part of the practice of dentistry. The Board shall determine the number of hours of study within a particular period and the nature of course work required. Failure to comply with continuing education requirements adopted under the authority of this section shall be grounds for the Board to decline to issue a renewal certificate under G.S. 90-227. (1993, c. 307, s. 3.)

§ 90-226. Provisional license.

(a) The North Carolina State Board of Dental Examiners shall, subject to its rules and regulations, issue a provisional license to practice dental hygiene to any person who is licensed to practice dental hygiene anywhere in the United States, or in any country, territory or other recognized jurisdiction, if the Board shall determine that said licensing jurisdiction imposed upon said person requirements for licensure no less exacting than those imposed by this State. A provisional licensee may engage in the practice of dental hygiene only in strict accordance with the terms, conditions and limitations of her license and with the rules and regulations of the Board pertaining to provisional license.

(b) A provisional license shall be valid until the date of the announcement of the results of the next succeeding Board examination of candidates for licensure to practice dental hygiene in this State, unless the same shall be earlier revoked or suspended by the Board.

(c) No person who has failed an examination conducted by the North Carolina State Board of Dental Examiners shall be eligible to receive a provisional license.

(d) Any person desiring to secure a provisional license shall make application therefor in the manner and form prescribed by the rules and regulations of the Board and shall pay the fee prescribed in G.S. 90-232.

(e) A provisional licensee shall be subject to those various disciplinary measures and penalties set forth in G.S. 90-229 upon a determination of the Board that said provisional licensee has violated any of the terms or provisions of this Article. (1971, c. 756, s. 5; 1975, c. 19, s. 5.)

§ 90-227. Renewal certificates.

(a) The Board shall issue annual renewal certificates to licensed dental hygienists.

(b) The Board shall have the authority to establish in its rules and regulations:

(1) The form of application for renewal certificates;
(2) The time the application must be submitted;
(3) The type of certificate to be issued;
(4) How the certificate must be displayed;
(5) The penalty for late application;
(6) The automatic loss of license if applications are not submitted. (1945, c. 639, s. 6; 1971, c. 756, s. 6.)

§ 90-228. Renewal of license.

The Board shall have the authority to renew the license of a dental hygienist who fails to obtain a renewal certificate for any year provided she

(1) Makes application for a renewal of license and
(2) Meets the qualifications established by the Board. (1945, c. 639, s. 7; 1971, c. 756, s. 7.)

§ 90-229. Disciplinary measures.

(a) The North Carolina State Board of Dental Examiners shall have the power and authority to (i) refuse to issue a license to practice dental hygiene; (ii) refuse to issue a certificate of renewal to practice dental hygiene; (iii) revoke or suspend a license to practice dental hygiene; [and] (iv) invoke such other disciplinary measures, censure or probative terms against a licensee as it deems proper; in any instance or instances in which the Board is satisfied that such applicant or licensee:

(1) Has engaged in any act or acts of fraud, deceit or misrepresentation in obtaining or attempting to obtain a license or the renewal thereof;
(2) Has been convicted of any of the criminal provisions of this Article or has entered a plea of guilty or nolo contendere to any charge or charges arising therefrom;
(3) Has been convicted of or entered a plea of guilty or nolo contendere to any felony charge or to any misdemeanor charge involving moral turpitude;
(4) Is a chronic or persistent user of intoxicants, drugs or narcotics to the extent that the same impairs her ability to practice dental hygiene;
(5) Is incompetent in the practice of dental hygiene;
(6) Has engaged in any act or practice violative of any of the provisions of this Article or violative of any of the rules and regulations promulgated and adopted by the Board, or has aided, abetted or assisted any other person or entity in the violation of the same;

(7) Has practiced any fraud, deceit or misrepresentation upon the public or upon any individual in an effort to acquire or retain any patient or patients;
(8) Has made fraudulent or misleading statements pertaining to her skill, knowledge, or method of treatment or practice;
(9) Has committed any fraudulent or misleading acts in the practice of dental hygiene;
(10) Has, in the practice of dental hygiene, committed an act or acts constituting malpractice;
(11) Has employed a person not licensed in this State to do or perform any act or service, or has aided, abetted or assisted any such unlicensed person to do or perform any act or service which cannot lawfully be done or performed by such person;
(12) Has engaged in any unprofessional conduct as the same may be from time to time, defined by the rules and regulations of the Board;
(13) Is mentally, emotionally, or physically unfit to practice dental hygiene or is afflicted with such a physical or mental disability as to be deemed dangerous to the health and welfare of patients. An adjudication of mental incompetency in a court of competent jurisdiction or a determination thereof by other lawful means shall be conclusive proof of unfitness to practice dental hygiene unless or until such person shall have been subsequently lawfully declared to be mentally competent.

(b) As used in this section the term "licensee" includes licensees and provisional licensees and the term "license" includes licenses and provisional licenses. (1945, c. 639, s. 8; 1971, c. 756, s. 8; 1997-456, s. 27.)

CASE NOTES

Cited in Dailey v. North Carolina State Bd. of Dental Exmrs., 309 N.C. 710, 309 S.E.2d 219 (1983); In re DeLancy, 67 N.C. App. 647, 313 S.E.2d 880 (1984).

§ 90-230. Certificate upon transfer to another state.

Any dental hygienist duly licensed by the North Carolina State Board of Dental Examiners, desiring to move from North Carolina to another state, territory or foreign country, if a holder of a certificate of renewal of license from said Board, upon application to said Board and the payment to it of the fee in this Article provided, shall be issued a certificate showing her full name and address, the date of license originally issued to her, the date and number of her renewal of license, and whether any charges have been filed with the Board against her. The Board may provide forms for such certificate, requiring such additional information as it may determine proper. (1971, c. 756, s. 10.)

§ 90-231. Opportunity for licensee or applicant to have hearing.

(a) With the exception of applicants for reinstatement after revocation, every applicant for a license or provisional license to practice dental hygiene or licensee or provisional licensee to practice dental hygiene shall after notice have an opportunity to be heard before the North Carolina State Board of Dental Examiners shall take any action the effect of which would be:
(1) To deny permission to take an examination for licensing for which application has been duly made; or
(2) To deny a license after examination for any cause other than failure to pass an examination; or
(3) To withhold the renewal of a license for any cause other than failure to pay a statutory renewal fee; or

(4) To suspend a license; or
(5) To revoke a license; or
(6) To revoke or suspend a provisional license; or
(7) To invoke any other disciplinary measures, censure or probative terms against a licensee or provisional licensee,

such proceedings to be conducted in accordance with the provisions of Chapter 150B of the General Statutes of North Carolina.

(b) In lieu of or as a part of such hearing and subsequent proceedings the Board is authorized and empowered to enter any consent order relative to the discipline, censure, or probation of a licensee, provisional licensee or an applicant for a license or provisional license, or relative to the revocation or suspension of a license or provisional license.

(c) Following the service of the notice of hearing as required by Chapter 150B of the General Statutes, the Board and the person upon whom such notice is served shall have the right to conduct adverse examinations, take depositions, and engage in such further discovery proceedings as are permitted by the laws of this State in civil matters. The Board is hereby authorized and empowered to issue such orders, commissions, notices, subpoenas, or other process as might be necessary or proper to effect the purposes of this subsection; provided, however, that no member of the Board shall be subject to examination hereunder. (1945, c. 639, s. 10; 1967, c. 489, s. 1; 1971, c. 756, s. 11; 1973, c. 1331, s. 3; 1987, c. 827, s. 1.)

§ 90-232. Fees.

(a) In order to provide the means of carrying out and enforcing the provisions of this Article and the duties devolving upon the North Carolina State Board of Dental Examiners, it is authorized to charge and collect fees established by its rules not exceeding the following:

(1) Each applicant for examination	$350.00
(2) Each renewal certificate, which fee shall be annually fixed by the Board and not later than November 30 of each year it shall give written notice of the amount of the renewal fee to each dental hygienist licensed to practice in this State by mailing such notice to the last address of record with the Board of each such dental hygienist	250.00
(3) Each restoration of license	150.00
(4) Each provisional license	150.00
(5) Each certificate of license to a resident dental hygienist desiring to change to another state or territory	50.00
(6) Annual fee to be paid upon license renewal to assist in funding programs for impaired dental hygienists	80.00
(7) Each license by credentials	1,500.

(b) In all instances where the Board uses the services of a regional or national testing agency for preparation, administration, or grading of examinations, the Board may require applicants to pay the actual cost of the testing agency in lieu of the fee authorized in subdivision (a)(1) of this section.

(c) In no event may the annual fee imposed on dental hygienists to fund the impaired dental hygienists program exceed the annual fee imposed on dentists to fund the impaired dentist program. All fees shall be payable in advance to the Board and shall be disposed of by the Board in the discharge of its duties under this Article. (1945, c. 639, s. 11; 1965, c. 163, s. 7; 1967, c. 489, s. 2; 1971, c. 756, s. 12; 1987, c. 555, s. 2; 1999-382, s. 3; 2002-37, s. 6; 2003-348, s. 2; 2006-235, s. 3.)

Editor's Note. — Session Laws 2006-235, ss. 4, 5, provide: "The North Carolina State Board of Dental Examiners shall continue to conduct clinical examinations for applicants seeking a license to practice dental hygiene until at least September 30, 2007. No applicant for a dental hygiene license shall be required to take a Board-approved regional or national independent third-party clinical examination prior to September 30, 2007.

"Notwithstanding any provision to the contrary, the North Carolina State Board of Dental Examiners may accept any application for the dental hygiene clinical examination to be conducted on June 8, 2006, if the application was received on or before March 31, 2006."

Effect of Amendments. — Session Laws 2006-235, s. 3, effective July 1, 2006, designated the formerly undesignated first paragraph as subsection (a), added subsection (b), and designated the formerly undesignated second paragraph as subsection (c).

§ 90-233. Practice of dental hygiene.

(a) A dental hygienist may practice only under the supervision of one or more licensed dentists. This subsection shall be deemed to be complied with in the case of dental hygienists employed by or under contract with a local health department or State government dental public health program and especially trained by the Dental Health Section of the Department of Health and Human Services as public health hygienists, while performing their duties for the persons officially served by the local health department or State government program under the direction of a duly licensed dentist employed by that program or by the Dental Health Section of the Department of Health and Human Services.

(a1) A dental hygienist who has three years of experience in clinical dental hygiene or a minimum of 2,000 hours performing primarily prophylaxis or periodontal debridement under the supervision of a licensed dentist, who completes annual CPR certification, who completes six hours each year of Board-approved continuing education in medical emergencies in addition to the requirements of G.S. 90-225.1, and who is designated by the employing dentist as being capable of performing clinical hygiene procedures without the direct supervision of the dentist, may perform one or more dental hygiene functions as described in G.S. 90-221(a) without a licensed dentist being physically present if all of the following conditions are met:

(1) A licensed dentist directs in writing the hygienist to perform the dental hygiene functions.

(2) The licensed dentist has personally conducted an evaluation of the patient which shall include a complete oral examination of the patient, a thorough analysis of the patient's health history, a diagnosis of the patient's condition, and a specific written plan for treatment.

(3) The dental hygiene functions directed to be performed in accordance with this subsection shall be conducted within 120 days of the dentist's evaluation.

(4) The services are performed in nursing homes; rest homes; long-term care facilities; rural and community clinics operated by Board-approved nonprofits; rural and community clinics operated by federal, State, county, or local governments; and any other facilities identified by the Office of Rural Health and approved by the Board as serving dental access shortage areas.

(a2) A dental hygienist shall not establish or operate a separate care facility that exclusively renders dental hygiene services.

(a3) A dental hygienist who has been disciplined by the Board may not practice outside the direct supervision of a dentist under G.S. 90-233(a1). A dentist who has been disciplined by the Board may not allow a hygienist to work outside of that dentist's direct supervision under G.S. 90-233(a1).

(a4) Each dentist who chooses to order dental hygiene services under G.S. 90-233(a1) shall report annually to the Board the number of patients who were treated outside the direct supervision of the dentist, the location in which the services were performed by the hygienist, and a description of any adverse circumstances which occurred during or after the treatment, if any. The dentist's report shall not identify hygienists or patients by name or any other identifier.

(a5) Clinical dental hygiene services shall be provided in compliance with both CDC and OSHA standards for infection control and patient treatment.

(b) A dentist in private practice may not employ more than two dental hygienists at one and the same time who are employed in clinical dental hygiene positions.

(c) Dental hygiene may be practiced only by the holder of a license or provisional license currently in effect and duly issued by the Board. The following acts, practices, functions or operations, however, shall not constitute the practice of dental hygiene within the meaning of this Article:

(1) The teaching of dental hygiene in a school or college approved by the Board in a board-approved program by an individual licensed as a dental hygienist in any state in the United States.

(2) Activity which would otherwise be considered the practice of dental hygiene performed by students enrolled in a school or college approved by the Board in a board-approved dental hygiene program under the direct supervision of a dental hygienist or a dentist duly licensed in North Carolina or qualified for the teaching of dentistry pursuant to the provisions of G.S. 90-29(c)(3), acting as an instructor.

(3) Any act or acts performed by an assistant to a dentist licensed to practice in this State when said act or acts are authorized and permitted by and performed in accordance with rules and regulations promulgated by the Board.

(4) Dental assisting and related functions as a part of their instructions by students enrolled in a course in dental assisting conducted in this State and approved by the Board, when such functions are performed under the supervision of a dentist acting as a teacher or instructor who is either duly licensed in North Carolina or qualified for the teaching of dentistry pursuant to the provisions of G.S. 90-29(c)(3). (1945, c. 639, s. 12; 1971, c. 756, s. 13; 1973, c. 476, s. 128; 1981, c. 824, ss. 2, 3; 1989, c. 727, s. 219(6a); 1997-443, s. 11A.23; 1999-237, s. 11.65; 2007-124, s. 2.)

Effect of Amendments. — Session Laws 2007-124, s. 2, effective October 1, 2007, added subsections (a1) through (a5).

§ 90-233.1. Violation a misdemeanor.

Any person who shall violate, or aid or abet another in violating, any of the provisions of this Article shall be guilty of a Class 1 misdemeanor. (1945, c. 639, s. 13; 1971, c. 756, s. 14; 1993, c. 539, s. 642; 1994, Ex. Sess., c. 24, s. 14(c).)

ARTICLE 17.

Dispensing Opticians.

§ 90-234. Necessity for certificate of registration.

On and after the first day of July, 1951, no person or combination of persons shall for pay, or reward, either directly or indirectly, practice as a dispensing optician as hereinafter defined in the State of North Carolina without a certificate of registration issued pursuant to the provisions of this Article by the North Carolina State Board of Opticians hereinafter established. (1951, c. 1089, s. 1.)

§ 90-235. Definition.

Within the meaning of the provisions of this Article, the term "dispensing optician" defines one who prepares and dispenses lenses, spectacles, eyeglasses and/or appurtenances thereto to the intended wearers thereof on written prescriptions from physicians or optometrists duly licensed to practice their professions, and in accordance with such prescriptions interprets, measures, adapts, fits and adjusts such lenses, spectacles, eyeglasses and/or appurtenances thereto to the human face for the aid or correction of visual or ocular anomalies of the human eye. The services and appliances related to ophthalmic dispensing shall be dispensed, furnished or supplied to the intended wearer or user thereof only upon prescription issued by a physician or an optometrist; but duplications, replacements, reproductions or repetitions may be done without prescription, in which event any such act shall be construed to be ophthalmic dispensing, the same as if performed on the basis of a written prescription. (1951, c. 1089, s. 2.)

§ 90-236. What constitutes practicing as a dispensing optician.

Any one or combination of the following practices when done for pay or reward shall constitute practicing as a dispensing optician: Interpreting prescriptions issued by licensed physicians and/or optometrists; fitting glasses on the face; servicing glasses or spectacles; measuring of patient's face, fitting frames, compounding and fabricating lenses and frames, and any therapeutic device used or employed in the correction of vision, and alignment of frames to the face of the wearer, provided, however, that the provisions of this section shall not apply to students and apprentices. (1951, c. 1089, s. 3; 1977, c. 755, s. 1.)

CASE NOTES

Neither an optician nor an optometrist is permitted to use any medicine to treat the eye in order to relieve irritation or for any other trouble which requires the use of drugs. High v. Ridgeway's Opticians, 258 N.C. 626, 129 S.E.2d 301 (1963).

Fitting Contact Lenses. — The General Assembly has not expressly authorized the optician to fit contact lenses to the human eye, but the general terms of the statutes are broad enough to authorize the dispensing optician to do so upon prescription of a physician, oculist or optometrist. High v. Ridgeway's Opticians, 258 N.C. 626, 129 S.E.2d 301 (1963).

So long as the dispensing optician fabricates, fits and inserts contact lenses in the eyes in accordance with the prescriptions of examining physicians or oculists, and requires the patient to return to the examining physician or oculist in order that the writer of the prescription may determine whether or not the prescription has been properly filled and the contact lenses properly measured, fabricated and fitted, such optician is not engaged in the practice of optometry within the meaning of this section. High v. Ridgeway's Opticians, 258 N.C. 626, 129 S.E.2d 301 (1963).

Applied in Wall & Ochs, Inc. v. Hicks, 469 F. Supp. 873 (E.D.N.C. 1979).

Cited in In re Berman, 245 N.C. 612, 97 S.E.2d 232 (1957).

§ 90-236.1. Requirements for filling contact lens prescriptions.

No person, firm or corporation licensed or registered under this Article shall fill a prescription or dispense lenses, other than spectacle lenses, unless the prescription specifically states on its face that the prescriber intends it to be for contact lenses and includes the type and specifications of the contact lenses being prescribed. No person, firm or corporation licensed under this Article shall fill a prescription beyond the expiration date stated on the face thereof.

Any person, firm or corporation that dispenses contact lenses on the prescription of a practitioner licensed under Articles 1 or 6 of this Chapter shall, at the time of delivery of the lenses, inform the recipient both orally and in writing that he return to the prescriber for insertion of the lens, instruction on lens insertion and care, and to ascertain the accuracy and suitability of the prescribed lens. The statement shall also state that if the recipient does not return to the prescriber after delivery of the lens for the purposes stated above, the prescriber shall not be responsible for any damages or injury resulting from the prescribed lens, except that this sentence does not apply if the dispenser and the prescriber are the same person.

Prescriptions filled pursuant to this section shall be kept on file by the prescriber and the person filling the prescription for at least 24 months after the prescription is filled.

Any person, firm or corporation dispensing, furnishing or supplying contact lenses in interstate commerce or at retail to recipients in this State, other than a practitioner licensed under Article 1 or Article 6 of this Chapter, is deemed a "dispensing optician" under G.S. 90-235 and is subject to the provisions of this Article. (1981, c. 600, s. 1; 1985, c. 748.)

§ 90-237. Qualifications for dispensing opticians.

In order to be issued a license as a registered licensed optician by the North Carolina State Board of Opticians, the applicant:

(1) Shall not have violated this Article or the rules of the Board.
(2) Shall be at least 18 years of age and a high school graduate or equivalent.
(2a) Shall be of good moral character.
(3) Shall have passed an examination conducted by the Board to determine his or her fitness to engage in the business of a dispensing optician.
(4) Shall have completed a six-month internship by working full time under the supervision of a licensed optician, optometrist, or physician trained in ophthalmology, in order to demonstrate proficiency in the areas of measurement of the face, and fitting and adjusting glasses and frames to the face, lens recognition, lens design, and prescription interpretation. (1951, c. 1089, s. 4; 1977, c. 755, s. 2; 1981, c. 600, s. 2; 1997-424, s. 1.)

§ 90-238. North Carolina State Board of Opticians created; appointment and qualification of members.

The North Carolina State Board of Opticians is created. The Board's duty is to carry out the purposes and enforce the provisions of this Article. The Board shall consist of seven members appointed by the Governor as follows:

(1) Five licensed dispensing opticians, each of whom shall serve three-year terms;

(2) Two residents of North Carolina who are not licensed as dispensing opticians, physicians, or optometrists, who shall serve three-year terms.

Each member of the Board shall serve until the member's successor is appointed and qualifies. No person shall serve on this Board for more than two complete consecutive terms. Before beginning office, each member of the Board shall take all oaths prescribed for other State officers in the manner provided by law, which oaths shall be filed in the office of the Secretary of State. The Governor may remove any member of the Board for good cause shown, may appoint members to fill unexpired terms, and must make optician appointments from a list of three nominees for each vacancy submitted by the Board as a result of an election conducted by the Board each year and open to all licensees. In naming candidates for election, the Board must ensure that its candidates reflect the composition of the State with regards to gender, ethnic, racial, and age composition. If the Board fails to fulfill its requirements under this section, the Governor may appoint a licensed optician to fill a vacancy on the Board. (1951, c. 1089, s. 5; 1979, c. 533; 1981, c. 600, s. 3; 1997-424, s. 7; 2007-525, s. 13.)

Effect of Amendments. — Session Laws 2007-525, s. 13, effective October 1, 2007, inserted the last two sentences of the second paragraph.

§ 90-239. Organization, meetings and powers of Board.

Within 30 days after appointment of the Board, the Board shall hold its first regular meeting, and at said meeting and annually thereafter shall choose from among its members a chairman, vice-chairman, a secretary and a treasurer. The Board may combine the offices of secretary and treasurer. The Board shall make such rules and regulations not inconsistent with the law as may be necessary to the proper performance of its duties, may employ agents to carry out the purposes of this Article, and each member may administer oaths and take testimony concerning any matter within the jurisdiction of the Board, and a majority of the Board shall constitute a quorum. The Board shall meet at least once a year, the time and place of meeting to be designated by the chairman. Special meetings may be called by the chairman or upon request of three members. The secretary of the Board shall keep a full and complete record of its proceedings, which shall at all reasonable times be open to public inspection. (1951, c. 1089, s. 6; 1981, c. 600, ss. 4-7.)

§ 90-240. Examination.

(a) Applicants to take the examination for dispensing opticians shall be high school graduates or the equivalent who:

(1) Have successfully completed a two-year course of training in an accredited school of opticianry with a minimum of 1600 hours or

(2) Have completed three and one-half years of apprenticeship while registered with the Board under a licensed dispensing optician, with time spent in a recognized school credited as part of the apprenticeship period or

(3) Have completed three and one-half years of apprenticeship while registered with the Board under the direct supervision of an optometrist or a physician specializing in ophthalmology, provided the supervising optometrist or physician elects to operate the apprenticeship under the same requirements applicable to dispensing opticians.

(b) The examination shall be confined to such knowledge as is reasonably necessary to engage in preparation and dispensing of optical devices and shall include the following:

(1) The skills necessary for the proper analysis of prescriptions;
(2) The skills necessary for the dispensing of eyeglasses and contact lenses; and
(3) The processes by which the products offered by dispensing opticians are manufactured.

(c) The examination shall be given at least twice each year at sites and on dates that are publicly announced 60 days in advance.

(d) Each applicant shall, upon request, receive his or her examination score on each section of the examination.

(e) The Board may include as part or all of the examination, any nationally prepared and recognized examination, and will periodically review and validate any exam in use by the Board. The Board will credit an applicant with the score on any national test taken in the last three years to the extent such test may be included in the North Carolina exam.

(f) An applicant for admission on the basis of apprenticeship shall have worked full time under the supervision of a licensed dispensing optician, optometrist or physician trained in ophthalmology. An apprentice shall have obtained experience in ophthalmic fabricating and manufacturing techniques and processes for no less than six months and shall have gained experience in the other activities defined as dispensing herein. (1951, c. 1089, s. 7; 1977, c. 755, s. 3; 1981, c. 600, s. 8.)

§ 90-241. Waiver of written examination requirements.

(a) The Board shall grant a license without examination to any applicant who:
(1) Is at least 18 years of age.
(2) Is of good moral character.
(3) Holds a license in good standing as a dispensing optician in another state.
(4) Has engaged in the practice of opticianry in the other state for four years immediately preceding the application to the Board.
(5) Has not violated this Article or the rules of the Board.

(b) The Board shall grant admission to the next examination and grant license upon attainment of a passing score on the examination to a person who has worked, in a state that does not license opticians, in opticianry for four years immediately preceding the application to the Board performing tasks and taking the curriculum equivalent to the North Carolina apprenticeship, and who meets the requirements of G.S. 90-237(1) through (3).

(c) Any person desiring to secure a license under this section shall make application therefor in the manner and form prescribed by the rules of the Board and shall pay the fee prescribed in G.S. 90-246.

(d) Repealed by Session Laws 1997-424, s. 2. (1951, c. 1089, s. 8; 1977, c. 755, s. 4; 1979, c. 166, ss. 2, 3; 1981, c. 600, s. 9; 1997-424, s. 2.)

§ 90-242: Repealed by Session Laws 1981, c. 600, s. 10.

§ 90-243. Registration of places of business, apprentices.

The Board may adopt rules requiring, as a condition of dispensing, the registration of places of business where ophthalmic dispensing is engaged in, and for registration of apprentices and interns who are working under direct supervision of a licensed optician. The Board may also require that any information furnished to it as required by law or regulation be furnished under oath. (1951, c. 1089, s. 10; 1967, c. 691, s. 49; 1979, c. 166, s. 1; 1981, c. 600, s. 11.)

§ 90-244. Display, use, and renewal of license of registration.

(a) Every person to whom a license has been granted under this Article shall display the same in a conspicuous part of the office or establishment wherein he is engaged as a dispensing optician. The Board may adopt regulations concerning the display of registrations of places of business and of apprentices and interns.

(b) A license issued by the Board automatically expires on the first day of January of each year. A license shall be reinstated without penalty from January 1 through January 15 immediately following expiration. After January 15, a license shall be reinstated by payment of the renewal fee and a penalty of fifty dollars ($50.00). Licenses that remain expired two years or more shall not be reinstated. (1951, c. 1098, s. 11; 1981, c. 600, s. 12; 1997-424, s. 3.)

§ 90-245. Collection of fees.

The secretary to the Board is hereby authorized and empowered to collect in the name and on behalf of this Board the fees prescribed by this Article and shall turn over to the State Treasurer all funds collected or received under this Article, which funds shall be credited to the North Carolina State Board of Opticians, and said funds shall be held and expended under the supervision of the Director of the Budget of the State of North Carolina exclusively for the administration and enforcement of the provisions of this Article. Nothing in this Article shall be construed to authorize any expenditure in excess of the amount available from time to time in the hands of the State Treasurer derived from the fees collected under the provisions of this Article and received by the State Treasurer in the manner aforesaid. (1951, c. 1089, s. 12; 1981, c. 884, s. 9.)

§ 90-246. Fees.

In order to provide the means of administering and enforcing the provisions of this Article and the other duties of the North Carolina State Board of Opticians, the Board is hereby authorized to charge and collect fees established by its rules not to exceed the following:

(1) Each examination	$200.00
(2) Each initial license	$ 50.00
(3) Each renewal of license	$100.00
(4) Each license issued to a practitioner of another state to practice in this State	$200.00
(5) Each registration of an optical place of business	$ 50.00
(6) Each application for registration as an opticianry apprentice or intern, and renewals thereof	$ 25.00
(7) Repealed by Session Laws 1997-424, s. 4, effective August 22, 1997.	
(8) Each registration of a training establishment	$ 25.00
(9) Each license verification	$ 10.00.

(1951, c. 1089, s. 13; 1977, c. 755, s. 5; 1981, c. 600, s. 13; 1989, c. 673, s. 1; 1997-424, s. 4.)

§ 90-247: Repealed by Session Laws 1981, c. 600, s. 14.

§ 90-248. Compensation and expenses of Board members and secretary.

Each member of the Board shall receive for his or her services for time actually in attendance upon Board meetings and affairs of the Board only, the amount of per diem provided by G.S. 138-5 and shall be reimbursed for subsistence, mileage and necessary expenses incurred in the discharge of such duties at the same rates as set forth in G.S. 138-6 and G.S. 138-7. (1951, c. 1089, s. 15; 1953, c. 894; 1965, c. 730; 1969, c. 445, s. 6; 1981, c. 600, s. 15.)

§ 90-249. Powers of the Board.

(a) The Board shall have the power to make rules, not inconsistent with this Article and the laws of the State of North Carolina, with respect to the following areas of the business of opticianry in North Carolina:

(1) Misrepresentation to the public.
(2) Baiting or deceptive advertising.
(3) Continuing education of licensees.
(4) Location of registrants in the State.
(5) Registration of established optical places of business, but no rule restricting type or location of a business may be enacted.
(6) Requiring photographs for purposes of identification of persons subject to this Article.
(7) Content of licensure examination and reexamination.
(8) Revocation, suspension, and reinstatement of licenses, probation, and reprimands of licensees, and other penalties.
(9) Fees within the limits of G.S. 90-246.
(10) Accreditation of schools of opticianry.
(11) Registration and training of apprentices and interns.
(12) Licenses and examinations pursuant to G.S. 90-241.

(b) through (d) Repealed by Session Laws 1997-424, s. 5. (1951, c. 1089, s. 16; 1953, c. 1041, s. 19; 1973, c. 1331, s. 3; 1977, c. 755, s. 6; 1981, c. 600, s. 16; 1987, c. 827, s. 1; 1997-424, s. 5.)

CASE NOTES

Constitutionality. — This section and G.S. 90-255, insofar as they affect advertising, are patently unconstitutional under the U.S. Const., Amend. I. Wall & Ochs, Inc. v. Hicks, 469 F. Supp. 873 (E.D.N.C. 1979).

Board May Revoke License Procured by Fraud or Misrepresentations. — Certain grounds for revocation of a license issued by the Board are set forth in this section. Fraud or misrepresentation, which is material, in the procurement of the license is not one of them, but the Board has inherent power, independent of statutory authority, to revoke a license it improperly issued by reason of material fraud or misrepresentation in its procurement. In re Berman, 245 N.C. 612, 97 S.E.2d 232 (1957).

The crucial findings of fact of the State Board of Opticians being supported by the evidence, it was error for the superior court on appeal to reverse the judgment of the Board revoking the license theretofore granted to the applicant under former G.S. 90-242 on the ground that its issuance was procured by misrepresentations. In re Berman, 245 N.C. 612, 97 S.E.2d 232 (1957).

§ 90-249.1. Disciplinary actions.

(a) The Board may suspend, revoke, or refuse to issue, renew, or reinstate any license for any of the following:

(1) Offering to practice or practicing as a dispensing optician without a license.

(2) Aiding or abetting an unlicensed person in offering to practice or practicing as a dispensing optician.
(3) Selling, transferring, or assigning a license.
(4) Engaging in fraud or misrepresentation to obtain or renew a license.
(5) Engaging in false or misleading advertising.
(6) Advertising in any manner that conveys or intends to convey the impression that eyes are examined by persons licensed under this Article or optical places of business registered under this Article.
(7) Engaging in malpractice, unethical conduct, fraud, deceit, gross negligence, incompetence, or gross misconduct.
(8) Being convicted of a crime involving fraud or moral turpitude.
(9) Violating any provision of this Article or the rules adopted by the Board.

(b) In addition or as an alternative to taking any of the actions permitted in subsection (a) of this section, the Board may assess a licensee a civil penalty of not more than one thousand dollars ($1,000) for the violation of any section of this Article. In any case in which the Board is authorized to take any of the actions permitted in subsection (a) of this section, the Board may instead accept an offer in compromise of the charges whereby the accused licensee shall pay to the Board a civil penalty of not more than one thousand dollars ($1,000). All civil penalties collected by the Board shall be remitted to the school fund of the county in which the violation occurred.

(c) In determining the amount of a civil penalty, the Board may consider:
(1) The degree and extent of harm caused by the violation to public health and safety or the potential for harm.
(2) The duration and gravity of the violation.
(3) Whether the violation was willful or reflects a continuing pattern.
(4) Whether the violation involved elements of fraud or deception.
(5) Prior disciplinary actions against the licensee.
(6) Whether and to what extent the licensee profited from the violation.

(d) Any person, including the Board and its staff, may file a complaint with the Board alleging that a licensee committed acts in violation of subsection (a) of this section. The Board may, without holding a hearing, dismiss the complaint as unfounded or trivial. Any hearings held pursuant to this section shall be conducted in accordance with Chapter 150B of the General Statutes. (1997-424, s. 6.)

§ 90-250. Sale of optical glasses.

No optical glass or other kindred products or instruments of vision shall be dispensed, ground or assembled in connection with a given formula prescribed by a licensed physician or optometrist except under the supervision of a licensed dispensing optician and in a registered optical establishment or office. Provided, however, that the provisions of this section shall not prohibit persons or corporations from selling completely assembled spectacles without advice or aid as to the selection thereof as merchandise from permanently located or established places of business. (1951, c. 1089, s. 17.)

CASE NOTES

Applied in Wall & Ochs, Inc. v. Hicks, 469 F. Supp. 873 (E.D.N.C. 1979).

§ 90-251. Licensee allowing unlicensed person to use his certificate or license.

Each licensee licensed under the provisions of this Article who shall rent, loan or allow the use of his registration certificate or license to an unlicensed person for any unlawful use shall be guilty of a Class 1 misdemeanor. (1951, c. 1089, s. 18; 1993, c. 539, s. 643; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 90-252. Engaging in practice without license.

Any person, firm or corporation owning, managing or conducting a store, shop or place of business and not having in its employ and on duty, during all hours in which acts constituting the business of opticianry are carried on, a licensed dispensing optician engaged in supervision of such store, office, place of business or optical establishment, or representing to the public, by means of advertisement or otherwise or by using the words, "optician, licensed optician, optical establishment, optical office, ophthalmic dispenser," or any combination of such terms within or without such store representing that the same is a legally established optical place of business duly licensed as such and managed or conducted by persons holding a dispensing optician's license, when in fact such permit is not held by such person, firm or corporation, or by some person employed by such person, firm or corporation and on the premises and in charge of such optical business, shall be guilty of a Class 1 misdemeanor. (1951, c. 1089, s. 19; 1981, c. 600, s. 17; 1993, c. 539, s. 644; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Cited in Wall & Ochs, Inc. v. Hicks, 469 F. Supp. 873 (E.D.N.C. 1979).

§ 90-253. Exemptions from Article.

Nothing in this Article shall be construed to apply to optometrists, or physicians trained in ophthalmology who are authorized to practice under the laws of this State, or to an unlicensed person working within the practice and under the direct supervision of the optometrist or physician trained in ophthalmology. An apprentice or intern registered with the Board and working under direct supervision of a licensed optician, optometrist or physician trained in ophthalmology will not be deemed to have engaged in opticianry by reason of performing acts defined as preparation and dispensing, provided the apprentice is in compliance with the rules of the Board respecting the training of apprentices.

As used in this section, "supervision" means the provision of general direction and control through immediate personal on-site inspection and evaluation of all work constituting the practice of opticianry and the provision of consultation and instruction by a licensed dispensing optician, except that on-site supervision is not required for minor adjustments or repairs to eyeglasses. (1951, c. 1089, s. 20; 1981, c. 600, s. 18.)

CASE NOTES

Constitutionality. — Classifications in this section, exempting physicians, optometrists and ophthalmic wholesalers from this Chapter's requirement that eyeglasses be dispensed only by licensed dispensing opticians, based on the presumption that these individuals possess such advanced training and skill that it would be illogical to require that they dispense glasses through a licensed optician, bear a rational relationship to the State's objective of forestalling the evils that could result from untrained and unlicensed personnel fitting and dispensing optical goods and thus are not violative of equal protection. Wall & Ochs, Inc. v. Hicks, 469 F. Supp. 873 (E.D.N.C. 1979).

§ 90-254. General penalty for violation.

Any person, firm or corporation who shall violate any provision of this Article for which no other penalty has been provided shall, upon conviction, be fined not more than two hundred dollars ($200.00) or imprisoned for a period of not more than 12 months, or both, in the discretion of the court.

Whenever it appears to the Board that any person, firm or corporation is violating any of the provisions of this Article or of the rules and regulations of the Board promulgated under this Article, the Board may apply to the superior court for a restraining order and injunction to restrain the violation; and the superior courts have jurisdiction to grant the requested relief, irrespective or whether or not criminal prosecution has been instituted or administrative sanctions imposed by reasons of the violation. The venue for actions brought under this subsection shall be the superior court of any county in which such acts are alleged to have been committed or in the county where the defendants in such action reside. (1951, c. 1089, s. 21; 1981, c. 600, s. 19.)

CASE NOTES

Cited in Wall & Ochs, Inc. v. Hicks, 469 F. Supp. 873 (E.D.N.C. 1979).

§ 90-255. Rebates.

It shall be unlawful for any person, firm or corporation to offer or give any gift or premium or discount, directly or indirectly, or in any form or manner participate in the division, assignment, rebate or refund of fees or parts thereof with any ophthalmologist, optometrist, or wholesaler, for the purpose of diverting or influencing the freedom of choice of the consumer in the selection of an ophthalmic dispenser. (1951, c. 1089, s. 23; 1981, c. 600, s. 20.)

CASE NOTES

Constitutionality. — G.S. 90-249 and this section, insofar as they affect advertising, are patently unconstitutional under U.S. Const., Amend. I. Wall & Ochs, Inc. v. Hicks, 469 F. Supp. 873 (E.D.N.C. 1979).

§ 90-255.1. Sale of flammable frames.

No person shall distribute, sell, exchange or deliver, or have in his possession with intent to distribute, sell, exchange or deliver any eyeglass frame or sunglass frame which contains any form of cellulose nitrate or other highly flammable materials. Any person violating the provisions of this section shall be guilty of a Class 2 misdemeanor. (1971, c. 239, s. 1; 1993, c. 539, s. 645; 1994, Ex. Sess., c. 24, s. 14(c).)

ARTICLE 18.

Physical Therapy.

§§ 90-256 through 90-270: Recodified as §§ 90-270.24 through 90-270.39.

Editor's Note. — This Article was rewritten by Session Laws 1979, c. 487, effective July 1, 1979, and has been recodified as Article 18B, G.S. 90-270.24 through 90-270.39.

ARTICLE 18A.

Psychology Practice Act.

§ 90-270.1. Title; purpose.

(a) This Article shall be known and may be cited as the "Psychology Practice Act."

(b) The practice of psychology in North Carolina is hereby declared to affect the public health, safety, and welfare, and to be subject to regulation to protect the public from the practice of psychology by unqualified persons and from unprofessional conduct by persons licensed to practice psychology. (1967, c. 910, s. 1; 1993, c. 375, s. 1.)

Cross References. — As to limited liability companies and their powers, see G.S. 57C-2-01 et seq. As to a civil action remedy for persons who are sexually exploited by their psychotherapists, see the Psychotherapy Patient/Client Sexual Exploitation Act, G.S. 90-21.41 et seq.

CASE NOTES

Legislative Intent. — The code is intended as a floor for ethical conduct, a minimum set of standards with which psychologists must comply; it is not a ceiling for ethical conduct, above which any behavior short of illegal activity is acceptable. Elliott v. North Carolina Psychology Bd., 126 N.C. App. 453, 485 S.E.2d 882 (1997), rev'd on other grounds, 348 N.C. 230, 498 S.E.2d 616 (1998).

Section to Be Strictly Construed. — The Psychology Practice Act should be strictly construed because it is both in derogation of the common law and penal in nature. Elliott v. North Carolina Psychology Bd., 348 N.C. 230, 498 S.E.2d 616 (1998).

Purpose. — The primary goal of the ethical code for psychologists is the welfare and protection of the individuals and groups with whom psychologists work. Elliott v. North Carolina Psychology Bd., 126 N.C. App. 453, 485 S.E.2d 882 (1997), rev'd on other grounds, 348 N.C. 230, 498 S.E.2d 616 (1998).

Violation Not Found. — Where psychologist engaged in social and sexual relationship with former clients only after the counseling relationship had terminated there was no violation of Principle 6(a). Elliott v. North Carolina Psychology Bd., 348 N.C. 230, 498 S.E.2d 616 (1998).

Psychology Board's Authority Over a Professional Counseling Practice. — North Carolina Psychology Board could not place a psychological associate's license on probation under G.S. 90-270.4(g) because the psychological assistant, who maintained both a psychological associate's practice and a licensed professional counselor's practice, could continue his licensed professional counselor's practice without interference from the Psychology Board, pursuant to G.S. 90-332.1(c), as long as he remained a qualified licensed professional counselor and did not promote that practice by holding himself out as a licensed psychological associate. Trayford v. N.C. Psychology Bd., 174 N.C. App. 118, 619 S.E.2d 862, 2005 N.C. App. LEXIS 2286 (2005), aff'd, 360 N.C. 396, 627 S.E.2d 462 (2006).

§ 90-270.2. Definitions.

The following definitions apply in this Article:

(1) Board. — The North Carolina Psychology Board.

(2) Examination. — Any and all examinations that are adopted by the Board and administered to applicants and licensees, including, but not limited to, the national examination, Board-developed examinations, and other examinations that assess the competency and ethics of psychologists and applicants.

(3) Jurisdiction. — Any governmental authority, including, but not limited to, a state, a territory, a commonwealth, a district of the United States, and a country or a local governmental authority thereof, that licenses, certifies, or registers psychologists.

(4) Health services. — Those activities of the practice of psychology that include the delivery of preventive, assessment, or therapeutic intervention services directly to individuals whose growth, adjustment, or functioning is actually impaired or may be at substantial risk of impairment.

(5) Institution of higher education. — A university, a college, a professional school, or another institution of higher learning that:

a. In the United States, is regionally accredited by bodies approved by the Commission on Recognition of Postsecondary Accreditation or its successor.

b. In Canada, holds a membership in the Association of Universities and Colleges of Canada.

c. In another country, is accredited by the comparable official organization having this authority.

(6) Licensed psychologist. — An individual to whom a license has been issued pursuant to the provisions of this Article, whose license is in force and not suspended or revoked, and whose license permits him or her to engage in the practice of psychology as defined in this Article.

(7) Licensed psychological associate. — An individual to whom a license has been issued pursuant to the provisions of this Article, whose license is in force and not suspended or revoked, and whose license permits him or her to engage in the practice of psychology as defined in this Article.

(7a) Neuropsychological. — Pertaining to the study of brain-behavior relationships, including the diagnosis, including etiology and prognosis, and treatment of the emotional, behavioral, and cognitive effects of cerebral dysfunction through psychological and behavioral techniques and methods.

(8) Practice of psychology. — The observation, description, evaluation, interpretation, or modification of human behavior by the application of psychological principles, methods, and procedures for the purpose of preventing or eliminating symptomatic, maladaptive, or undesired behavior or of enhancing interpersonal relationships, work and life adjustment, personal effectiveness, behavioral health, or mental health. The practice of psychology includes, but is not limited to: psychological testing and the evaluation or assessment of personal characteristics such as intelligence, personality, abilities, interests, aptitudes, and neuropsychological functioning; counseling, psychoanalysis, psychotherapy, hypnosis, biofeedback, and behavior analysis and therapy; diagnosis, including etiology and prognosis, and treatment of mental and emotional disorder or disability, alcoholism and substance abuse, disorders of habit or conduct, as well as of the psychological and neuropsychological aspects of physical illness, acci-

dent, injury, or disability; and psychoeducational evaluation, therapy, remediation, and consultation. Psychological services may be rendered to individuals, families, groups, and the public. The practice of psychology shall be construed within the meaning of this definition without regard to whether payment is received for services rendered.

(9) Psychologist. — A person represents himself or herself to be a psychologist if that person uses any title or description of services incorporating the words "psychology", "psychological", "psychologic", or "psychologist", states that he or she possesses expert qualification in any area of psychology, or provides or offers to provide services defined as the practice of psychology in this Article. All persons licensed under this Article may present themselves as psychologists, as may those persons who are exempt by G.S. 90-270.4 and those who are qualified applicants under G.S. 90-270.5. (1967, c. 910, s. 2; 1977, c. 670, s. 1; 1979, c. 670, s. 1; 1993, c. 375, s. 1; 1993 (Reg. Sess., 1994), c. 569, s. 14; 1999-292, ss. 1, 2.)

CASE NOTES

Constitutionality. — Where the only question presented by petitioner's application to the Board was whether he was entitled to receive a temporary license as a practicing psychologist, questions of the constitutionality of G.S. 90-270.4 and subsection (d) of this section were not properly before the court reviewing the Board's decision, and the court exceeded its authority in undertaking to deal with them. In re Partin, 37 N.C. App. 302, 246 S.E.2d 519 (1978).

Exemption from § 90-18. — While not specifically exempted by G.S. 90-18, a psychologist who limits himself to the practice of psychology and the rendering of professional psychological services as defined in subsections (d) and (e) of this section is exempt from G.S. 90-18 to that extent. Wesley v. Greyhound Lines, 47 N.C. App. 680, 268 S.E.2d 855, cert. denied, 301 N.C. 239, 283 S.E.2d 136 (1980).

Cited in Curry v. Baker, 130 N.C. App. 182, 502 S.E.2d 667 (1998).

§ 90-270.3. Practice of medicine and optometry not permitted.

Nothing in this Article shall be construed as permitting licensed psychologists or licensed psychological associates to engage in any manner in all or any of the parts of the practice of medicine or optometry licensed under Articles 1 and 6 of Chapter 90 of the General Statutes, including, among others, the diagnosis and correction of visual and muscular anomalies of the human eyes and visual apparatus, eye exercises, orthoptics, vision training, visual training and developmental vision. A licensed psychologist or licensed psychological associate shall assist his or her client or patient in obtaining professional help for all aspects of the client's or patient's problems that fall outside the boundaries of the psychologist's own competence, including provision for the diagnosis and treatment of relevant medical or optometric problems. (1967, c. 910, s. 3; 1977, c. 670, s. 2; 1979, c. 670, s. 2; 1993, c. 375, s. 1.)

CASE NOTES

Cited in McDonald v. Taylor, 106 N.C. App. 18, 415 S.E.2d 81 (1992); Curry v. Baker, 130 N.C. App. 182, 502 S.E.2d 667 (1998).

§ 90-270.4. Exemptions to this Article.

(a) Nothing in this Article shall be construed to prevent the teaching of psychology, the conduct of psychological research, or the provision of psychological services or consultation to organizations or institutions, provided that such teaching, research, service, or consultation does not involve the delivery or supervision of direct psychological services to individuals or groups of individuals who are themselves, rather than a third party, the intended beneficiaries of such services, without regard to the source or extent of payment for services rendered. Nothing in this Article shall prevent the provision of expert testimony by psychologists who are otherwise exempted by this act. Persons holding an earned master's, specialist, or doctoral degree in psychology from an institution of higher education may use the title "psychologist" in activities permitted by this subsection.

(b) Nothing in this Article shall be construed as limiting the activities, services, and use of official titles on the part of any person in the regular employ of the State of North Carolina or whose employment is included under the State Personnel Act who has served in a position of employment involving the practice of psychology as defined in this Article, provided that the person was serving in this capacity on December 31, 1979.

(c) Persons certified by the State Board of Education as school psychologists and serving as regular salaried employees of the Department of Public Instruction or local boards of education are not required to be licensed under this Article in order to perform the duties for which they serve the Department of Public Instruction or local boards of education, and nothing in this Article shall be construed as limiting their activities, services, or titles while performing those duties for which they serve the Department of Public Instruction or local boards of education. If a person certified by the State Board of Education as a school psychologist and serving as a regular salaried employee of the Department of Public Instruction or a local board of education is or becomes a licensed psychologist under this Article, he or she shall be required to comply with all conditions, requirements, and obligations imposed by statute or by Board rules upon all other licensed psychologists as a condition to retaining that license. Other provisions of this Article notwithstanding, if a person certified by the State Board of Education as a school psychologist and serving as a regular salaried employee of the Department of Public Instruction or a local board of education is or becomes a licensed psychological associate under this Article, he or she shall not be required to comply with the supervision requirements otherwise applicable to licensed psychological associates by Board rules or by this Article in the course of his or her regular salaried employment with the Department of Public Instruction or a local board of education, but he or she shall be required to comply with all other conditions, requirements, and obligations imposed by statute or a local board of education or by Board rules upon all other licensed psychological associates as a condition to retaining that license.

(d) Nothing in this Article shall be construed as limiting the activities, services, and use of title designating training status of a student, intern, fellow, or other trainee preparing for the practice of psychology under the supervision and responsibility of a qualified psychologist in an institution of higher education or service facility, provided that such activities and services constitute a part of his or her course of study as a matriculated graduate student in psychology. For individuals pursuing postdoctoral training or experience in psychology, nothing shall limit the use of a title designating training status, but the Board may develop rules defining qualified supervision, disclosure of supervisory relationships, frequency of supervision, settings to which trainees may be assigned, activities in which trainees may engage, qualifications for trainee status, nature of responsibility assumed by the supervisor, and the structure, content, and organization of postdoctoral experience.

(e) Subject to subsection (g) of this section, nothing in this Article shall be construed to prevent a qualified member of other professional groups licensed or certified under the laws of this State from rendering services within the scope of practice, as defined in the statutes regulating those professional practices, provided the person does not hold himself or herself out to the public by any title or description stating or implying that the person is a psychologist or licensed, certified, or registered to practice psychology.

(f) Nothing in this Article is to be construed as prohibiting a psychologist who is not a resident of North Carolina who holds an earned doctoral, master's, or specialist degree in psychology from an institution of higher education, and who is licensed or certified only in another jurisdiction, from engaging in the practice of psychology, including the provision of health services, in this State for up to five days in any calendar year. All such psychologists shall comply with supervision requirements established by the Board, and shall notify the Board in writing of their intent to practice in North Carolina, prior to the provision of any services in this State. The Board shall adopt rules implementing and defining this provision.

(g) Except as provided in subsection (c) of this section, if a person who is otherwise exempt from the provisions of this Article and not required to be licensed under this Article is or becomes licensed under this Article, he or she shall comply with all Board rules and statutes applicable to all other psychologists licensed under this Article. These requirements apply regardless of whether the person holds himself or herself out to the public by any title or description stating or implying that the person is a psychologist, a licensed psychological associate, or licensed to practice psychology.

(h) A licensee whose license is suspended or revoked pursuant to the provisions of G.S. 90-270.15, or an applicant who is notified that he or she has failed an examination for the second time, as specified in G.S. 90-270.5(b), or an applicant who is notified that licensure is denied pursuant to G.S. 90-270.11 or G.S. 90-270.15, or an applicant who discontinues the application process at any point must terminate the practice of psychology, in accordance with the duly adopted rules of the Board. (1967, c. 910, s. 4; 1977, c. 670, s. 3; 1979, c. 670, ss. 3, 4; c. 1005, s. 1; 1981, c. 654, ss. 1, 2; 1983, c. 82, s. 5; 1985, c. 734, ss. 1-3; 1993, c. 375, s. 1; 1995, c. 509, s. 44; 2006-175, s. 1; 2007-468, ss. 1, 2.)

Effect of Amendments. — Session Laws 2006-175, s. 1, effective August 1, 2006, substituted "licensed or certified under the laws of this State from rendering services within the scope of practice, as defined in the statutes regulating those professional practices" for "from rendering services consistent with their professional training and code of ethics" in the middle of subsection (e).

Session Laws 2007-468, ss. 1 and 2, effective August 29, 2007, rewrote subsections (e) and (g).

CASE NOTES

Constitutionality. — Where the only question presented by petitioner's application to the Board was whether he was entitled to receive a temporary license as a practicing psychologist, questions of the constitutionality of this section and former G.S. 90-270.2(d) (see now G.S. 90-270.2(8)) were not properly before the court reviewing the Board's decision, and the court exceeded its authority in undertaking to deal with them. In re Partin, 37 N.C. App. 302, 246 S.E.2d 519 (1978).

Psychology Board's Authority Over a Professional Counseling Practice. — North Carolina Psychology Board could not place a psychological associate's license on probation under G.S. 90-270.4(g) because the psychological assistant, who maintained both a psychological associate's practice and a licensed professional counselor's practice, could continue his licensed professional counselor's practice without interference from the Psychology Board, pursuant to G.S. 90-332.1(c), as long as he remained a qualified licensed professional counselor and did not promote that practice by holding himself out as a licensed psychological associate. Trayford v. N.C. Psychology Bd., 174 N.C. App. 118, 619 S.E.2d 862, 2005 N.C. App. LEXIS 2286 (2005), aff'd, 360 N.C. 396, 627 S.E.2d 462 (2006).

§ 90-270.5. Application; examination; supervision; provisional and temporary licenses.

(a) Except as otherwise exempted by G.S. 90-270.4, persons who are qualified by education to practice psychology in this State must make application for licensure to the Board within 30 days of offering to practice or undertaking the practice of psychology in North Carolina. Applications must then be completed for review by the Board within the time period stipulated in the duly adopted rules of the Board. Persons who practice or offer to practice psychology for more than 30 days without making application for licensure, who fail to complete the application process within the time period specified by the Board, or who are denied licensure pursuant to G.S. 90-270.11 or G.S. 90-270.15, may not subsequently practice or offer to practice psychology without first becoming licensed.

(b) After making application for licensure, applicants must take the first examination to which they are admitted by the Board. If applicants fail the examination, they may continue to practice psychology until they take the next examination to which they are admitted by the Board. If applicants fail the second examination, they shall cease the practice of psychology per G.S. 90-270.4(h), and may not subsequently practice or offer to practice psychology without first reapplying for and receiving a license from the Board. An applicant who does not take an examination on the date prescribed by the Board shall be deemed to have failed that examination.

(c) All individuals who have yet to apply and who are practicing or offering to practice psychology in North Carolina, and all applicants who are practicing or offering to practice psychology in North Carolina, shall at all times comply with supervision requirements established by the Board. The Board shall specify in its rules the format, setting, content, time frame, amounts of supervision, qualifications of supervisors, disclosure of supervisory relationships, the organization of the supervised experience, and the nature of the responsibility assumed by the supervisor. Individuals shall be supervised for all activities comprising the practice of psychology until they have met the following conditions:

(1) For licensed psychologist applicants, until they have passed the examination to which they have been admitted by the Board, have been notified of the results, have completed supervision requirements specified in subsection (d) of this section, and have been informed by the Board of permanent licensure as a licensed psychologist; or

(2) For licensed psychological associate applicants, until they have passed the examination to which they have been admitted by the Board, have been notified of the results, and have been informed by the Board of permanent licensure as a licensed psychological associate, after which time supervision is required only for those activities specified in subsection (e) of this section.

(d) For permanent licensure as a licensed psychologist, an otherwise qualified psychologist must secure two years of acceptable and appropriate supervised experience germane to his or her training and intended area of practice as a psychologist. The Board shall permit such supervised experience to be acquired on a less than full-time basis, and shall additionally specify in its rules the format, setting, content, time frame, amounts of supervision, qualifications of supervisors, disclosure of supervisory relationships, the organization of the supervised experience, and the nature of the responsibility assumed by the supervisor. Supervision of health services must be received from qualified licensed psychologists holding health services provider certificates, or from other psychologists recognized by the Board in accordance with Board rules.

(1) One of these years of experience shall be postdoctoral, and for this year, the Board may require, as specified in its rules, that the supervised experience be comparable to the knowledge and skills acquired during formal doctoral or postdoctoral education, in accordance with established professional standards.

(2) One of these years may be predoctoral and the Board shall establish rules governing appropriate supervised predoctoral experience.

(3) A psychologist who meets all other requirements of G.S. 90-270.11(a) as a licensed psychologist, except the two years of supervised experience, may be issued a provisional license by the Board for the practice of psychology. If the psychologist terminates the supervised experience before the completion of two years, the Board may place the psychologist on inactive status, during which time supervision will not be required, and the practice of psychology or the offer to practice psychology is prohibited. In the event a licensed psychologist issued a provisional license under this subsection is placed on inactive status or is completing the supervised experience on a part-time basis, the Board may renew the provisional license as necessary until such time as the psychologist has completed the equivalent of two years' supervised experience.

(e) A licensed psychological associate shall be supervised by a qualified licensed psychologist, or other qualified professionals, in accordance with Board rules specifying the format, setting, content, time frame, amounts of supervision, qualifications of supervisors, disclosure of supervisory relationships, the organization of the supervised experience, and the nature of the responsibility assumed by the supervisor. A licensed psychological associate who provides health services shall be supervised, for those activities requiring supervision, by a qualified licensed psychologist holding health services provider certification or by other qualified professionals under the overall direction of a qualified licensed psychologist holding health services provider certification, in accordance with Board rules. Except as provided below, supervision, including the supervision of health services, is required only when a licensed psychological associate engages in: assessment of personality functioning; neuropsychological evaluation; psychotherapy, counseling, and other interventions with clinical populations for the purpose of preventing or eliminating symptomatic, maladaptive, or undesired behavior; and, the use of intrusive, punitive, or experimental procedures, techniques, or measures. The Board shall adopt rules implementing and defining this provision, and as the practice of psychology evolves, may identify additional activities requiring supervision in order to maintain acceptable standards of practice.

(f) A nonresident psychologist who is either licensed or certified by a similar Board in another jurisdiction whose standards, in the opinion of the Board, are, at the date of his or her certification or licensure, substantially equivalent to or higher than the requirements of this Article, may be issued a temporary license by the Board for the practice of psychology in this State for a period not to exceed the aggregate of 30 days in any calendar year. The Board may issue temporary health services provider certification simultaneously if the nonresident psychologist can demonstrate two years of acceptable supervised health services experience. All temporarily licensed psychologists shall comply with supervision requirements established by the Board.

(g) An applicant for reinstatement of licensure, whose license was suspended under G.S. 90-270.15(f), may be issued a temporary license and temporary health services provider certification in accordance with the duly adopted rules of the Board. (1967, c. 910, s. 5; 1977, c. 670, s. 4; 1979, c. 670, s. 3; 1985, c. 734, s. 4; 1993, c. 375, s. 1.)

OPINIONS OF ATTORNEY GENERAL

This Article, the Practicing Psychologists Licensing Act, exempts professionals such as counselors in school agencies, social workers, clergymen, and others from its requirements. See opinion of Attorney General to Ruth E. Cook, Member, N.C. House of Representatives, 46 N.C.A.G. 205 (1977).

§ 90-270.6. Psychology Board; appointment; term of office; composition.

For the purpose of carrying out the provisions of this Article, there is created a North Carolina Psychology Board, which shall consist of seven members appointed by the Governor. At all times three members shall be licensed psychologists, two members shall be licensed psychological associates, and two members shall be members of the public who are not licensed under this Article. The Governor shall give due consideration to the adequate representation of the various fields and areas of practice of psychology and to adequate representation from various geographic regions in the State. Terms of office shall be three years. All terms of service on the Board expire June 30 in appropriate years. As the term of a psychologist member expires, or as a vacancy of a psychologist member occurs for any other reason, the North Carolina Psychological Association, or its successor, shall, having sought the advice of the chairs of the graduate departments of psychology in the State, for each vacancy, submit to the Governor a list of the names of three eligible persons. From this list the Governor shall make the appointment for a full term, or for the remainder of the unexpired term, if any. Each Board member shall serve until his or her successor has been appointed. As the term of a member expires, or if one should become vacant for any reason, the Governor shall appoint a new member within 60 days of the vacancy's occurring. No member, either public or licensed under this Article, shall serve more than three complete consecutive terms. (1967, c. 910, s. 6; 1977, c. 670, s. 5; 1979, c. 670, s. 3; c. 1005, s. 2; 1983, c. 82, ss. 1-3; 1993, c. 375, s. 1; 2007-468, s. 3.)

Effect of Amendments. — Session Laws 2007-468, s. 3, effective August 29, 2007, deleted the former third sentence, which read: "Each member of the board must reside in a different congressional district at the time of appointment"; substituted "The Governor shall give due consideration" for "Due consideration shall also be given," and inserted "and to adequate representation from various geographic regions in the State" in the third sentence.

CASE NOTES

Psychology Board's Authority Over a Professional Counseling Practice. — North Carolina Psychology Board could not place a psychological associate's license on probation under G.S. 90-270.4(g) because the psychological assistant, who maintained both a psychological associate's practice and a licensed professional counselor's practice, could continue his licensed professional counselor's practice without interference from the Psychology Board, pursuant to G.S. 90-332.1(c), as long as he remained a qualified licensed professional counselor and did not promote that practice by holding himself out as a licensed psychological associate. Trayford v. N.C. Psychology Bd., 174 N.C. App. 118, 619 S.E.2d 862, 2005 N.C. App. LEXIS 2286 (2005), aff'd, 360 N.C. 396, 627 S.E.2d 462 (2006).

§ 90-270.7. Qualifications of Board members; removal of Board members.

(a) Each licensed psychologist and licensed psychological associate member of the Board shall have the following qualifications:

(1) Shall be a resident of this State and a citizen of the United States;

(2) Shall be at the time of appointment and shall have been for at least five years prior thereto, actively engaged in one or more branches of psychology or in the education and training of master's, specialist, doctoral, or postdoctoral students of psychology or in psychological research, and such activity during the two years preceding appointment shall have occurred primarily in this State.

(3) Shall be free of conflict of interest in performing the duties of the Board.

(b) Each public member of the Board shall have the following qualifications:

(1) Shall be a resident of this State and a citizen of the United States;

(2) Shall be free of conflict of interest or the appearance of such conflict in performing the duties of the Board;

(3) Shall not be a psychologist, an applicant or former applicant for licensure as a psychologist, or a member of a household that includes a psychologist.

(c) A Board member shall be automatically removed from the Board if he or she:

(1) Ceases to meet the qualifications specified in this subsection;

(2) Fails to attend three successive Board meetings without just cause as determined by the remainder of the Board;

(3) Is found by the remainder of the Board to be in violation of the provisions of this Article or to have engaged in immoral, dishonorable, unprofessional, or unethical conduct, and such conduct is deemed to compromise the integrity of the Board;

(4) Is found to be guilty of a felony or an unlawful act involving moral turpitude by a court of competent jurisdiction or is found to have entered a plea of nolo contendere to a felony or an unlawful act involving moral turpitude;

(5) Is found guilty of malfeasance, misfeasance, or nonfeasance in relation to his or her Board duties by a court of competent jurisdiction; or

(6) Is incapacitated and without reasonable likelihood of resuming Board duties, as determined by the Board. (1967, c. 910, s. 7; 1977, c. 670, s. 6; 1985, c. 734, s. 5; 1993, c. 375, s. 1.)

§ 90-270.8. Compensation of members; expenses; employees.

Members of the Board shall receive no compensation for their services, but shall receive their necessary expenses incurred in the performance of duties required by this Article, as prescribed for State boards generally. The Board may employ necessary personnel for the performance of its functions, and fix the compensation therefor, within the limits of funds available to the Board; however, the Board shall not employ any of its own members to perform inspectional or similar ministerial tasks for the Board. In no event shall the State of North Carolina be liable for expenses incurred by the Board in excess of the income derived from this Article. (1967, c. 910, s. 8.)

§ 90-270.9. Election of officers; meetings; adoption of seal and appropriate rules; powers of the Board.

The Board shall annually elect the chair and vice-chair from among its membership. The Board shall meet annually, at a time set by the Board, in the City of Raleigh, and it may hold additional meetings and conduct business at any place in the State. Four members of the Board shall constitute a quorum. The Board may empower any member to conduct any proceeding or investigation necessary to its purposes and may empower its agent or counsel to conduct any investigation necessary to its purposes, but any final action requires a quorum of the Board. The Board may order that any records concerning the practice of psychology relevant to a complaint received by the Board or an inquiry or investigation conducted by or on behalf of the Board be produced before the Board or for inspection and copying by representatives of or counsel to the Board by the custodian of such records. The Board shall adopt an official seal, which shall be affixed to all licenses issued by it. The Board shall make such rules and regulations not inconsistent with law, as may be necessary to regulate its proceedings and otherwise to implement the provisions of this Article. (1967, c. 910, s. 9; 1985, c. 734, s. 6; 1993, c. 375, s. 1.)

CASE NOTES

Rule Concerning Educational Requirements. — The Board did not exceed its rulemaking authority under this section in adopting a rule which required that the applicant's doctoral degree, if other than one based on a Ph.D. program in psychology at an accredited educational institution, must have been based on a minimum of 60 semester hours of graduate study in standard psychology courses. In re Partin, 37 N.C. App. 302, 246 S.E.2d 519 (1978) (decided prior to 1977 amendment of § 90-270.11).

Records of Psychologist. — This section permits only the North Carolina State Board of Examiners of Practicing Psychologists to require submission of confidential patient records in the instance of ethics complaints against a psychologist. The rules of the North Carolina Psychological Association do not require disclosure of confidential client information by members without the client's consent. Sultan v. State Bd. of Exmrs. of Practicing Psychologists, 121 N.C. App. 739, 468 S.E.2d 443 (1996).

The presence or absence of psychological-patient privilege is irrelevant to psychologist's general professional obligation to maintain the confidentiality of client information, subject to this section, in a non-courtroom setting. Sultan v. State Bd. of Exmrs. of Practicing Psychologists, 121 N.C. App. 739, 468 S.E.2d 443 (1996).

Power to Investigate. — North Carolina Psychology Board is statutorily empowered to investigate as well as to adjudicate complaints against its licensees under G.S. 90-270.9 and G.S. 90-270.15. Farber v. N.C. Psychology Bd., 153 N.C. App. 1, 569 S.E.2d 287, cert. denied, 356 N.C. 612, 574 S.E.2d 679 (2002).

Cited in Stephenson v. Bartlett, 358 N.C. 219, 595 S.E.2d 112 (2004).

§ 90-270.10. Annual report.

On June 30 of each year, the Board shall submit a report to the Governor of the Board's activities since the preceding July 1, including the names of all licensed psychologists and licensed psychological associates to whom licenses have been granted under this Article, any cases heard and decisions rendered in matters before the Board, the recommendations of the Board as to future actions and policies, and a financial report. Each member of the Board shall review and sign the report before its submission to the Governor. Any Board member shall have the right to record a dissenting view. (1967, c. 910, s. 10; 1979, c. 670, s. 3; 1993, c. 375, s. 1.)

§ 90-270.11. Licensure; examination; foreign graduates.

(a) Licensed Psychologist. — The Board shall issue a permanent license to practice psychology to any applicant who pays an application fee and any applicable examination fee as specified in G.S. 90-270.18(b), who passes an examination in psychology as prescribed by the Board, and who submits evidence verified by oath and satisfactory to the Board that he or she:

(1) Is at least 18 years of age;
(2) Is of good moral character;
(3) Has received a doctoral degree based on a planned and directed program of studies in psychology from an institution of higher education. The degree program, wherever administratively housed, must be publicly identified and clearly labeled as a psychology

program. The Board shall adopt rules implementing and defining these provisions, including, but not limited to, such factors as residence in the educational program, internship and related field experiences, number of course credits, course content, numbers and qualifications of faculty, and program identification and identity.

(4) Has had at least two years of acceptable and appropriate supervised experience germane to his or her training and intended area of practice as a psychologist as specified in G.S. 90-270.5(d).

(b) Licensed Psychological Associate. —

(1) The Board shall issue a permanent license to practice psychology to any applicant who pays an application fee and any applicable examination fee as specified in G.S. 90-270.18(b), who passes an examination in psychology as prescribed by the Board, and who submits evidence verified by oath and satisfactory to the Board that he or she:

a. Is at least 18 years of age;

b. Is of good moral character;

c. Has received a master's degree in psychology or a specialist degree in psychology from an institution of higher education. The degree program, wherever administratively housed, must be publicly identified and clearly labeled as a psychology program. The Board shall adopt rules implementing and defining these provisions, including, but not limited to, such factors as residence in the program, internship and related field experiences, number of course credits, course content, numbers and qualifications of faculty, and program identification and identity.

(2) Notwithstanding the provisions of this subsection, a licensed psychologist applicant who has met all requirements for licensure except passing the examination at the licensed psychologist level, may be issued a license as a licensed psychological associate without having a master's degree or specialist degree in psychology if the applicant passes the examination at the licensed psychological associate level.

(c) Foreign Graduates. — Applicants trained in institutions outside the United States, applying for licensure at either the licensed psychologist or licensed psychological associate level, must show satisfactory evidence of training and degrees substantially equivalent to those required of applicants trained within the United States, pursuant to Board rules and regulations.

(d) Prior Licensure. — A person who is licensed in good standing as a licensed practicing psychologist or psychological associate under the provisions of the Practicing Psychologist Licensing Act in effect immediately prior to the ratification of this Psychology Practice Act shall be deemed, as of October 1, 1993 to have met all requirements for licensure under this act and shall be eligible for renewal of licensure in accordance with the provisions of this act. (1967, c. 910, s. 11; 1971, c. 889, ss. 2, 3; 1975, c. 675, ss. 1, 2; 1977, c. 670, s. 7; 1979, c. 670, ss. 5, 6; 1979, 2nd Sess., c. 1176; 1981, c. 738, ss. 1, 2; 1983, c. 37, ss. 1, 2; c. 82, s. 4; 1985, c. 734, s. 7; 1987, c. 326, ss. 1, 2; c. 500, s. 1; 1989, c. 554; 1993, c. 375, s. 1; 1995, c. 509, s. 45.)

CASE NOTES

Nature of Doctoral Degree Program. — The Board did not exceed its rulemaking authority under G.S. 90-270.9 in adopting a rule which required that the applicant's doctoral degree, if other than one based on a Ph.D. program in psychology at an accredited educational institution, must have been based on a minimum of 60 semester hours of graduate study in standard psychology courses. In re Partin, 37 N.C. App. 302, 246 S.E.2d 519 (1978) decided prior to 1977 amendment of G.S. 90-270.11.

The requirement of the statute that the applicant must have received "his doctoral degree based on a program of studies the content of which was primarily psychological from an accredited educational institution," was neither vague nor uncertain. On the contrary, such a requirement calls for application of objective standards which both bear a rational relationship to the purposes of this Article, the Practicing Psychologist Licensing Act, and furnish sufficiently clear guidelines to control the Board in the exercise of its licensing and rule-making functions. In re Partin, 37 N.C. App. 302, 246 S.E.2d 519 (1978) decided prior to 1977 amendment.

Nature of Course. — The Board is not bound by the expressions of opinions of an applicant and his teacher on the question of whether a course taken by the applicant was psychological in nature. In re Partin, 37 N.C. App. 302, 246 S.E.2d 519 (1978) decided prior to 1977 amendment.

The legislature in this section provided the Board with clear and objective standards to guide it in the exercise of its delegated licensing authority. In re Partin, 37 N.C. App. 302, 246 S.E.2d 519 (1978) decided prior to 1977 amendment).

Board's Findings Are Conclusive. — It is the function of the Board, and not that of the reviewing court, to resolve conflicts in the evidence and to make findings of fact. The Board's findings of fact, when supported by competent, material, and substantial evidence, in view of the entire record, are conclusive on appeal. In re Partin, 37 N.C. App. 302, 246 S.E.2d 519 (1978) decided prior to 1977 amendment.

Cited in Duggins v. North Carolina State Bd. of Certified Pub. Accountant Exmrs., 294 N.C. 120, 240 S.E.2d 406 (1978); Reich v. Price, 110 N.C. App. 255, 429 S.E.2d 372 (1993).

§ 90-270.12: Repealed by Session Laws 1977, c. 670, s. 8.

§ 90-270.13. Licensure of psychologists licensed or certified in other jurisdictions; licensure of diplomates of the American Board of Professional Psychology; reciprocity.

(a) Upon application and payment of the required fee, the Board shall grant permanent licensure at the appropriate level to any person who, at the time of application meets all of the following requirements:

(1) Is licensed or certified as a psychologist by a similar psychology licensing board in another jurisdiction.
(2) The license or certification is in good standing.
(3) Is a graduate of an institution of higher education.
(4) Who passes an examination prescribed by the Board.
(5) Meets the definition of a senior psychologist as that term is defined by the rules of the Board.

(a1) Upon application and payment of the required fee, the Board shall grant permanent licensure at the appropriate level to any person who, at the time of application, meets all of the following requirements:

(1) Is licensed or certified as a psychologist by a similar psychology licensing board in another jurisdiction.
(2) The license or certification is in good standing.
(3) Possesses a doctoral degree in psychology from an institution of higher education.
(4) Passes an examination prescribed by the Board.
(5) Has no unresolved complaints in any jurisdiction at the time of application in this State.
(6) Holds a current credential for psychology licensure mobility, as defined in rules adopted by the Board.

(b) The Board may establish formal written agreements of reciprocity with the psychology boards of other jurisdictions if the Board determines that the standards of the boards of the other jurisdictions are substantially equivalent to or greater than those required by this Article.

(c) The Board shall grant health services provider certification to any person licensed under the provisions of subsections (a) and (b) above when it determines that the applicant's training and experience are substantially equivalent to or greater than that specified in G.S. 90-270.20.

(d) Upon application and payment of the requisite fee, the Board shall waive the requirement of the national written examination to any person who is a diplomate in good standing of the American Board of Professional Psychology.

(e) The Board shall adopt rules implementing and defining these provisions, and, with respect to the senior psychologist, shall adopt rules including, but not limited to, such factors as educational background, professional experience, length and status of licensure, ethical conduct, and examination required.

(f) The Board may deny licensure to any person otherwise eligible for permanent licensure under this section upon documentation of conduct specified in G.S. 90-270.15. (1967, c. 910, s. 13; 1993, c. 375, s. 1; 2007-468, ss. 4-6.)

Effect of Amendments. — Session Laws 2007-468, ss. 4-6, effective August 29, 2007, rewrote subsesction (a) by inserting subdivision (a)(1) through (a)(5) designations and making minor stylistic changes; added subsection (a1); in subsection (f), substituted "section" for "subsection" and substituted "conduct" for "illegal, immoral, dishonorable, unprofessional, or unethical conduct as."

CASE NOTES

Failure to Define "Senior Psychologist". — The State Psychology Board's failure to promulgate a rule defining "senior psychologist" rendered inapplicable the requirement that an applicant fulfill the "senior psychologist" requirement, and was tantamount to a decision that any applicant meeting the other prerequisites of this section qualified as a senior psychologist. Barrett v. North Carolina Psychology Bd., 132 N.C. App. 126, 510 S.E.2d 189 (1999).

§ 90-270.14. Renewal of licenses; duplicate or replacement licenses.

(a) A license in effect on October 1, 1993, must be renewed on or before January 1, 1994. Thereafter, a license issued under this Article must be renewed biennially on or before the first day of October in each even-numbered year, the requirements for such renewal being:

(1) Each application for renewal must be made on a form prescribed by the Board and accompanied by a fee as specified in G.S. 90-270.18(b). If a license is not renewed on or before the renewal date, an additional fee shall be charged for late renewal as specified in G.S. 90-270.18(b).

(2) The Board may establish continuing education requirements as a condition for license renewal.

(b) A licensee may request the Board to issue a duplicate or replacement license for a fee as specified in G.S. 90-270.18(b). Upon receipt of the request and a showing of good cause for the issuance of a duplicate or replacement license, and the payment of the fee, the Board shall issue a duplicate or replacement license. (1967, c. 910, s. 14; 1971, c. 889, s. 1; 1975, c. 675, s. 3; 1979, c. 710; 1985, c. 734, s. 8; 1987, c. 500, s. 2; 1989 (Reg. Sess., 1990), c. 1029, s. 2; 1993, c. 375, s. 1.)

§ 90-270.15. Denial, suspension, or revocation of licenses and health services provider certification, and other disciplinary and remedial actions for violations of the Code of Conduct; relinquishing of license.

(a) Any applicant for licensure or health services provider certification and any person licensed or certified under this Article shall have behaved in conformity with the ethical and professional standards specified in this Code of

Conduct and in the rules of the Board. The Board may deny, suspend, or revoke licensure and certification, and may discipline, place on probation, limit practice, and require examination, remediation, and rehabilitation, or any combination thereof, all as provided for in subsection (b) below. The Board shall act upon proof that the applicant or licensee engaged in illegal, immoral, dishonorable, unprofessional, or unethical conduct by violating any of the provisions of the Code of Conduct as follows:

(1) Has been convicted of a felony or entered a plea of guilty or nolo contendere to any felony charge;

(2) Has been convicted of or entered a plea of guilty or nolo contendere to any misdemeanor involving moral turpitude, misrepresentation or fraud in dealing with the public, or conduct otherwise relevant to fitness to practice psychology, or a misdemeanor charge reflecting the inability to practice psychology with due regard to the health and safety of clients or patients;

(3) Has engaged in fraud or deceit in securing or attempting to secure or renew a license or in securing or attempting to secure health services provider certification under this Article or has willfully concealed from the Board material information in connection with application for a license or health services provider certification, or for renewal of a license under this Article;

(4) Has practiced any fraud, deceit, or misrepresentation upon the public, the Board, or any individual in connection with the practice of psychology, the offer of psychological services, the filing of Medicare, Medicaid, or other claims to any third party payor, or in any manner otherwise relevant to fitness for the practice of psychology;

(5) Has made fraudulent, misleading, or intentionally or materially false statements pertaining to education, licensure, license renewal, certification as a health services provider, supervision, continuing education, any disciplinary actions or sanctions pending or occurring in any other jurisdiction, professional credentials, or qualifications or fitness for the practice of psychology to the public, any individual, the Board, or any other organization;

(6) Has had a license or certification for the practice of psychology in any other jurisdiction suspended or revoked, or has been disciplined by the licensing or certification board in any other jurisdiction for conduct which would subject him or her to discipline under this Article;

(7) Has violated any provision of this Article or of the duly adopted rules of the Board;

(8) Has aided or abetted the unlawful practice of psychology by any person not licensed by the Board;

(9) For a licensed psychologist, has provided health services without health services provider certification;

(10) Has been guilty of immoral, dishonorable, unprofessional, or unethical conduct as defined in this subsection, or in the then-current code of ethics of the American Psychological Association, except as the provisions of such code of ethics may be inconsistent and in conflict with the provisions of this Article, in which case, the provisions of this Article control;

(11) Has practiced psychology in such a manner as to endanger the welfare of clients or patients;

(12) Has demonstrated an inability to practice psychology with reasonable skill and safety by reason of illness, inebriation, misuse of drugs, narcotics, alcohol, chemicals, or any other substance affecting mental or physical functioning, or as a result of any mental or physical condition;

(13) Has practiced psychology or conducted research outside the boundaries of demonstrated competence or the limitations of education, training, or supervised experience;

(14) Has failed to use, administer, score, or interpret psychological assessment techniques, including interviewing and observation, in a competent manner, or has provided findings or recommendations which do not accurately reflect the assessment data, or exceed what can reasonably be inferred, predicted, or determined from test, interview, or observational data;

(15) Has failed to provide competent diagnosis, counseling, treatment, consultation, or supervision, in keeping with standards of usual and customary practice in this State;

(16) In the absence of established standards, has failed to take all reasonable steps to ensure the competence of services;

(17) Has failed to maintain a clear and accurate case record which documents the following for each patient or client:

   a. Presenting problems, diagnosis, or purpose of the evaluation, counseling, treatment, or other services provided;
   b. Fees, dates of services, and itemized charges;
   c. Summary content of each session of evaluation, counseling, treatment, or other services, except that summary content need not include specific information that may cause significant harm to any person if the information were released;
   d. Test results or other findings, including basic test data; and
   e. Copies of all reports prepared;

(18) Except when prevented from doing so by circumstances beyond the psychologist's control, has failed to retain securely and confidentially the complete case record for at least seven years from the date of the last provision of psychological services; or, except when prevented from doing so by circumstances beyond the psychologist's control, has failed to retain securely and confidentially the complete case record for three years from the date of the attainment of majority age by the patient or client or for at least seven years from the date of the last provision of psychological services, whichever is longer; or, except when prevented from doing so by circumstances beyond the psychologist's control, has failed to retain securely and confidentially the complete case record indefinitely if there are pending legal or ethical matters or if there is any other compelling circumstance;

(19) Has failed to cooperate with other psychologists or other professionals to the potential or actual detriment of clients, patients, or other recipients of service, or has behaved in ways which substantially impede or impair other psychologists' or other professionals' abilities to perform professional duties;

(20) Has exercised undue influence in such a manner as to exploit the client, patient, student, supervisee, or trainee for the financial or other personal advantage or gratification of the psychologist or a third party;

(21) Has harassed or abused, sexually or otherwise, a client, patient, student, supervisee, or trainee;

(22) Has failed to cooperate with or to respond promptly, completely, and honestly to the Board, to credentials committees, or to ethics committees of professional psychological associations, hospitals, or other health care organizations or educational institutions, when those organizations or entities have jurisdiction; or has failed to cooperate with institutional review boards or professional standards review organizations, when those organizations or entities have jurisdiction; or

(23) Has refused to appear before the Board after having been ordered to do so in writing by the Chair;

(b) Upon proof that an applicant or licensee under this Article has engaged in any of the prohibited actions specified in subsection (a) of this section, the Board may, in lieu of denial, suspension, or revocation, issue a formal reprimand or formally censure the applicant or licensee, may place the applicant or licensee upon probation with such appropriate conditions upon the continued practice as the Board may deem advisable, may require examination, remediation, or rehabilitation for the applicant or licensee, including care, counseling, or treatment by a professional or professionals designated or approved by the Board, the expense to be borne by the applicant or licensee, may require supervision for the services provided by the applicant or licensee by a licensee designated or approved by the Board, the expense to be borne by the applicant or licensee, may limit or circumscribe the practice of psychology provided by the applicant or licensee with respect to the extent, nature, or location of the services provided, as the Board deems advisable, or may discipline and impose any appropriate combination of the foregoing. In addition, the Board may impose such conditions of probation or restrictions upon continued practice at the conclusion of a period of suspension or as requirements for the restoration of a revoked or suspended license. In lieu of or in connection with any disciplinary proceedings or investigation, the Board may enter into a consent order relative to discipline, supervision, probation, remediation, rehabilitation, or practice limitation of a licensee or applicant for a license.

(c) The Board may assess costs of disciplinary action against an applicant or licensee found to be in violation of this Article.

(d) When considering the issue of whether or not an applicant or licensee is physically or mentally capable of practicing psychology with reasonable skill and safety with patients or clients, then, upon a showing of probable cause to the Board that the applicant or licensee is not capable of practicing psychology with reasonable skill and safety with patients or clients, the Board may petition a court of competent jurisdiction to order the applicant or licensee in question to submit to a psychological evaluation by a psychologist to determine psychological status or a physical evaluation by a physician to determine physical condition, or both. Such psychologist or physician shall be designated by the court. The expenses of such evaluations shall be borne by the Board. Where the applicant or licensee raises the issue of mental or physical competence or appeals a decision regarding mental or physical competence, the applicant or licensee shall be permitted to obtain an evaluation at the applicant's or licensee's expense. If the Board suspects the objectivity or adequacy of the evaluation, the Board may compel an evaluation by its designated practitioners at its own expense.

(e) Except as provided otherwise in this Article, the procedure for revocation, suspension, denial, limitations of the license or health services provider certification, or other disciplinary, remedial, or rehabilitative actions, shall be in accordance with the provisions of Chapter 150B of the General Statutes. The Board is required to provide the opportunity for a hearing under Chapter 150B to any applicant whose license or health services provider certification is denied or to whom licensure or health services provider certification is offered subject to any restrictions, probation, disciplinary action, remediation, or other conditions or limitations, or to any licensee before revoking, suspending, or restricting a license or health services provider certificate or imposing any other disciplinary action or remediation. If the applicant or licensee waives the opportunity for a hearing, the Board's denial, revocation, suspension, or other proposed action becomes final without a hearing's having been conducted. Notwithstanding the foregoing, no applicant or licensee is entitled to a hearing for failure to pass an examination. In any proceeding before the Board, in any record of any hearing before the Board, in any complaint or notice of charges against any licensee or applicant for licensure, and in any decision rendered by the Board, the Board may withhold from public disclosure the identity of any clients or patients who have not consented to the public disclosure of psychological services' having been provided by the licensee or applicant. The Board may close a hearing to the public and receive in closed session evidence involving or concerning the treatment of or delivery of psychological services to a client or a patient who has not consented to the public disclosure of such treatment or services as may be necessary for the protection and rights of such patient or client of the accused applicant or licensee and the full presentation of relevant evidence. All records, papers, and other documents containing information collected and compiled by or on behalf of the Board, as a result of investigations, inquiries, or interviews conducted in connection with licensing or disciplinary matters will not be considered public records within the meaning of Chapter 132 of the General Statutes; provided, however, that any notice or statement of charges against any licensee or applicant, or any notice to any licensee or applicant of a hearing in any proceeding, or any decision rendered in connection with a hearing in any proceeding, shall be a public record within the meaning of Chapter 132 of the General Statutes, notwithstanding that it may contain information collected and compiled as a result of such investigation, inquiry, or hearing except that identifying information concerning the treatment of or delivery of services to a patient or client who has not consented to the public disclosure of such treatment or services may be deleted; and provided, further, that if any such record, paper, or other document containing information theretofore collected and compiled by or on behalf of the Board, as hereinbefore provided, is received and admitted in evidence in any hearing before the Board, it shall thereupon be a public record within the meaning of Chapter 132 of the General Statutes, subject to any deletions of identifying information concerning the treatment of or delivery of psychological services to a patient or client who has not consented to the public disclosure of such treatment or services.

(f) A license and a health services provider certificate issued under this Article are suspended automatically by operation of law after failure to renew a license for a period of more than sixty days after the renewal date. The Board may reinstate a license and a health services provider certificate suspended under this subsection upon payment of a fee as specified in G.S. 90-270.18(b), and may require that the applicant file a new application, furnish new supervisory reports or references or otherwise update his or her credentials, or submit to examination for reinstatement. Notwithstanding any provision to the contrary, the Board retains full jurisdiction to investigate alleged violations of this Article by any person whose license is suspended under this subsection and, upon proof of any violation of this Article by any such person, the Board may take disciplinary action as authorized by this section.

(g) A person whose license or health services provider certification has been denied or revoked may reapply to the Board for licensure or certification after the passage of one calendar year from the date of such denial or revocation.

(h) A licensee may, with the consent of the Board, voluntarily relinquish his or her license or health services provider certificate at any time. The Board may delay or refuse the granting of its consent as it may deem necessary in order to investigate any pending complaint, allegation, or issue regarding violation of any provision of this Article by the licensee. Notwithstanding any provision to the contrary, the Board retains full jurisdiction to investigate alleged violations of this Article by any person whose license is relinquished under this subsection and, upon proof of any violation of this Article by any such person, the Board may take disciplinary action as authorized by this section.

(i) The Board may adopt such rules as it deems reasonable and appropriate to interpret and implement the provisions of this section. (1967, c. 910, s. 15; 1973, c. 1331, s. 3; 1977, c. 670, s. 9; 1979, c. 1005, s. 4; 1985, c. 734, s. 9; 1987, c. 827, s. 1; 1991, c. 239, s. 1; c. 761, ss. 14-16; 1993, c. 375, s. 1; 1993 (Reg. Sess., 1994), c. 570, s. 7.)

Editor's Note. — This section was amended by Session Laws 1993, c. 375, s. 1, in the coded bill drafting format provided by G.S. 120-20.1. The amendment added a new subsection (i) identical to the existing (i), without deleting the existing (i). Only one subsection (i) has been set out in the form above at the direction of the Revisor of Statutes.

Session Law 1993 (Reg. Sess., 1994), c. 570, s. 7 amended this section. The amendatory language purported to amend subsection (c), but, in fact, the text of subsection (e) was intended. The amendment was implemented at subsection (e) at the direction of the Revisor of Statutes.

Legal Periodicals. — For comment, "You Can't Always Get What You Want: A Look at North Carolina's Public Records Law," see 72 N.C.L. Rev. 1527 (1994).

CASE NOTES

Constitutionality of Ethical Principles of Psychologists. — The Preambles to the Ethical Principles of Psychologists are unconstitutionally vague for purposes of being cited for specific violations under the U.S. Const., Amends. V and XIV and under N.C. Const., Art. I, § 19. White v. North Carolina State Bd. of Exmrs. of Practicing Psychologists, 97 N.C. App. 144, 388 S.E.2d 148, cert. denied and appeal dismissed, 326 N.C. 601, 393 S.E.2d 891 (1990).

Ethical Principles of Psychologists 1f, 2e, 3c, 3d, 5c, 7b, 8c, and 8d are not unconstitutionally vague. White v. North Carolina State Bd. of Exmrs. of Practicing Psychologists, 97 N.C. App. 144, 388 S.E.2d 148, cert. denied and appeal dismissed, 326 N.C. 601, 393 S.E.2d 891 (1990).

G.S. 90-270.15(a)(10), incorporating the American Psychological Association's ethical standards, does not contain an unconstitutional delegation of legislative authority. Farber v. N.C. Psychology Bd., 153 N.C. App. 1, 569 S.E.2d 287, cert. denied, 356 N.C. 612, 574 S.E.2d 679 (2002).

Trial court did not abuse its discretion in refusing to issue a declaratory judgment regarding the constitutionality of G.S. 90-270.15(a)(10) where it decided that further grounds for relief were unnecessary and would serve no useful purpose. Farber v. N.C. Psychology Bd., 153 N.C. App. 1, 569 S.E.2d 287, cert. denied, 356 N.C. 612, 574 S.E.2d 679 (2002).

Purpose. — The primary goal of the ethical code for psychologists is the welfare and protection of the individuals and groups with whom psychologists work. Elliott v. North Carolina Psychology Bd., 126 N.C. App. 453, 485 S.E.2d 882 (1997), rev'd on other grounds, 348 N.C. 230, 498 S.E.2d 616 (1998).

Authority. — The General Assembly has given to the North Carolina State Board of Examiners of Practicing Psychologists (Board), not the North Carolina Psychological Association (NCPA), both the authority and the responsibility to police the conduct of psychologists in North Carolina. Sultan v. State Bd. of Exmrs. of Practicing Psychologists, 121 N.C. App. 739, 468 S.E.2d 443 (1996).

North Carolina Psychology Board is statutorily empowered to investigate as well as to adjudicate complaints against its licensees under G.S. 90-270.9 and G.S. 90-270.15. Farber v. N.C. Psychology Bd., 153 N.C. App. 1, 569 S.E.2d 287, cert. denied, 356 N.C. 612, 574 S.E.2d 679 (2002).

Under G.S. 90-270.15(a), the North Carolina Psychology Board is responsible for overseeing licensed psychologists practicing in the state, and it may discipline licensees who violate ethical or professional standards; under G.S. 90-270.15(e), disciplinary actions by the Board are governed by the Administrative Procedure Act, G.S. 150B-1 et seq. Farber v. N.C. Psychology Bd., 153 N.C. App. 1, 569 S.E.2d 287, cert. denied, 356 N.C. 612, 574 S.E.2d 679 (2002).

Violation Not Found. — Where psychologist engaged in social and sexual relationship with former clients only after the counseling relationship had terminated there was no violation of Principle 6(a). Elliott v. North Carolina Psychology Bd., 348 N.C. 230, 498 S.E.2d 616 (1998).

Violation Found. — Where the evidence showed that a psychologist entered into a personal relationship with a patient in order to meet his own emotional needs, the North Carolina Psychology Board properly concluded that the psychologist violated G.S. 90-270.15(a)(10). Farber v. N.C. Psychology Bd., 153 N.C. App. 1, 569 S.E.2d 287, cert. denied, 356 N.C. 612, 574 S.E.2d 679 (2002).

Where a psychologist allowed a patient to end her therapy in order to pursue a personal relationship with him, and such behavior ultimately caused the patient to suffer severe depression, thereby endangering her welfare, the North Carolina Psychology Board properly found that the psychologist violated G.S. 90-270.15(a)(11). Farber v. N.C. Psychology Bd., 153 N.C. App. 1, 569 S.E.2d 287, cert. denied, 356 N.C. 612, 574 S.E.2d 679 (2002).

Where a psychologist entered into a relationship with his patient to gratify his own personal needs, and the patient would not have ended her therapy but for her relationship with the psychologist, the North Carolina Psychology Board properly found that the psychologist violated G.S. 90-270.15(a)(20). Farber v. N.C. Psychology Bd., 153 N.C. App. 1, 569 S.E.2d 287, cert. denied, 356 N.C. 612, 574 S.E.2d 679 (2002).

No Liability to Third Parties. — Psychologists are liable in medical malpractice only to their patients, not to third parties even if the treatment has resulted in adverse consequences on the patients relationship with them. Russell v. Adams, 125 N.C. App. 637, 482 S.E.2d 30 (1997).

Legislative Intent. — The code is intended as a floor for ethical conduct, a minimum set of standards with which psychologists must comply; it is not a ceiling for ethical conduct, above which any behavior short of illegal activity is acceptable. Elliott v. North Carolina Psychology Bd., 126 N.C. App. 453, 485 S.E.2d 882 (1997), rev'd on other grounds, 348 N.C. 230, 498 S.E.2d 616 (1998).

Costs Properly Assessed. — Trial court erred in finding that there was no evidence in the record to support the North Carolina Psychology Board's assessment of costs against a psychologist; the transcript clearly and undisputedly recited the total number of hours spent on the disciplinary proceeding, and the costs were mandated by N.C. Admin. Code tit. 21, r. 54.1605(11)(c) (June 2002). Farber v. N.C. Psychology Bd., 153 N.C. App. 1, 569 S.E.2d 287, cert. denied, 356 N.C. 612, 574 S.E.2d 679 (2002).

§ 90-270.16. Prohibited acts.

(a) Except as permitted in G.S. 90-270.4 and G.S. 90-270.5, it shall be a violation of this Article for any person not licensed in accordance with the provisions of this Article to represent himself or herself as a psychologist, licensed psychologist, licensed psychological associate, or health services provider in psychology.

(b) Except as provided in G.S. 90-270.4 and G.S. 90-270.5, it shall be a violation of this Article for any person not licensed in accordance with the provisions of this Article to practice or offer to practice psychology as defined in this Article whether as an individual, firm, partnership, corporation, agency, or other entity.

(c) Except as provided in G.S. 90-270.4 and G.S. 90-270.5, it shall be a violation of this Article for any person not licensed in accordance with the provisions of this Article to use a title or description of services including the term "psychology," or any of its derivatives such as "psychologic", "psychological", or "psychologist", singly or in conjunction with modifiers such as "licensed", "practicing", "certified", or "registered". (1967, c. 910, s. 16; 1979, c. 670, s. 3; c. 1005, s. 3; 1993, c. 375, s. 1.)

CASE NOTES

Unwittingly Employing Unlicensed Psychologist. — Provision in insurance contract between plaintiff psychologist and defendant insurer that the policy did not apply to any criminal, fraudulent or malicious act or omission of the insured, along with subsection (c) of this section and G.S. 90-270.17, making it a misdemeanor for a psychologist to employ another psychologist who does not possess a valid license, created an insurmountable bar to plaintiff's claim for reimbursement of moneys refunded by him to the Department of Human Resources for services rendered by unlicensed psychologist employed by him, and his asserted lack of knowledge that the psychologist in question was not licensed was not relevant, as there is no such requirement of knowledge explicit or implicit in this section. Swisher v. American Home Assurance Co., 80 N.C. App. 718, 343 S.E.2d 288, cert. denied and appeal dismissed, 318 N.C. 420, 349 S.E.2d 606 (1986).

Cited in State v. Clemmons, 111 N.C. App. 569, 433 S.E.2d 748 (1993).

§ 90-270.17. Violations and penalties.

Any person who violates G.S. 90-270.16 is guilty of a Class 2 misdemeanor. Each violation shall constitute a separate offense. (1967, c. 910, s. 17; 1993, c. 539, s. 646; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Unwittingly Employing Unlicensed Psychologist. — Provision in insurance contract between plaintiff psychologist and defendant insurer that the policy did not apply to any criminal, fraudulent or malicious act or omission of the insured, along with G.S. 90-270.16(c) and this section, making it a misdemeanor for a psychologist to employ another psychologist who does not possess a valid license, created an insurmountable bar to plaintiff's claim for reimbursement of moneys refunded by him to the Department of Human Resources for services rendered by unlicensed psychologist employed by him, and his asserted lack of knowledge that the psychologist in question was not licensed was not relevant, as there is no such requirement of knowledge explicit or implicit in G.S. 90-270.16. Swisher v. American Home Assurance Co., 80 N.C. App. 718, 343 S.E.2d 288, cert. denied and appeal dismissed, 318 N.C. 420, 349 S.E.2d 606 (1986).

§ 90-270.18. Disposition and schedule of fees.

(a) Except for fees paid directly to the vendor as provided in subdivision (b)(2) of this section, all fees derived from the operation of this Article shall be deposited with the State Treasurer to the credit of a revolving fund for the use of the Board in carrying out its functions. All fees derived from the operation of this Article shall be nonrefundable.

(b) Fees for activities specified by this Article are as follows:

(1) Application fees for licensed psychologists and licensed psychological associates per G.S. 90-270.11(a) and (b)(1), or G.S. 90-270.13, shall not exceed one hundred dollars ($100.00).

(2) Fees for the national written examination shall be the cost of the examination as set by the vendor plus an additional fee not to exceed fifty dollars ($50.00). The Board may require applicants to pay the fee directly to the vendor.

(3) Fees for additional examinations shall be as prescribed by the Board.

(4) Fees for the renewal of licenses, per G.S. 90-270.14(a)(1), shall not exceed two hundred fifty dollars ($250.00) per biennium. This fee may not be prorated.

(5) Late fees for license renewal, per G.S. 90-270.14(a)(1), shall be twenty-five dollars ($25.00).

(6) Fees for the reinstatement of a license, per G.S. 90-270.15(f), shall not exceed one hundred dollars ($100.00).

(7) Fees for a duplicate license, per G.S. 90-270.14(b), shall be twenty-five dollars ($25.00).

(8) Fees for a temporary license, per G.S. 90-270.5(f) and 90-270.5(g), shall be thirty-five dollars ($35.00).

(9) Application fees for a health services provider certificate, per G.S. 90-270.20, shall be fifty dollars ($50.00).

(c) The Board may specify reasonable charges for duplication services, materials, and returned bank items in its rules. (1967, c. 910, s. 19; 1993, c. 257, s. 5; c. 375, s. 1; 2003-368, s. 4.)

§ 90-270.19. Injunctive authority.

The Board may apply to the superior court for an injunction to prevent violations of this Article or of any rules enacted pursuant thereto. The court is empowered to grant such injunctions regardless of whether criminal prosecution or other action has been or may be instituted as a result of such violation. (1983, c. 82, s. 6.)

§ 90-270.20. Provision of health services; certification as health services provider.

(a) Health services, as defined in G.S. 90-270.2(4) and G.S. 90-270.2(8), may be provided by qualified licensed psychological associates, qualified licensed psychologists holding provisional, temporary, or permanent licenses, or qualified applicants. Qualified licensed psychological associates, qualified licensed psychologists holding provisional or temporary licenses, or qualified applicants may provide health services only under supervision as specified in the duly adopted rules of the Board.

(b) After January 1, 1995, any licensed psychologist who is qualified by education, who holds permanent licensure and a doctoral degree, and who provides or offers to provide health services to the public must be certified as a health services provider psychologist (HSP-P) by the Board. The Board shall certify as health services provider psychologists those applicants who shall demonstrate at least two years of acceptable supervised health services experience, of which at least one year is postdoctoral. The Board shall specify the format, setting, content, and organization of the supervised health services experience or program. The Board may, upon verification of supervised experience and the meeting of all requirements as a licensed psychologist, issue the license and certificate simultaneously. An application fee, as specified in G.S. 90-270.18(b)(9), must be paid.

(c) After January 1, 1995, any licensed psychological associate who is qualified by education may be granted certification as a health services provider psychological associate (HSP-PA). The Board may, upon verification of qualifications and the meeting of all requirements as a licensed psychological associate, issue the license and certificate simultaneously. An application fee, as specified in G.S. 90-270.18(b)(9), must be paid.

(d) After January 1, 1995, any licensed psychologist holding a provisional license who is qualified by education may be granted certification as a health services provider psychologist (provisional) (HSP-PP) by the Board. The Board may, upon verification of qualifications and the meeting of all requirements for a provisional license, issue the license and certificate simultaneously. An application fee, as specified in G.S. 90-270.18(b)(9), must be paid.

(e) Notwithstanding the provisions of subsection (b) of this section, if application is made to the Board before June 30, 1994, by a licensed psychologist who is listed in the National Register of Health Services Providers in Psychology, or who holds permanent licensure and who can demonstrate that he or she has been engaged acceptably in the provision of health services for two years or its equivalent, that licensed psychologist shall be certified as a health services provider psychologist. The applicant, in order to demonstrate two years of acceptable experience or its equivalent, must meet one of the following conditions:

(1) The applicant is a diplomate in good standing of the American Board of Professional Psychology in any of the areas of professional practice deemed appropriate by the Board;

(2) The applicant has the equivalent of two years of acceptable full-time experience, one of which was postdoctoral, at sites where health services are provided;

(3) The applicant submits evidence satisfactory to the Board demonstrating that he or she has been engaged acceptably for the equivalent of at least two years full-time in the provision of health services; or

(4) Any other conditions that the Board may deem acceptable.

(f) Notwithstanding the provisions of subsection (c) of this section, if application is made to the Board before June 30, 1994, by a licensed psychological associate who can demonstrate that he or she has been engaged acceptably in the provision of health services under supervision for two years or its equivalent, that licensed psychological associate shall be certified as a health services provider psychological associate.

(g) The Board shall have the authority to deny, revoke, or suspend the health services provider certificate issued pursuant to these subsections upon a finding that the psychologist has not behaved in conformity with the ethical and professional standards prescribed in G.S. 90-270.15. (1985, c. 734, s. 10; 1993, c. 375, s. 1; 1993 (Reg. Sess., 1994), c. 569, s. 13.)

§ 90-270.21. Ancillary services.

A psychologist licensed under this Article may employ or supervise unlicensed individuals who assist in the provision of psychological services to clients, patients, and their families. The Board may adopt rules specifying the titles used by such individuals, the numbers employed or supervised by any particular psychologist, the activities in which they may engage, the nature and extent of supervision which must be provided, the qualifications of such individuals, and the nature of the responsibility assumed by the employing or supervising psychologist. (1993, c. 375, s. 1.)

§ 90-270.22. Criminal history record checks of applicants for licensure and licensees.

(a) The Board may request that an applicant for licensure or reinstatement of a license or that a licensed psychologist or psychological associate currently under investigation by the Board for allegedly violating this Article consent to a criminal history record check. Refusal to consent to a criminal history record check may constitute grounds for the Board to deny licensure or reinstatement of a license to an applicant or take disciplinary action against a licensee, including revocation of a license. The Board shall be responsible for providing to the North Carolina Department of Justice the fingerprints of the applicant or licensee to be checked, a form signed by the applicant or licensee consenting to the criminal record check and the use of fingerprints and other identifying information required by the State or National Repositories, and any additional information required by the Department of Justice. The Board shall keep all information obtained pursuant to this section confidential.

The Board shall collect any fees required by the Department of Justice and shall remit the fees to the Department of Justice for the cost of conducting the criminal history record check.

(b) Limited Immunity. — The Board, its officers and employees, acting reasonably and in compliance with this section, shall be immune from civil liability for denying licensure or reinstatement of a license to an applicant or the revocation of a license or other discipline of a licensee based on information provided in the applicant's or licensee's criminal history record check. (2006-175, s. 2.)

Editor's Note. — Session Laws 2006-175, s. 4, made this section effective August 1, 2006.

§ 90-270.23: Reserved for future codification purposes.

ARTICLE 18B.

Physical Therapy.

§ 90-270.24. Definitions.

In this Article, unless the context otherwise requires, the following definitions shall apply:

(1) "Board" means the North Carolina Board of Physical Therapy Examiners.

(2) "Physical therapist" means any person who practices physical therapy in accordance with the provisions of this Article.

(3) "Physical therapist assistant" means any person who assists in the practice of physical therapy in accordance with the provisions of this Article, and who works under the supervision of a physical therapist by performing such patient-related activities assigned by a physical therapist which are commensurate with the physical therapist assistant's education and training, but an assistant's work shall not include the interpretation and implementation of referrals from licensed medical doctors or dentists, the performance of evaluations, or the determination or major modification of treatment programs.

(4) "Physical therapy" means the evaluation or treatment of any person by the use of physical, chemical, or other properties of heat, light, water, electricity, sound, massage, or therapeutic exercise, or other rehabilitative procedures, with or without assistive devices, for the purposes of preventing, correcting, or alleviating a physical or mental disability. Physical therapy includes the performance of specialized tests of neuromuscular function, administration of specialized therapeutic procedures, interpretation and implementation of referrals from licensed medical doctors or dentists, and establishment and modification of physical therapy programs for patients. Evaluation and treatment of patients may involve physical measures, methods, or procedures as are found commensurate with physical therapy education and training and generally or specifically authorized by regulations of the Board. Physical therapy education and training shall include study of the skeletal manifestations of systemic disease. Physical therapy does not include the application of roentgen rays or radioactive materials, surgery, manipulation of the spine unless prescribed by a physician licensed to practice medicine in North Carolina, or medical diagnosis of disease.

(5) "Physical therapy aide" means any nonlicensed person who aids in the practice of physical therapy in accordance with the provisions of this Article, and who at all times acts under the orders, direction, and on-site supervision of a licensed physical therapist or physical therapist assistant. An aide may perform physical therapy related activities which are assigned and are commensurate with an aide's training and abilities, but an aide's work shall not include the interpretation and implementation of referrals from licensed medical doctors or dentists, the performance of evaluations, the determination and modification of treatment programs, or any independent performance of any physical therapy procedures. (1951, c. 1131, s. 1; 1969, c. 556; 1979, c. 487; 1985, c. 701, s. 1.)

Editor's Note. — This Article is former Article 18, G.S. 90-256 through 90-270 of this Chapter, as rewritten by Session Laws 1979, c. 487, effective July 1, 1979, and recodified. Where appropriate, the historical citations to sections in the former Article have been added to corresponding sections in the Article as rewritten.

§ 90-270.25. Board of Examiners.

The North Carolina Board of Physical Therapy Examiners is hereby created. The Board shall consist of eight members, including one medical doctor licensed and residing in North Carolina, four physical therapists, two physical therapist assistants, and one public member. The public member shall be appointed by the Governor and shall be a person who is not licensed under Chapter 90 who shall represent the interest of the public at large. The medical doctor, physical therapists, and physical therapists assistants shall be appointed by the Governor from a list compiled by the North Carolina Physical Therapy Association, Inc., following the use of a nomination procedure made available to all physical therapists and physical therapist assistants licensed and residing in North Carolina. In soliciting nominations and compiling its list, the Association will give consideration to geographic distribution, practice setting (institution, independent, academic, etc.), and other factors that will promote representation of all aspects of physical therapy practice on the Board. The records of the operation of the nomination procedure shall be filed with the Board, to be available for a period of six months following nomination, for reasonable inspection by any licensed practitioner. Each physical therapist member of the Board shall be licensed and reside in this State; provided that the physical therapist shall have not less than three years' experience as a physical therapist immediately preceding appointment and shall be actively engaged in the practice of physical therapy in North Carolina during incumbency. Each physical therapist assistant member shall be licensed and reside in this State; provided that the physical therapist assistant shall have not less than three years' experience as a physical therapist assistant immediately preceding appointment and shall be actively engaged in practice as a physical therapist assistant in North Carolina during incumbency.

Members shall be appointed to serve three-year terms, or until their successors are appointed, to commence on January 1 in respective years. In the event that a member of the Board for any reason shall become ineligible to or cannot complete a term of office, another appointment shall be made by the Governor, in accordance with the procedure stated above, to fill the remainder of the term. No member may serve for more than two successive three-year terms.

The Board each year shall designate one of its physical therapist members as chairman and one member as secretary-treasurer. Each member of the Board shall receive such per diem compensation and reimbursement for travel and subsistence as shall be set for licensing boards generally. (1951, c. 1131, s. 2; 1969, c. 445, s. 7; c. 556; 1979, c. 487; 1981, c. 765, s. 1; 1981 (Reg. Sess., 1982), c. 1191, s. 82; 1985, c. 701, s. 1.)

§ 90-270.26. Powers of the Board.

The Board shall have the following general powers and duties:

(1) Examine and determine the qualifications and fitness of applicants for a license to practice physical therapy in this State;

(2) Issue, renew, deny, suspend, or revoke licenses to practice physical therapy in this State, or reprimand or otherwise discipline licensed physical therapists and physical therapist assistants;

(3) Conduct investigations for the purpose of determining whether violations of this Article or grounds for disciplining licensed physical therapists or physical therapist assistants exist;

(3a) Establish mechanisms for assessing the continuing competence of licensed physical therapists or physical therapist assistants to engage in the practice of physical therapy, including approving rules requiring licensees to periodically, or in response to complaints or incident reports, submit to the Board: (i) evidence of continuing education experiences; (ii) evidence of minimum standard accomplishments; or (iii) evidence of compliance with other Board-approved measures, audits, or evaluations; and specify remedial actions if necessary or desirable to obtain license renewal or reinstatement;

(4) Employ such professional, clerical or special personnel necessary to carry out the provisions of this Article, and may purchase or rent necessary office space, equipment and supplies;

(5) Conduct administrative hearings in accordance with Chapter 150B of the General Statutes when a "contested case" as defined in G.S. 150B-2(2) arises under this Article;

(6) Appoint from its own membership one or more members to act as representatives of the Board at any meeting where such representation is deemed desirable;

(7) Establish reasonable fees for applications for examination, certificates of licensure and renewal, and other services provided by the Board;

(8) Adopt, amend, or repeal any rules or regulations necessary to carry out the purposes of this Article and the duties and responsibilities of the Board.

The powers and duties enumerated above are granted for the purpose of enabling the Board to safeguard the public health, safety and welfare against unqualified or incompetent practitioners of physical therapy, and are to be liberally construed to accomplish this objective. In instances where the Board makes a decision to discipline physical therapists or physical therapist assistants under powers set out by any of subsections (2) through (5) of this section, it may as part of its decision charge the reasonable costs of investigation and hearing to the person disciplined. (1979, c. 487; 1985, c. 701, s. 1; 1987, c. 827, ss. 1, 77; 2006-144, s. 1.)

Effect of Amendments. — Session Laws 2006-144, s. 1, effective July 19, 2006, added subdivision (3a).

§ 90-270.27. Records to be kept; copies of record.

The Board shall keep a record of proceedings under this Article and a record of all persons licensed under it. The record shall show the name, last known place of business and last known place of residence, and date and number of licensure certificate as a physical therapist or physical therapist assistant, for every living licensee. Any interested person in the State is entitled to obtain a copy of that record on application to the Board and payment of such reasonable charge as may be fixed by it based on the costs involved. (1951, c. 1131, s. 12; 1969, c. 556; 1979, c. 487; 1985, c. 701, s. 1.)

§ 90-270.28. Disposition of funds.

All fees and other moneys collected and received by the Board shall be used for the purposes of implementing this Article. The financial records of the Board shall be subjected to an annual audit and paid for out of the funds of the Board. (1951, c. 1131, s. 14; 1969, c. 556; 1979, c. 487; 1985, c. 701, s. 1.)

§ 90-270.29. Qualifications of applicants for examination; application; fee.

Any person who desires to be licensed under this Article and who:

(1) Is of good moral character;

(2) If an applicant for physical therapy licensure, has been graduated from a physical therapy program accredited by an agency recognized by either the U.S. Office of Education or the Council on Postsecondary Accreditation; and

(3) If an applicant for physical therapist assistant licensure, has been graduated from a physical therapist assistant educational program accredited by an agency recognized by either the U.S. Office of Education or the Council on Postsecondary Accreditation;

may make application on a form furnished by the Board for examination for licensure as a physical therapist or physical therapist assistant. At the time of making such application, the applicant shall pay to the secretary-treasurer of the Board the fee prescribed by the Board, no portion of which shall be returned. (1951, c. 1131, s. 3; 1959, c. 630; 1969, c. 556; 1979, c. 487; 1985, c. 701, s. 1.)

§ 90-270.30. Licensure of foreign-trained physical therapists.

Any person who has been trained as a physical therapist in a foreign county [country] and desires to be licensed under this Article and who:

(1) Is of good moral character;

(2) Holds a diploma from an educational program for physical therapists approved by the Board:

(3) Submits documentary evidence to the Board of completion of a course of instruction substantially equivalent to that obtained by an applicant for licensure under G.S. 90-270.29; and

(4) Demonstrates satisfactory proof of proficiency in the English language;

may make application on a form furnished by the Board for examination as a foreign-trained physical therapist. At the time of making such application, the applicant shall pay to the secretary-treasurer of the Board the fee prescribed by the Board, no portion of which shall be returned. (1959, c. 630; 1969, c. 556; 1979, c. 487; 1985, c. 701, s. 1.)

Editor's Note. — The word "country" has been inserted in brackets in the introductory language of this section, as the word probably intended by the legislature.

§ 90-270.31. Certificates of licensure.

(a) The Board shall furnish a certificate of licensure to each applicant successfully passing the examination for licensure as a physical therapist or physical therapist assistant, respectively. Upon receipt of satisfactory evidence that an applicant has graduated, within six months prior to application, from a physical therapy or physical therapy assistant program accredited as required under G.S. 90-270.29, the Board may authorize the applicant to perform as a physical therapist or physical therapist assistant in this State, but only under the immediate supervision of a physical therapist licensed in this State, until a formal decision by the Board on the application for license. If a new graduate applicant that has been authorized to perform under supervision by a licensed physical therapist fails (without due cause as determined in the Board's discretion) to take the next succeeding examination, or if the applicant fails to pass the examination, and consequently does not become licensed, the authorization for the applicant to perform under supervision shall expire. Applicants approved by the Board for performance as physical therapists or physical therapist assistants while their applications are pending under circumstances described in this subsection shall be referred to as Physical Therapist Graduate or Physical Therapist Assistant Graduate.

(b) The Board shall furnish a certificate of licensure to any person who is a physical therapist or physical therapist assistant registered or licensed under the laws of another state or territory, if the individual's qualifications were at the date of his registration or licensure substantially equal to the requirements under this Article. When making such application, the applicant shall pay to the secretary-treasurer of the Board the fee prescribed by the Board, no portion of which shall be returned. (1951, c. 1131, ss. 4, 6; 1959, c. 630; 1969, c. 556; 1979, c. 487; 1985, c. 701, s. 1.)

§ 90-270.32. Renewal of license; lapse; revival.

(a) Every licensed physical therapist or physical therapist assistant shall, during the month of January of every year, apply to the Board for a renewal of licensure and pay to the secretary-treasurer the prescribed fee. Licenses that are not so renewed shall automatically lapse. The Board may decline to renew licenses of physical therapists or physical therapist assistants for failure to comply with any required continuing competency measures.

(b) The manner in which lapsed licenses shall be revived, reinstated, or extended shall be established by the Board in its discretion. (1951, c. 1131, s. 7; 1959, c. 630; 1969, c. 556; 1979, c. 487; 1985, c. 701, s. 1; 2006-144, s. 2.)

Effect of Amendments. — Session Laws 2006-144, s. 2, effective July 19, 2006, added the last sentence in subsection (a); and substituted "revived, reinstated, or extended" for "revived or extended" in subsection (b).

§ 90-270.33. Fees.

The Board may collect fees established by its rules, but those fees shall not exceed the following schedule for the specified items:

(1) Each application for licensure	$150.00
(2) License renewal	$120.00
(3) Transfer/verification/replace certificate	$30.00
(4) Examination retake	$60.00
(5) Late renewal	$20.00
(6) Licensure revival (in addition to renewal)	$30.00
(7) Directory	$10.00
(8) Licensee lists or labels	60.00

In all instances where the Board uses the services of a national testing service for preparation, administration, or grading of examinations, the Board may charge the applicant the actual cost of the examination services, in addition to its other fees. (1951, c. 1131, s. 2; 1969, c. 445, s. 7; c. 556; 1979, c. 487; 1985, c. 161; c. 701, s. 1; 1999-345, s. 1.)

§ 90-270.34. Exemptions from licensure; certain practices exempted.

(a) The following persons shall be permitted to practice physical therapy or assist in the practice in this State without obtaining a license under this Article upon the terms and conditions specified herein:

(1) Students enrolled in accredited physical therapist or physical therapist assistant educational programs, while engaged in completing a

clinical requirement for graduation, which must be performed under the supervision of a licensed physical therapist;

(2) Physical therapists licensed in other jurisdictions while enrolled in graduate educational programs in this State that include the evaluation and treatment of patients as part of their experience required for credit, so long as the student is not at the same time gainfully employed in this State as a physical therapist;

(3) Practitioners of physical therapy employed in the United States armed services, United States Public Health Service, Veterans Administration or other federal agency, to the extent permitted under federal law, so long as the practitioner limits services to those directly relating to work with the employing government agency;

(4) Physical therapists or physical therapist assistants licensed in other jurisdictions who are teaching or participating in special physical therapy education projects, demonstrations or courses in this State, in which their participation in the evaluation and treatment of patients is minimal;

(5) A physical therapy aide while in the performance of those acts and practices specified in G.S. 90-270.24(5);

(6) Persons authorized to perform as physical therapists or physical therapist assistants under the provision of G.S. 90-270.31.

(b) Nothing in this Article shall be construed to prohibit:

(1) Any act in the lawful practice of a profession by a person duly licensed in this State;

(2) The administration of simple massages and the operation of health clubs so long as not intended to constitute or represent the practice of physical therapy. (1951, c. 1131, ss. 9, 11; 1959, c. 630; 1969, c. 556; 1979, c. 487; 1985, c. 701, s. 1.)

§ 90-270.35. Unlawful practice.

Except as otherwise authorized in this Article, if any person, firm, or corporation shall:

(1) Practice, attempt to practice, teach, consult, or supervise in physical therapy, or hold out any person as being able to do any of these things in this State, without first having obtained a license or authorization from the Board for the person performing services or being so held out;

(2) Use in connection with any person's name any letters, words, numerical codes, or insignia indicating or implying that the person is a physical therapist or physical therapist assistant, or applicant with "Graduate" status, unless the person is licensed or authorized in accordance with this Article;

(3) Practice or attempt to practice physical therapy with a revoked, lapsed, or suspended license;

(4) Practice physical therapy and fail to refer to a licensed medical doctor or dentist any patient whose medical condition should have, at the time of evaluation or treatment, been determined to be beyond the scope of practice of a physical therapist;

(5) Aid, abet, or assist any unlicensed person to practice physical therapy in violation of this Article; or

(6) Violate any of the provisions of this Article;

said person, firm, or corporation shall be guilty of a Class 1 misdemeanor. Each act of such unlawful practice shall constitute a distinct and separate offense. (1951, c. 1131, ss. 9, 11; 1969, c. 556; 1979, c. 487; 1985, c. 701, s. 1; 1993, c. 539, s. 647; 1994, Ex. Sess., c. 24, s. 14(c).)

OPINIONS OF ATTORNEY GENERAL

A podiatrist may prescribe or refer physical therapy to a licensed physical therapist for the benefit of the podiatrist's patients. See opinion of Attorney General to Mr. E. Joseph Daniels, D.P.M., AACFS, President, North Carolina Board of Podiatry Examiners, 52 N.C.A.G. 70 (1982).

§ 90-270.36. Grounds for disciplinary action.

Grounds for disciplinary action shall include but not be limited to the following:

(1) The employment of fraud, deceit or misrepresentation in obtaining or attempting to obtain a license, or the renewal thereof;

(2) The use of drugs or intoxicating liquors to an extent which affects professional competency;

(3) Conviction of an offense under any municipal, State, or federal narcotic or controlled substance law, until proof of rehabilitation can be established;

(4) Conviction of a felony or other public offense involving moral turpitude, until proof of rehabilitation can be established;

(5) An adjudication of insanity or incompetency, until proof of recovery from the condition can be established;

(6) Engaging in any act or practice violative of any of the provisions of this Article or of any of the rules and regulations adopted by the Board, or aiding, abetting or assisting any other person in the violation of the same;

(7) The commission of an act or acts of malpractice, gross negligence or incompetence in the practice of physical therapy;

(8) Practice as a licensed physical therapist or physical therapist assistant without a valid certificate of renewal;

(9) Engaging in conduct that could result in harm or injury to the public. (1951, c. 1131, s. 8; 1959, c. 630; 1969, c. 556; 1973, c. 1331, s. 3; 1979, c. 487; 1985, c. 701, s. 1.)

CASE NOTES

Statute Not Unconstitutionally Vague. — Language of G.S. 90-270.36(7) and (9) was not unconstitutionally vague and was sufficiently specific to provide the North Carolina Board of Physical Therapy Examiners with the authority to determine that a physical therapist's actions violated acceptable standards of practice in the physical therapy field. Sibley v. N.C. Bd. of Therapy Exam'rs, 151 N.C. App. 367, 566 S.E.2d 486 (2002).

Cited in Dailey v. North Carolina State Bd. of Dental Exmrs., 309 N.C. 710, 309 S.E.2d 219 (1983).

§ 90-270.37. Enjoining illegal practices.

(a) The Board may, if it finds that any person is violating any of the provisions of this Article, apply in its own name to the superior court for a temporary or permanent restraining order or injunction to restrain such person from continuing such illegal practices. The court is empowered to grant injunctive relief regardless of whether criminal prosecution or other action has been or may be instituted as a result of the violation. In the court's consideration of the issue of granting or continuing an injunction sought by the Board, a showing of conduct in violation of the terms of this Article shall be sufficient to meet any requirement of general North Carolina injunction law for irreparable damage.

(b) The venue for actions brought under this section shall be the superior court of any county in which such illegal or unlawful acts are alleged to have been committed, in the county in which the defendants in such action reside, or in the county in which the Board maintains its offices and records. (1979, c. 487; 1985, c. 701, s. 1.)

§ 90-270.38. Title.

This Article may be cited as the "Physical Therapy Practice Act". (1951, c. 1131, s. 15; 1969, c. 556; 1979, c. 487; 1985, c. 701, s. 1.)

§ 90-270.39. Osteopaths, chiropractors, and podiatrists not restricted.

Nothing in this Article shall restrict the use of physical therapy modalities by licensed osteopaths, chiropractors, or podiatrists, in the lawful practice of their professions; except that, these licensed professionals shall not be permitted to in any way hold themselves, or any employee or associate, out as practicing physical therapy or being licensed by the Board of Physical Therapy Examiners, or any other agency, to do so. (1951, c. 1131, s. 15.1; 1969, c. 556; 1979, c. 487; 1985, c. 701, s. 1.)

§§ 90-270.40 through 90-270.44: Reserved for future codification purposes.

Article 18C.

Marriage and Family Therapy Licensure.

§ 90-270.45. Title of Article.

This Article shall be known as the "Marriage and Family Therapy Licensure Act." (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

Cross References. — As to a civil action remedy for persons who are sexually exploited by their psychotherapists, see the Psychotherapy Patient/Client Sexual Exploitation Act, G.S. 90-21.41 et seq.

§ 90-270.46. Policy and purpose.

Marriage and family therapy in North Carolina is a professional practice that affects the public safety and welfare and requires appropriate licensure and control in the public interest.

It is the purpose of this Article to establish a licensure agency, a structure, and procedures that will (i) ensure that the public has a means of protecting itself from the practice of marriage and family therapy by unprofessional, unauthorized, and unqualified individuals, and (ii) protect the public from unprofessional, improper, unauthorized and unqualified use of certain titles by persons who practice marriage and family therapy. This Article shall be liberally construed to carry out these policies and purposes. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

Legal Periodicals. — For note suggesting the need for a new tort of breach of confidence, in light of Watts v. Cumberland County Hospital System, 75 N.C. App. 1, 330 S.E.2d 242 (1985), see 8 Campbell L. Rev. 145 (1985).

§ 90-270.47. Definitions.

As used in this Article, unless the context clearly requires a different meaning:

(1) "Allied mental health field" and "degree" mean:
  a. Master's or doctoral degree in clinical social work;
  b. Master's or doctoral degree in psychiatric nursing;
  c. Master's or doctoral degree in counseling or clinical or counseling psychology;
  d. Doctor of medicine or doctor of osteopathy degree with an appropriate residency training in psychiatry; or
  e. Master's or doctoral degree in any mental health field the course of study of which is equivalent to the master's degree in marriage and family therapy.

(2) "Board" means the North Carolina Marriage and Family Therapy Licensure Board.

(3) "Licensed marriage and family therapist" means a person to whom a license has been issued pursuant to this Article, if the license is in force and not suspended or revoked.

(3a) "Marriage and family therapy" is the clinical practice, within the context of marriage and family systems, of the diagnosis and treatment of psychosocial aspects of mental and emotional disorders. Marriage and family therapy involves the professional application of psychotherapeutic and family systems theories and techniques in the delivery of services to families, couples, and individuals for the purpose of treating these diagnosed mental and emotional disorders. Marriage and family therapy includes referrals to and collaboration with other health care professionals when appropriate.

(4) "Practice of marriage and family therapy" means the rendering of professional marriage and family therapy services to individuals, couples, or families, singly or in groups, whether the services are offered directly to the general public or through organizations, either public or private, for a fee, monetary or otherwise.

(5) "Recognized educational institution" means any educational institution that grants a bachelor's, master's, or doctoral degree and is recognized by the Board and by a nationally or regionally recognized educational or professional accrediting body. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

§ 90-270.48. Prohibited acts.

Except as specifically provided elsewhere in this Article, it is unlawful for a person not licensed as a marriage and family therapist under this Article to practice marriage or family therapy or hold himself or herself out to the public as a person practicing marriage and family therapy. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

§ 90-270.48A. Exemptions.

(a) This Article does not prevent members of the clergy or licensed, certified, or registered members of professional groups recognized by the Board from advertising or performing services consistent with their own profession. Members of the clergy include, but are not limited to, persons who are ordained, consecrated, commissioned, or endorsed by a recognized denomination, church, faith group, or synagogue. Professional groups the Board shall recognize include, but are not limited to, licensed or certified social workers, licensed professional counselors, fee-based pastoral counselors, licensed practicing psychologists, psychological associates, physicians, and attorneys-at-law. However, in no event may a person use the title "Licensed Marriage and Family Therapist," use the letters "LMFT," or in any way imply that the person is a licensed marriage and family therapist unless the person is licensed as such under this Article.

(b) A person is exempt from the requirements of this Article if any of the following conditions are met:

(1) The person is (i) preparing for the practice of marriage and family therapy in a manner prescribed by rules of the Board, (ii) under qualified supervision in a training institution or facility or supervisory arrangement recognized and approved by the Board, and (iii) designated by a title such as "marriage and family therapy intern," or "marriage and family therapy supervisee," or another similar title approved by the Board.

(2) The person is practicing marriage and family therapy as an employee of a recognized educational institution, or a governmental institution or agency and the practice is included in the duties for which the person was employed by the institution or agency.

(3) The person is practicing marriage and family therapy as an employee of a nonprofit organization which the Board has determined meets community needs and the practice is included in the duties for which the person was employed by the nonprofit organization.

(4) The person is practicing marriage and family therapy as an employee of a hospital licensed under Article 5 of Chapter 131E or Article 2 of Chapter 122C of the General Statutes. Provided, however, no such person shall hold himself out as a licensed marriage and family therapist. (1993 (Reg. Sess., 1994), c. 564, s. 2; 2001-487, s. 40(i).)

§ 90-270.48B: Repealed by Session Laws 2003-117, s. 2, effective October 1, 2003, and applicable to claims for payment or reimbursement for services rendered on or after that date.

§ 90-270.49. North Carolina Marriage and Family Therapy Licensure Board.

(a) Establishment. — There is established as an agency of the State of North Carolina the North Carolina Marriage and Family Therapy Licensure Board, which shall be composed of seven Board members to be appointed as provided in G.S. 90-270.50. Board members shall be appointed for terms of four years each, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the Board member whom he shall succeed. Upon the expiration of a Board member's term of office, the Board member shall continue to serve until a successor has qualified. No person may be appointed more than once to fill an unexpired term or for more than two consecutive full terms. The Governor shall designate one Board member to serve as chairperson of the Board. No person may serve as chairperson for more than four years.

The Governor may remove any member from the Board or remove the chairperson from the position of chairperson only for neglect of duty, malfeasance, or conviction of a felony or crime of moral turpitude while in office.

No Board member shall participate in any matter before the Board in which the member has a pecuniary interest, personal bias, or other similar conflict of interest.

(b) Quorum and Principal Office. — Four of the members of the Board shall constitute a quorum of the Board. The Board shall specify the principal office of the Board within this State.

(c) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 564, s. 2. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

§ 90-270.50. Appointment and qualification of Board members.

(a) Nominations for Appointment. — The Governor shall appoint members of the Board only from among the candidates who meet the following qualifications:

(1) Four members shall be practicing marriage and family therapists who are licensed marriage and family therapists in the State at the time of their appointment, each of whom has been for at least five years immediately preceding appointment actively engaged as a marriage and family therapist in rendering professional services in marriage and family therapy, or in the education and training of graduate or postgraduate students of marriage and family therapy, and has spent the majority of the time devoted to this activity in this State during the two years preceding appointment.

(2) Three members shall be representatives of the general public who have no direct affiliation with the practice of marriage and family therapy.

(b) The appointment of any member of the Board shall automatically terminate 30 days after the date the member is no longer a resident of the State of North Carolina.

(c) The Governor shall fill any vacancy by appointment for the unexpired term.

(d) Each member of the Board must be a citizen of this State and must reside in a different congressional district in this State. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

§ 90-270.51. Powers and duties.

(a) The Board shall administer and enforce this Article.

(b) Subject to the provisions of Chapter 150B of the General Statutes, the Board may adopt, amend, or repeal rules to administer and enforce this Article, including rules of professional ethics for the practice of marriage and family therapy.

(c) The Board shall examine and pass on the qualifications of all applicants for licensure under this Article, and shall issue a license to each successful applicant.

(d) The Board may adopt a seal which may be affixed to all licenses issued by the Board.

(e) The Board may authorize expenditures to carry out the provisions of this Article from the fees that it collects, but expenditures may not exceed the revenues of the Board during any fiscal year.

(f) The Board may employ, subject to the provisions of Chapter 126 of the General Statutes, attorneys, experts, and other employees as necessary to perform its duties. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1987, c. 827, s. 78; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

§ 90-270.52. License application.

(a) Each person desiring to obtain a license under this Article shall apply to the Board upon the form and in the manner prescribed by the Board. Each applicant shall furnish evidence satisfactory to the Board that the applicant:

(1) Is of good moral character;

(2) Has not engaged or is not engaged in any practice or conduct that would be a ground for denial, revocation, or suspension of a license under G.S. 90-270.60;

(3) Is qualified for licensure pursuant to the requirements of this Article.

(b) A license obtained through fraud or by any false representation is void. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

§ 90-270.53: Repealed by Session Laws 1993 (Regular Session, 1994), c. 564, s. 2.

§ 90-270.54. Requirements for license.

(a) Each applicant shall be issued a license by the Board if the applicant meets the qualifications set forth in G.S. 90-270.52(a) and provides satisfactory evidence to the Board that the applicant:

(1) Meets educational and experience qualifications as follows:

a. Educational requirements: Possesses a minimum of a master's degree from a recognized educational institution in the field of marriage and family therapy, or a degree in an allied mental health field, which degree is evidenced by the applicant's official transcripts which establish that the applicant has completed an appropriate course of study in an allied mental health field. An applicant with a degree in an allied mental health field may meet the educational requirements if the applicant presents satisfactory evidence of post-master's or post-doctoral training taken in the field of marriage and family therapy from a program recognized by the Board regardless whether the training was taken at a nondegree granting institution or in a nondegree program, as long as the training, by itself or in combination with any other training, is the equivalent in content and quality, as defined in the rules of the Board, of a master's or doctoral degree in marriage and family therapy;

b. Experience requirements: Has at least 1,500 hours of clinical experience in the practice of marriage and family therapy, not more than 500 hours of which were obtained while the candidate was a student in a master's degree program and at least 1,000 of which were obtained after the applicant was granted a degree in the field of marriage and family therapy or an allied mental health field (with ongoing supervision consistent with standards approved by the Board); and

(2) Passes an examination administered by the Board.

(b) Any person who is a certified marriage and family therapist on January 1, 1995, shall be deemed to be a licensed marriage and family therapist as of that date. Valid and unexpired certificates operate as licenses for the purposes of this Article until the date set for renewal of the certificate, at which time the Board shall issue the certificate holder a license in accordance with G.S. 90-270.58. (1979, c. 697, s. 1; 1981, c. 611, s. 2; 1985, c. 223, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

§ 90-270.55. Examinations.

The Board shall conduct an examination at least once a year at a time and place designated by the Board. Examinations may be written, oral, or both as determined by the Board. Examinations shall include questions in theoretical and applied fields to test an applicant's knowledge and competence to engage in the practice of marriage and family therapy. The Board shall set the passing score for examinations. Any person who fails an examination conducted by the Board shall not be admitted to a subsequent examination for a period of at least six months. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

§ 90-270.55A. Temporary license.

The Board shall issue a nonrenewable temporary license to a person applying for licensure under G.S. 90-270.54 for a period not to exceed the lesser of one year or the date next scheduled for issuance of new licenses pursuant to G.S. 90-270.54 upon a finding that the person substantially meets the education and experience requirements of G.S. 90-270.54(a)(1). No temporary license shall be issued to a person who has failed an examination administered under G.S. 90-270.55. Recipients of temporary licenses have all the rights, duties, and obligations of permanent licensees, except that the Board shall limit by rule the practice of marriage and family therapy by temporary licensees. (1993 (Reg. Sess., 1994), c. 564, s. 2.)

§ 90-270.56. Reciprocal licenses.

The Board shall issue a license by reciprocity to any person who applies for the license as prescribed by the Board and who is licensed or certified as a marriage and family therapist in another state whose requirements for the license or certificate are equivalent to or exceed the requirements of this State. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

§ 90-270.57. Fees.

In order to fund the Board's activities under this Article, the Board may charge and collect fees not exceeding the following:

(1) Each license examination	$ 50.00
(2) Each license application	150.00
(3) Each renewal of license	100.00
(4) Each reciprocal license application	150.00
(5) Each reinstatement of an expired license	125.00
(6) Each application to return to active status	125.00.

In addition to the examination fee provided in subdivision (1) of this section, the Board may charge and collect from each applicant for license examination the cost of test materials.

The Board is authorized to return all or a portion of fees paid in cases where the applicant is ineligible or in cases of undue hardship. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1989, c. 581, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

§ 90-270.58. Renewal of license.

All licenses issued under this Article shall expire automatically on the first day of July of each year. The Board shall renew a license upon (i) completion of the continuing education requirements of G.S. 90-270.58B and (ii) payment of the renewal fee. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1989, c. 581, s. 2; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

§ 90-270.58A. Reinstatement after expiration.

A person whose license has expired may have the license reinstated as prescribed by the Board. The Board shall charge and collect a fee for reinstatement of the license. (1993 (Reg. Sess., 1994), c. 564, s. 2.)

§ 90-270.58B. Inactive status.

(a) A person who holds a valid and unexpired license and who is not actively engaged in the practice of marriage and family therapy may apply to the Board to be placed on inactive status. A person on inactive status shall not be required to pay annual renewal fees.

(b) A person on inactive status shall not practice or hold himself out as practicing marriage and family therapy or perform any other activities prohibited by this Article.

(c) A person desiring to return to active status shall submit written application to the Board. The Board shall return the person to active status upon payment of the fee specified in G.S. 90-270.57 and upon such showing of competency to resume practice as the Board may require. (1993 (Reg. Sess., 1994), c. 564, s. 2.)

§ 90-270.58C. Continuing education requirements.

The Board shall prescribe continuing education requirements for licensees. These requirements shall be designed to maintain and improve the quality of professional services in marriage and family therapy provided to the public, to keep the licensee knowledgeable of current research, techniques, and practice, and to provide other resources that will improve skill and competence in marriage and family therapy. The number of hours of continuing education shall not exceed the number of hours available that year in Board-approved courses within the State. The Board may waive these continuing education requirements for not more than 12 months, but only upon the licensee's satisfactory showing to the Board of undue hardship. (1993 (Reg. Sess., 1994), c. 564, s. 2.)

§ 90-270.59. Disposition of funds.

All moneys received by the Board shall be used to implement this Article. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

§ 90-270.60. Denial, revocation, or suspension of license.

(a) Grounds for Denial, Revocation, or Suspension. — The Board may deny, revoke, or suspend a license granted pursuant to this Article on any of the following grounds:

(1) Conviction of a felony under the laws of the United States or of any state of the United States.
(2) Conviction of any crime, an essential element of which is dishonesty, deceit, or fraud.
(3) Fraud or deceit in obtaining a license as a marriage and family therapist.
(4) Dishonesty, fraud or gross negligence in the practice of marriage and family therapy.
(5) Violation of any rule of professional ethics and professional conduct adopted by the Board.

(b) Any disciplinary action taken shall be in accordance with Chapter 150B of the General Statutes. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1987, c. 827, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

CASE NOTES

Cited in Dailey v. North Carolina State Bd. of Dental Exmrs., 309 N.C. 710, 309 S.E.2d 219 (1983).

§ 90-270.61. Penalties.

Any person not licensed as a marriage and family therapist under this Article who engages in the practice of marriage and family therapy, or holds himself or herself out to be a marriage or family therapist or engaged in marriage and family therapy in violation of this Article is guilty of a Class 2 misdemeanor. (1979, c. 697, s. 1; 1985, c. 223, ss. 1, 1.1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

§ 90-270.62. Injunction.

As an additional remedy, the Board may proceed in a superior court to enjoin and restrain any person without a valid license from violating the prohibitions of this Article. The Board shall not be required to post bond to such proceeding. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

§§ 90-270.63, 90-270.64: Reserved for future codification purposes.

ARTICLE 18D.

Occupational Therapy.

§ 90-270.65. Title.

This Article shall be known as the "North Carolina Occupational Therapy Practice Act." (1983 (Reg. Sess., 1984), c. 1073, s. 1.)

Cross References. — As to limited liability companies and their powers, see G.S. 57C-2-01 et seq.

§ 90-270.66. Declaration of purpose.

The North Carolina Occupational Therapy Practice Act is enacted to safeguard the public health, safety and welfare, to protect the public from being harmed by unqualified persons, to assure the highest degree of professional services and conduct on the part of occupational therapists and occupational therapy assistants, to provide for the establishment of licensure requirements, and to insure the availability of occupational therapy services of high quality to persons in need of such services. It is the purpose of this Article to provide for the regulation of persons offering occupational therapy services to the public. (1983 (Reg. Sess., 1984), c. 1073, s. 1; 2005-432, s. 1.)

Editor's Note. — Session Laws 2005-432, s. 16, provides: "All members serving on the North Carolina Board of Occupational Therapy on the effective date of this act shall complete their current terms. Upon completion of their current terms, the occupational therapist members shall serve one additional term of either three or four years as follows: the occupational therapist member who served the longest may serve an additional three-year term; the other two occupational therapist members, the occupational therapy assistant member, and the physician member shall be eligible to serve one additional four-year term. The Governor shall appoint a new public member to serve a four-year term. The Governor shall also appoint the counselor, educator, or school-based professional member for a four-year term pursuant to G.S. 90-270.68(a)(4), as enacted in Section 4 of this act, to begin October 1, 2005. Members appointed thereafter shall serve four-year terms."

§ 90-270.67. Definitions.

As used in this Article, unless the context clearly requires a different meaning:

(1) Accrediting body. — The Accrediting Council for Occupational Therapy Education.

(1a) Board. — The North Carolina Board of Occupational Therapy.

(1b) Examining body. — The National Board for Certification in Occupational Therapy.

(2) Occupational therapist. — An individual licensed in good standing to practice occupational therapy as defined in this Article.

(3) Occupational therapy assistant. — An individual licensed in good standing to assist in the practice of occupational therapy under this Article, who performs activities commensurate with his or her education and training under the supervision of a licensed occupational therapist.

(4) Occupational therapy. — A health care profession providing evaluation, treatment and consultation to help individuals achieve a maximum level of independence by developing skills and abilities interfered with by disease, emotional disorder, physical injury, the aging process, or impaired development. Occupational therapists use purposeful activities and specially designed orthotic and prosthetic devices to reduce specific impairments and to help individuals achieve independence at home and in the work place.

(5) Person. — Any individual, partnership, unincorporated organization, or corporate body, except that only an individual may be licensed under this Article. (1983 Reg. Sess., 1984), c. 1073, s. 1; 1989, c. 256, s. 1; c. 770, s. 46; 2005-432, s. 2; 2006-226, s. 18.)

Effect of Amendments. — Session Laws 2006-226, s. 18, effective August 10, 2006, substituted "Occupational therapy. —" for "Occupational therapy means a", and made a punctuation change at the beginning of subdivision (4).

§ 90-270.68. Establishment of Board, terms, vacancies, removal, meetings, compensation.

(a) Establishment of Board. — The North Carolina Board of Occupational Therapy is created. The Board shall consist of seven members who are appointed by the Governor and are residents of this State at the time of and during their appointment, as follows:

(1) Three members shall be occupational therapists and one member shall be an occupational therapy assistant. Each of these members shall be licensed to practice in North Carolina and have practiced, taught, or engaged in research in occupational therapy for at least three of the five years immediately preceding appointment to the Board.

(2) One member shall be a physician in good standing with the North Carolina Medical Board and licensed by and registered with the North Carolina Medical Board to practice medicine in this State.

(3) One member shall represent the public at large and shall be a person who is not a health care provider licensed under this Chapter or the spouse of a licensed health care provider.

(4) One member shall be a counselor, educator, or school-based professional certified or licensed under North Carolina law who is employed in the North Carolina public school system and is not an occupational therapist or an occupational therapy assistant.

The occupational therapist members and the occupational therapy assistant member shall be nominated by the North Carolina Occupational Therapy

Association, Inc., following the use of a procedure made available to all occupational therapists and occupational therapy assistants licensed and residing in North Carolina. In soliciting nominations and compiling its list, the Association shall give consideration to geographic distribution, clinical specialty, and other factors that will promote representation of all aspects of occupational therapy practice. The records of the nomination procedures shall be filed with the Board and made available for a period of six months following nomination for reasonable inspection by any licensed practitioner of occupational therapy.

The physician member shall be nominated by the North Carolina Occupational Therapy Association, Inc., after consultation with the North Carolina Medical Society. The counselor, educator, or school-based professional member shall be nominated by the North Carolina Occupational Therapy Association, Inc., after consultation with the North Carolina School Counselors Association.

(b) Terms. — Members of the Board shall serve four-year staggered terms. No member shall serve more than two consecutive four-year terms, unless a member is appointed to fill a vacancy for an unexpired term, then that member may complete the unexpired term and serve one additional four-year term.

(c) Vacancies. — In the event a member of the Board cannot complete a term of office, the vacancy shall be filled by appointment by the Governor, in accordance with the procedures set forth in this section, for the remainder of the unexpired term. Vacancies shall be filled by the Governor within 45 days of receipt of the nominations from the North Carolina Occupational Therapy Association, Inc., or, in the case of public members, within 45 days of the receipt of notice of vacancy.

(d) Removal. — The Board may remove any of its members for neglect of duty, incompetence, or unprofessional conduct. A member subject to disciplinary proceedings shall be disqualified from participating in Board business until the charges are resolved.

(e) Meetings. — Each year the Board shall meet and designate a chairperson, a vice-chairperson, and a secretary-treasurer from among its members. The Board may hold additional meetings upon call of the chairperson or any two board members. A majority of the Board membership shall constitute a quorum.

(f) Compensation. — Members of the Board shall receive no compensation for their services, but shall be entitled to travel, per diem, and other expenses authorized by G.S. 93B-5. (1983 (Reg. Sess., 1984), c. 1073, s. 1; 1989, c. 256, s. 2; 2005-432, s. 3.)

Editor's Note. — Session Laws 2005-432, s. 16, provides: "All members serving on the North Carolina Board of Occupational Therapy on the effective date of this act shall complete their current terms. Upon completion of their current terms, the occupational therapist members shall serve one additional term of either three or four years as follows: the occupational therapist member who served the longest may serve an additional three-year term; the other two occupational therapist members, the occupational therapy assistant member, and the physician member shall be eligible to serve one additional four-year term. The Governor shall appoint a new public member to serve a four-year term. The Governor shall also appoint the counselor, educator, or school-based professional member for a four-year term pursuant to G.S. 90-270.68(a)(4), as enacted in Section 4 of this act, to begin October 1, 2005. Members appointed thereafter shall serve four-year terms."

§ 90-270.69. Powers and duties of the Board.

The Board shall have the following powers and duties:

(1) Establish and determine the qualifications and fitness of applicants for licensure to practice occupational therapy in this State.

(2) Conduct investigations, subpoena individuals and records, and do all other things necessary and proper to discipline persons licensed under this Article and to enforce this Article.

(2a) Communicate disciplinary actions to relevant State and federal authorities and to other state occupational therapy licensing authorities.

(3) Issue and renew, and deny, suspend, revoke or refuse to issue or renew any license under this Article.

(4) Adopt, amend, or repeal any reasonable rules or regulations necessary to carry out the purposes of this Article, including but not limited to rules establishing ethical standards of practice.

(5) Employ professional, clerical, investigative or special personnel necessary to carry out the provisions of this Article, and purchase or rent office space, equipment and supplies.

(6) Adopt a seal by which it shall authenticate its proceedings, official records, and licenses.

(7) Conduct administrative hearings in accordance with Chapter 150B of the General Statutes when a "contested case" as defined in G.S. 150B-2(2) arises under this Article.

(8) Establish reasonable fees for applications, limited permits, initial and renewal licenses, and other services provided by the Board.

(9) Submit an annual report to the Governor and General Assembly of all its official actions during the preceding year, together with any recommendations and findings regarding improvement of the profession of occupational therapy.

(10) Publish and make available upon request the licensure standards prescribed under this Article and all rules and regulations established by the Board.

(11) Conduct a training program as needed for new Board members designed to familiarize new members with their duties. (1983 (Reg. Sess., 1984), c. 1073, s. 1; 1987, c. 827, ss. 1, 77; 2005-432, s. 4.)

§ 90-270.70. Requirements for licensure.

(a) Any individual who desires to be licensed as an occupational therapist or occupational therapy assistant shall file a written application with the Board on forms provided by the Board, showing to the satisfaction of the Board that the applicant:

(1) Is of good moral character; and

(2) Has passed an examination approved by the Board as provided in this Article.

Applicants for licensure as an occupational therapist must also have successfully completed an accredited occupational therapy educational curriculum and the required supervised fieldwork as determined by the Board. Applicants for licensure as an occupational therapy assistant must also have successfully completed an accredited occupational therapy assistant educational curriculum and the required supervised fieldwork as determined by the Board.

(b) Occupational therapists who are trained outside of the United States and its territories shall satisfy the examination and educational requirements as stated in subsection (a) of this section. The Board shall require these applicants to meet examination eligibility requirements as established by the credentialing body recognized by the Board before taking the examination. (1983 (Reg. Sess., 1984), c. 1073, s. 1; 2005-432, s. 5.)

§ 90-270.71: Repealed by Session Laws 2005-432, s. 6, effective September 22, 2005.

§ 90-270.72. Exemption from requirements.

The Board may exempt an applicant from certain licensure requirements if the applicant presents proof satisfactory to the Board of current licensure as an occupational therapist or occupational therapy assistant in another state or the District of Columbia, Puerto Rico, or Guam, provided the other jurisdiction's licensure standards are considered by the Board to be substantially equivalent to or higher than those prescribed in this Article. (1983 (Reg. Sess., 1984), c. 1073, s. 1; 2005-432, s. 7.)

§ 90-270.73. Issuance of license.

(a) The Board shall issue a license to any individual who meets the requirements of this Article upon payment of the license fee prescribed in G.S. 90-270.77.

(b) Any individual licensed as an occupational therapist under this Article may use the words "occupational therapist" and may use the letters "O.T." or "O.T./L." in connection with his or her name or place of business.

(c) Any individual licensed as an occupational therapy assistant under this Article may use the words "occupational therapy assistant" and may use the letters "O.T.A." or "O.T.A./L." in connection with his or her name or place of business.

(d) Any individual possessing a limited permit to practice occupational therapy may use the words "occupational therapy limited permittee" or "occupational therapy assistant limited permittee" and may use the letters "O.T./L.P." or "O.T.A./L.P." in connection with his or her name or place of business. (1983 (Reg. Sess., 1984), c. 1073, s. 1; 2005-432, s. 8.)

§ 90-270.74: [Expired.]

Editor's Note. — This section expired pursuant to its own terms, as enacted by 1983 (Reg. Sess., 1984), c. 1073, s. 1, and as amended by Session Laws 2005-432, s. 9, effective October 1, 2007.

§ 90-270.75. Renewal of license.

(a) Licenses issued under this Article shall be subject to annual renewal upon completion of continuing education and competency requirements as may be required by the Board, upon the payment of a renewal fee specified under G.S. 90-270.77 and in compliance with this Article, and shall expire unless renewed in the manner prescribed by the Board. The Board may provide for the late renewal of a license upon the payment of a late fee in accordance with G.S. 90-270.77, but no such late renewal may be granted more than five years after a license expires.

(b) A suspended license is subject to expiration and may be renewed as provided in this section, but such renewal shall not entitle the licensee to engage in the licensed activity or in any other conduct or activity in violation of the order or judgment by which the license was suspended until the license is reinstated. If a license revoked on disciplinary grounds is reinstated, the licensee shall pay the renewal fee and any late fee that may be applicable. (1983 (Reg. Sess., 1984), c. 1073, s. 1; 1989, c. 256, s. 3; 2005-432, s. 10.)

§ 90-270.76. Suspension, revocation and refusal to renew license.

(a) The Board may deny or refuse to renew a license, may suspend or revoke a license, or may impose probationary conditions on a license if the licensee or applicant for licensure has engaged in any of the following conduct:

(1) Obtaining a license by means of fraud, misrepresentation, or concealment of material facts.

(2) Engaging in unprofessional conduct pursuant to rules established by the Board or violating the Code of Ethics adopted and published by the Board.

(3) Having been convicted of or pleaded guilty or nolo contendere to a crime involving moral turpitude or any crime which indicates that the occupational therapist or occupational therapy assistant is unfit or incompetent to practice occupational therapy or that the occupational therapist or occupational therapy assistant has deceived or defrauded the public.

(4) Engaging in any act or practice violative of any of the provisions of this Article or any rule or regulation adopted by the Board or aiding, abetting or assisting any person in such a violation.

(5) Committing an act or acts of malpractice, gross negligence or incompetence in the practice of occupational therapy.

(6) Practicing as a licensed occupational therapist or occupational therapy assistant without a current license.

(7) Engaging in conduct that could result in harm or injury to the public.

(8) Having an occupational therapy license revoked or suspended or other disciplinary action taken whether in this State or another jurisdiction.

(9) Being unfit or incompetent to practice occupational therapy by reason of deliberate or negligent acts or omissions regardless of whether actual injury to a patient is established.

(b) The denial, refusal to renew, suspension, revocation or imposition of probationary conditions upon a license may be ordered by the Board after a hearing held in accordance with G.S. Chapter 150B and rules adopted by the Board. An application may be made to the Board for reinstatement of a revoked license if the revocation has been in effect for at least one year. (1983 (Reg. Sess., 1984), c. 1073, s. 1; 1987, c. 827, s. 1; 2005-432, s. 11.)

§ 90-270.77. Fees.

The Board shall adopt and publish, in the manner established by its rules and regulations, fees reasonably necessary to cover the cost of services rendered for the following purposes:

(1) For an initial application, a fee not to exceed ten dollars ($10.00).

(2) For issuance of an initial license, a fee not to exceed one hundred dollars ($100.00).

(3) For the renewal of a license, a fee not to exceed fifty dollars ($50.00).

(4) For the late renewal of a license, a fee not to exceed fifty dollars ($50.00).

(5) **(Expired effective October 1, 2007)** For a limited permit, a fee not to exceed fifty dollars ($50.00). This fee shall expire October 1, 2007.

(6) For copies of Board rules and licensure standards, charges not to exceed the actual cost of printing and mailing. (1983 (Reg. Sess., 1984), c. 1073, s. 1; 2005-432, s. 12.)

§ 90-270.78. False representation of license prohibited.

(a) It is unlawful for any person who is not licensed in accordance with this Article or whose license has been suspended, revoked or not renewed by the Board to:

(1) Engage in the practice of occupational therapy.

(2) Orally, in writing, in print or by sign, or in any other manner, directly or by implication, represent that he or she is engaging in occupational therapy.

(3) Use in connection with his or her name or place of business the words "occupational therapist", "occupational therapy assistant", "occupational therapist limited permittee", or "occupational therapy assistant limited permittee", or the letters "O.T.", "O.T./L.", "O.T.A.", "O.T.A./L.", "O.T./L.P.", or "O.T.A./L.P." or any other words, letters, abbreviations or insignia indicating or implying that the person is an occupational therapist, occupational therapy assistant, occupational therapist limited permittee, or occupational therapy assistant limited permittee.

(b) Any person who resides in another state or foreign country and who, by use of electronic or other medium, performs any of the acts described as the practice of occupational therapy pursuant to this Article, but is not licensed pursuant to this Article, shall be regarded as practicing occupational therapy without a North Carolina license and is subject to the provisions of this Article and appropriate regulation by the Board. (1983 (Reg. Sess., 1984), c. 1073, s. 1; 2005-432, s. 13.)

§ 90-270.79. Violation a misdemeanor.

Any person who violates any provision of this Article shall be guilty of a Class 1 misdemeanor. Each act of such unlawful practice shall constitute a distinct and separate offense. (1983 (Reg. Sess., 1984), c. 1073, s. 1; 1993, c. 539, s. 648; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 90-270.80. Injunctions.

The Board may make application to any appropriate court for an order enjoining violations of this Article, and upon a showing by the Board that any person has violated or is about to violate this Article, the court may grant an injunction, restraining order, or take other appropriate action. (1983 (Reg. Sess., 1984), c. 1073, s. 1.)

§ 90-270.80A. Civil penalties, disciplinary costs.

(a) Authority to Assess Civil Penalties. — The Board may assess a civil penalty not in excess of one thousand dollars ($1,000) for the violation of any section of this Article or the violation of any rules adopted by the Board. The clear proceeds of any civil penalty assessed under this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(b) Consideration Factors. — Before imposing and assessing a civil penalty, the Board shall consider the following factors:

(1) The nature, gravity, and persistence of the particular violation.

(2) The appropriateness of the imposition of a civil penalty when considered alone or in combination with other punishment.

(3) Whether the violation was willful and malicious.

(4) Any other factors that would tend to mitigate or aggravate the violations found to exist.

(c) Schedule of Civil Penalties. — The Board shall establish a schedule of civil penalties for violations of this Article and rules adopted by the Board.

(d) Costs. — The Board may assess the costs of disciplinary actions against any person found to be in violation of this Article or rules adopted by the Board. (2005-432, s. 14.)

§ 90-270.81. Persons and practices not affected.

Nothing in this Article shall be construed to prevent or restrict:

(1) Any person registered, certified, credentialed, or licensed to engage in another profession or occupation or any person working under the supervision of a person registered, certified, credentialed, or licensed to engage in another profession or occupation in this State from performing work incidental to the practice of that profession or occupation as long as the person does not represent himself or herself as an occupational therapist or occupational therapy assistant.

(2) Any person employed as an occupational therapist or occupational therapy assistant by the government of the United States, if he or she provides occupational therapy solely under the direction or control of the organization by which he or she is employed.

(3) Any person pursuing a course of study leading to a degree or certificate in occupational therapy at an accredited or approved educational program if the activities and services constitute a part of a supervised course of study and if the person is designated by a title which clearly indicates his or her status as a student or trainee.

(4) Any person fulfilling the supervised fieldwork experience required for licensure under this Article if the person is designated by a title, which clearly indicates his or her status as a student or trainee.

(5) Occupational therapists or occupational therapy assistants licensed in other jurisdictions who are consulting, teaching, or participating in special occupational therapy education projects, demonstrations or courses in this State, provided their evaluation and treatment of patients is minimal.

(6) The practice of occupational therapy by an occupational therapist or occupational therapy assistant licensed in another jurisdiction who comes into this State, whether in person or by use of any electronic or other medium, on an irregular basis, to consult with a North Carolina licensed occupational therapist or occupational therapy assistant or to consult with faculty at an academic facility about education and training. This shall not apply to occupational therapists or occupational therapy assistants residing in a neighboring state and regularly practicing in this State. (1983 (Reg. Sess., 1984), c. 1073, s. 1; 2005-432, s. 15.)

Article 19.

Sterilization Operations.

§ 90-271. Operation lawful upon request of married person or person over 18.

It shall be lawful for any physician or surgeon licensed by this State when so requested by any person 18 years of age or over, or less than 18 years of age if legally married, to perform upon such person a surgical interruption of vas deferens or Fallopian tubes, as the case may be, provided a request in writing is made by such person prior to the performance of such surgical operation, and provided, further, that prior to or at the time of such request a full and reasonable medical explanation is given by such physician or surgeon to such person as to the meaning and consequences of such operation; and provided, further, that the surgical interruption of Fallopian tubes is performed in a hospital or ambulatory surgical facility licensed by the Department of Health and Human Services. (1963, c. 600; 1965, cc. 108, 941; 1971, c. 1231, s. 1; 1973, c. 476, s. 152; c. 998, s. 1; 1977, c. 7; 1979, c. 728; 1997-443, s. 11A.118(a).)

OPINIONS OF ATTORNEY GENERAL

Necessary Procedure for Sterilization of an Unmarried Minor. — See opinion of Attorney General to Mr. William W. Aycock, Jr., Attorney for Edgecombe County Department of Social Services, 40 N.C.A.G. 162 (1970).

§ 90-272. Operation on unmarried minor.

Any such physician or surgeon may perform a surgical interruption of vas deferens or Fallopian tubes upon any unmarried person under the age of 18 years when so requested in writing by such minor and in accordance with the conditions and requirements set forth in G.S. 90-271, provided that the juvenile court of the county wherein such minor resides, upon petition of the parent or parents, if they be living, or the guardian or next friend of such minor, shall determine that the operation is in the best interest of such minor and shall enter an order authorizing the physician or surgeon to perform such operation. (1963, c. 600; 1971, c. 1231, s. 1.)

CASE NOTES

Cited in Avery v. County of Burke, 660 F.2d 111 (4th Cir. 1981).

OPINIONS OF ATTORNEY GENERAL

Applicable to Operation Performed on Federal Reservation. — See opinion of Attorney General to Capt. Earl R. Peters, U.S. Navy, 42 N.C.A.G. 212 (1973).

Necessary Procedure for Sterilization of an Unmarried Minor. — See opinion of Attorney General to Mr. William W. Aycock, Jr., Attorney for Edgecombe County Department of Social Services, 41 N.C.A.G. 162 (1970).

§ 90-273: Repealed by Session Laws 1973, c. 998, s. 2.

§ 90-274. No liability for nonnegligent performance of operation.

Subject to the rules of law applicable generally to negligence, no physician or surgeon licensed by this State shall be liable either civilly or criminally by reason of having performed a surgical interruption of vas deferens or Fallopian tubes authorized by the provisions of this Article upon any person in this State. (1963, c. 600.)

§ 90-275. Article does not affect duty of guardian to obtain order permitting guardian to consent to sterilization of a mentally ill or mentally retarded ward.

Nothing in this Article shall be deemed to affect the provisions of G.S. 35A-1245. (1963, c. 600; 2003-13, s. 6.)

Cross References. — As to procedure for sterilization of mentally ill or mentally retarded in case of medical necessity, see G.S. 35A-1245.

CASE NOTES

Cited in Trayford v. N.C. Psychology Bd., 174 N.C. App. 118, 619 S.E.2d 862, 2005 N.C. App. LEXIS 2286 (2005), aff'd, 360 N.C. 396, 627 S.E.2d 462 (2006).

ARTICLE 20.

Nursing Home Administrator Act.

§ 90-275.1. Title.

This Article shall be known and may be cited as the "Nursing Home Administrator Act." (1969, c. 843, s. 1.)

§ 90-276. Definitions.

For the purposes of this Article and as used herein:

(1) "Administrator-in-training" means an individual registered with the Board who serves a training period under the supervision of a preceptor.

(2) "Board" means the North Carolina State Board of Examiners for Nursing Home Administrators.

(3) "Nursing home" means any institution or facility defined as such for licensing purposes under G.S. 131E-101(6), whether proprietary or nonprofit, including but not limited to nursing homes owned or administered by the federal or State government or any agency or political subdivision thereof and nursing homes operated in combination with a home for the aged or any other facility.

(4) "Nursing home administrator" means a person who administers, manages, supervises, or is in general administrative charge of a nursing home, whether such individual has an ownership interest in such home and whether his functions and duties are shared with one or more individuals.

(5) "Preceptor" means a person who is a licensed and registered nursing home administrator and meets the requirements of the Board to supervise administrators-in-training during the training period. (1969, c. 843, s. 1; 1981, c. 722, s. 3; 1981 (Reg. Sess., 1982), c. 1234, s. 1; 2001-153, s. 1.)

§ 90-277. Composition of Board.

There is created the State Board of Examiners for Nursing Home Administrators. The Board shall consist of seven members. The seven members shall be voting members and shall meet the following criteria:

(1) All shall be individuals representative of the professions and institutions concerned with the care and treatment of chronically ill or infirm elderly patients.

(2) Less than a majority of the Board members shall be representative of a single profession or institutional category.

(3) Three of the Board members shall be licensed nursing home administrators, at least one of whom shall be employed by a for-profit nursing home and at least one of whom shall be employed by a

nonprofit nursing home. These three Board members shall be considered as representatives of institutions in construing this section.

(4) Four of the Board members shall be public, noninstitutional members, with no direct financial interest in nursing homes.

(5) The terms of the Board members shall be limited to two consecutive terms.

Effective July 1, 1973, the Governor shall appoint three members, one of whom shall be a licensed nursing home administrator, for terms of three years, and four members, two of whom shall be licensed nursing home administrators, for terms of two years. Thereafter, all terms shall be three years. However, no member shall serve more than two consecutive full terms. Any vacancy occurring in the position of an appointive member shall be filled by the Governor for the unexpired term in the same manner as for new appointments. Appointive members may be removed by the Governor for cause after due notice and hearing.

Any member of the Board shall be automatically removed from the Board upon certification by the Board to the Governor that the member no longer satisfies the criteria set forth in subdivisions (1) through (4) of this section for appointment to the Board. (1969, c. 843, s. 1; 1973, c. 728; 1981, c. 722, s. 4; 1995, c. 86, s. 1.)

§ 90-278. Qualifications for licensure.

The Board shall have authority to issue licenses to qualified persons as nursing home administrators, and shall establish qualification criteria for such nursing home administrators.

(1) A license as a nursing home administrator shall be issued to any person upon the Board's determination that:

  a. He is at least 18 years of age, of good moral character and of sound physical and mental health; and

  b. He has successfully completed the equivalent of two years of college level study (60 semester hours or 96 quarter hours) from an accredited community college, college or university prior to application for licensure;

  or

  has completed a combination of education and experience, acceptable under rules promulgated by the Board, prior to application for licensure. Under this provision, two years of supervisory experience in a nursing home shall be equated to one year of college study; and

  c. He has satisfactorily completed a course prescribed by the Board, which course contains instruction on the services provided by nursing homes, laws governing nursing homes, protection of patient interests and nursing home administration; and

  d. He has successfully completed his training period as an administrator-in-training as prescribed by the Board. If a person has served at least 12 weeks as a hospital administrator or assistant administrator of a hospital-based long-term care nursing unit or hospital-based swing beds licensed under Article 5 of Chapter 131E or Article 2 of Chapter 122C, the Board shall consider this experience comparable to the initial on-the-job portion of the administrator-in-training program only; and

  e. He has passed examinations administered by the Board and designed to test for competence in the subject matters referred to in paragraph c of this subdivision.

(2) Repealed by Session Laws 1981, c. 722, s. 6.

(3) A temporary license may be issued under requirements and conditions prescribed by the Board to any person to act or serve as administrator of a nursing home without meeting the requirements for full licensure, but only when there are unusual circumstances preventing compliance with the procedures for licensing elsewhere provided by this Article. The temporary license shall be issued by the chairman only for the period prior to the next meeting of the Board, at which time the Board may renew such temporary license for a further period only up to one year. (1969, c. 843, s. 1; 1973, c. 476, s. 128; 1981, c. 722, ss. 5-7; 1981 (Reg. Sess., 1982), c. 1234, s. 2; 1983, c. 737; 1987, c. 492, s. 1; 1991, c. 710, s. 1.)

§ 90-279. Licensing function.

The Board shall license nursing home administrators in accordance with rules and regulations issued and from time to time revised by it. A nursing home administrator's license shall not be transferable and shall be valid until expiration or until suspended or revoked for violation of this Article or of the standards established by the Board pursuant to this Article. Denial of issuance or renewal, suspension or revocation by the Board shall be subject to the provisions of Chapter 150B of the General Statutes. (1969, c. 843, s. 1; 1973, c. 1331, s. 3; 1987, c. 827, s. 1.)

§ 90-280. Fees; display of license; duplicate license; inactive list.

(a) Each applicant for an examination administered by the Board and each applicant for an administrator-in-training program shall pay a processing fee set by the Board not to exceed one hundred dollars ($100.00) plus the actual cost of the exam.

(b) Each person licensed as a nursing home administrator shall be required to pay a license fee in an amount set by the Board not to exceed five hundred dollars ($500.00). A license shall expire on the thirtieth day of September of the second year following its issuance and shall be renewable biennially upon payment of a renewal fee set by the Board not to exceed five hundred dollars ($500.00).

(c) Each person licensed as a nursing home administrator shall display his license certificate, along with the current certificate of renewal, in a conspicuous place in his place of employment.

(d) Any person licensed as a nursing home administrator may receive a duplicate license by payment of a fee set by the Board not to exceed twenty-five dollars ($25.00).

(e) Any person licensed as a nursing home administrator who is not acting, serving, or holding himself out to be a nursing home administrator may have his name placed on an inactive list for such period of time not to exceed four years upon payment of a fee set by the Board not to exceed fifty dollars ($50.00) per year. Each year during that four-year period, upon request and payment of the fee, the person's name may remain on an inactive list for one additional year.

(f) Any person having a temporary license issued pursuant to G.S. 90-278(3) shall pay a fee in an amount set by the Board not to exceed two hundred dollars ($200.00). If the Board renews the temporary license, no further fee shall be required.

(g) The Board may set fees not to exceed two hundred and fifty dollars ($250.00) for conducting and administering initial training and continuing education courses, and may set a fee not to exceed one hundred dollars

($100.00) for certifying a course submitted for review by another individual or agency wishing to offer such courses or may set an annual fee not to exceed two thousand dollars ($2,000) for certifying a course provider in lieu of certifying each course offered by the provider. (1969, c. 843, s. 1; 1977, c. 652; 1979, 2nd Sess., c. 1282; 1981 (Reg. Sess., 1982), c. 1234, s. 4; 1983, c. 215; 1995 (Reg. Sess., 1996), c. 645, s. 1; 1999-217, s. 1.)

§ 90-281. Collection of funds.

All fees and other moneys collected and received by the Board shall be handled as provided by law and as prescribed by the State Treasurer. Such funds shall be used and expended by the Board to pay the compensation and travel expenses of members and employees of the Board and other expenses necessary for the Board to administer and carry out the provisions of this Article. (1969, c. 843, s. 1; 1983, c. 913, s. 10.)

§ 90-282: Repealed by Session Laws 1981, c. 722, s. 8.

§ 90-283. Organization of Board; compensation; employees and services.

The Board shall elect from its membership a chairman, vice-chairman and secretary, and shall adopt rules and regulations to govern its proceedings. Board members shall be entitled to receive only such compensation and reimbursement as is prescribed by Chapter 93B of the General Statutes for State boards generally. At any meeting a majority of the voting members shall constitute a quorum. The Board may employ any necessary personnel to assist it in the performance of its duties and may contract for such services as may be necessary to carry out the provisions of this Article. (1969, c. 843, s. 1; 1981, c. 722, s. 9; 2001-153, s. 2.)

§ 90-284. Exclusive jurisdiction of Board.

The Board shall have exclusive authority to determine the qualifications, skill and fitness of any person to serve as an administrator of a nursing home under the provisions of this Article, and the holder of a license under the provisions of this Article shall be deemed qualified to serve as the administrator of a nursing home for all purposes. (1969, c. 843, s. 1.)

§ 90-285. Functions and duties of the Board.

The Board shall meet at least once annually in Raleigh or any other location designated by the chairman and shall have the following functions and duties:

(1) Develop, impose and enforce rules and regulations setting out standards which must be met by individuals in order to receive and hold a license as a nursing home administrator, which standards shall be designed to insure that nursing home administrators shall be individuals who are of good character and who are otherwise suitable, by education, training and experience in the field of institutional administration, to serve as nursing home administrators.

(2) Develop and apply appropriate methods and procedures, including examination and investigations, for determining whether individuals meet such standards, and administer an examination at least twice each year at such times and places as the Board shall designate.

(3) Issue licenses to qualified individuals.

(4) Establish and implement procedures designed to insure that individuals licensed as nursing home administrators will, during any period that they serve as such, comply with the requirements of such standards.
(5) Receive, investigate, and take appropriate action with respect to any charge or complaint filed with the Board to the effect that any individual licensed as a nursing home administrator has failed to comply with the requirements of such standards.
(6) Conduct a continuing study and investigation of nursing homes and nursing home administrators within the State in order to make improvements in the standards imposed for the licensing of administrators and of procedures and methods for the enforcement of such standards, and to raise the quality of nursing home administration in such other ways as may be effective.
(7) Conduct, or cause to be conducted by contract or otherwise, one or more courses of instruction and training sufficient to meet the requirements of this Article, and make provisions for the conduct of such courses and their accessibility to residents of this State, unless it finds that there are sufficient courses conducted by others within this State. In lieu thereof the Board may approve courses conducted within and without this State as sufficient to meet the education and training requirements of this Article.
(8) Make rules and regulations, not inconsistent with law, as may be necessary for the proper performance of its duties, and to take such other actions as may be necessary to enable the State to meet the requirements set forth in section 1908 of the Social Security Act, the federal rules and regulations promulgated thereunder, and other pertinent federal authority.
(9) Receive and disburse any funds appropriated or given to the Board, including any federal funds, to carry out the purposes of this Article.
(10) Maintain a register of all applications for licensing and registration of nursing home administrators, which register shall show: the place or residence, name and age of each applicant; the name and address of employer or business connection of each applicant; the date of application; information of educational and experience qualifications; the action taken by the Board and the dates; the serial number of the license issued to the applicant; and such other pertinent information as may be deemed necessary.
(11) Develop an administrator-in-training program to insure that nursing home administrators have adequate training and experience prior to licensure. (1969, c. 843, s. 1; 1981, c. 722, ss. 10, 11; 1981 (Reg. Sess., 1982), c. 1234, s. 3.)

§ 90-285.1. Suspension, revocation or refusal to issue a license.

The Board may suspend, revoke, or refuse to issue a license or may reprimand or otherwise discipline a licensee after due notice and an opportunity to be heard at a formal hearing, upon substantial evidence that a licensee:
(1) Has violated the provisions of this Article or the rules adopted by the Board;
(2) Has violated the provisions of Part B of Article 6 of Chapter 131E of the General Statutes and rules promulgated thereunder;
(3) Has been convicted of, or has tendered and has had accepted a plea of no contest to, a criminal offense showing professional unfitness;
(4) Has practiced fraud, deceit, or misrepresentation in securing or procuring a nursing home administrator license;

(5) Is incompetent to engage in the practice of nursing home administration or to act as a nursing home administrator;
(6) Has practiced fraud, deceit, or misrepresentation in his capacity as a nursing home administrator;
(7) Has committed acts of misconduct in the operation of a nursing home under his jurisdiction;
(8) Is a habitual drunkard;
(9) Is addicted or dependent upon the use of morphine, opium, cocaine, or other drugs recognized as resulting in abnormal behavior;
(10) Has practiced without being registered biennially;
(11) Has transferred or surrendered possession of, either temporarily or permanently, his license or certificate to any other person;
(12) Has paid, given, has caused to be paid or given or offered to pay or to give to any person a commission or other valuable consideration for the solicitation or procurement, either directly or indirectly, of nursing home patronage;
(13) Has been guilty of fraudulent, misleading, or deceptive advertising;
(14) Has falsely impersonated another licensee;
(15) Has failed to exercise regard for the safety, health or life of the patient;
(16) Has permitted unauthorized disclosure of information relating to a patient or his records; or
(17) Has discriminated among patients, employees, or staff on account of race, sex, religion, color, or national origin. (1981, c. 722, s. 12; 2001-153, s. 3.)

§ 90-286. Renewal of license.

Every holder of a nursing home administrator's license shall renew it biennially by application to the Board. The Board shall grant renewals when the applicant has paid the fee required by this Article and has satisfactorily completed continuing education courses as may be prescribed by the Board, unless the Board finds that the applicant has acted or failed to act in such a manner as would constitute grounds for suspension, revocation or denial of a license as provided by this Article. The Board shall adopt rules defining the content of continuing education courses approved or required by it under this section and shall make a copy of these rules available to each licensee. The Board shall not require any licensee to successfully complete more than 30 hours of continuing education courses every two years. The Board shall certify and administer continuing education courses for nursing home administrators and shall keep a record of the courses successfully completed by each licensee. (1969, c. 843, s. 1; 1981, c. 722, s. 13; 1983, c. 72.)

§ 90-287. Reciprocity with other states.

The Board may issue a nursing home administrator's license, without examination, to any person who holds a current license as a nursing home administrator from another jurisdiction, provided that the Board finds that the standards for licensure in such other jurisdiction are at least the substantial equivalent of those prevailing in this State, and that the applicant is otherwise qualified. (1969, c. 843, s. 1.)

§ 90-288. Misdemeanor.

It shall be unlawful and constitute a Class 1 misdemeanor,
(1) For any person to act or serve in the capacity as, or hold himself out to be, a nursing home administrator, or use any title, sign, or other

indication that he is a nursing home administrator, unless he is the holder of a valid license as a nursing home administrator, issued in accordance with the provisions of this Article, and

(2) For any person to violate any of the provisions of this Article or any rules and regulations issued pursuant thereto. (1969, c. 843, s. 1; 1993, c. 539, s. 649; 1994, Ex. Sess., c. 24, s. 14(c).)

§§ 90-288.01 through 90-288.09: Reserved for future codification purposes.

Article 20A.

Assisted Living Administrator Act.

§ 90-288.10. Title.

This Article shall be known as the Assisted Living Administrator Act. (1999-443, s. 1.)

§ 90-288.11. Purpose.

The administrators of assisted living residences are responsible for the residents who require daily care to attend to their physical, mental, and emotional needs. Therefore, the certification of assisted living administrators is necessary to ensure adequate levels of care across the State and to protect public health, safety, and welfare. (1999-443, s. 1.)

§ 90-288.12. Certification required; exemptions.

(a) No person shall perform or offer to perform services as an assisted living administrator unless the person has been certified under the provisions of this Article. A certificate granted under this Article shall be valid throughout the State.

(b) The provisions of this Article shall not apply to:

(1) Combination homes as defined in G.S. 131E-101 and hospitals that contain adult care beds.

(2) Family care homes as defined in G.S. 131D-2(a)(5).

(3) Continuing care facilities, as defined in Article 64 of Chapter 58 of the General Statutes, if adult care beds are housed in the same facility as nursing home beds. (1999-443, s. 1.)

§ 90-288.13. Definitions.

The following definitions apply in this Article:

(1) Administrator-in-training. — An individual who serves a training period under the supervision of an approved preceptor.

(2) Assisted living administrator. — An individual certified to operate, administer, manage, and supervise an assisted living residence or to share in the performance of these duties with another person who has been so certified.

(3) Assisted living residence. — A facility defined in G.S. 131D-2(a)(1d), whether proprietary or nonprofit. The term also includes institutions or facilities that are owned or administered by the federal or State government or any agency or political subdivision of the State government.

(4) Department. — The Department of Health and Human Services.
(5) Preceptor. — An individual who is certified by the Department as an assisted living administrator and who meets the requirements established by the Department to serve as a supervisor of administrators-in-training. (1999-443, s. 1.)

§ 90-288.14. Assisted living administrator certification.

An applicant shall be certified by the Department as an assisted living administrator if the applicant meets all of the following qualifications:
(1) Is at least 21 years old.
(2) Provides a satisfactory criminal background report from the State Repository of Criminal Histories, which shall be provided by the State Bureau of Investigation upon its receiving fingerprints from the applicant. If the applicant has been a resident of this State for less than five years, the applicant shall provide a satisfactory criminal background report from both the State and National Repositories of Criminal Histories.
(3) Successfully completes the equivalent of two years of coursework at an accredited college or university or has a combination of education and experience as approved by the Department.
(4) Successfully completes a Department approved administrator-in-training program of at least 120 hours of study in courses relating to assisted living residences.
(5) Successfully completes a written examination administered by the Department. (1999-443, s. 1.)

§ 90-288.15. Issuance, renewal, and replacement of certificates.

(a) The Department shall issue a certificate to any applicant who has satisfactorily met the requirements of this Article. The certificate shall show the full name of the person and an identification number and shall be signed by the Secretary of the Department. A certificate may not be transferred or assigned.

(b) All certificates shall expire on December 31 of the second year following issuance. All applications for renewal shall be filed with the Department and shall be accompanied by documentation of the certificate holder's completion of the annual continuing education requirements established by the Department regarding the management and operation of an assisted living residence.

(c) The Department shall replace any certificate that is lost, destroyed, or mutilated subject to rules established by the Department. (1999-443, s. 1.)

§ 90-288.16. Certification by reciprocity.

The Department may grant, upon application, a certificate to a person who holds a valid certificate as an assisted living community administrator issued by another state if, in the Department's determination, the standards of competency for the certificate are substantially equivalent to those in this State. (1999-443, s. 1.)

§ 90-288.17. Posting certificates.

Every person issued a certificate under this Article shall display the certificate prominently in the assisted living residence where the person works. (1999-443, s. 1.)

§ 90-288.18. Adverse action on a certificate.

(a) Subject to subsection (b) of this section, the Department shall have the authority to deny a new or renewal application for a certificate, and to amend, recall, suspend, or revoke an existing certificate upon a determination that there has been a substantial failure to comply with the provisions of this Article or any rules promulgated under this Article.

(b) The provisions of Chapter 150B of the General Statutes shall govern all administrative action and judicial review in cases where the Department has taken action as described in subsection (a) of this section. A petition for a contested case shall be filed within 30 days after the Department mails the certificate holder a notice of its decision to deny a renewal application, or to recall, suspend, or revoke an existing certificate. (1999-443, s. 1.)

§ 90-288.19. Reporting requirement.

The holder of a facility license issued pursuant to G.S. 131D-2 shall report any incidents of suspected abuse, neglect, or exploitation of persons residing in an assisted living residence by a person certified under this Article to the Health Care Personnel Registry. (1999-443, s. 1.)

§ 90-288.20. Penalties.

A person who serves as an assisted living administrator without first obtaining a certificate from the Department is guilty of a Class 1 misdemeanor. Each act of unlawful practice constitutes a distinct and separate offense. (1999-443, s. 1.)

Article 21.

Determination of Need for Medical Care Facilities.

§§ 90-289 through 90-291: Repealed by Session Laws 1973, c. 113.

Article 22.

Licensure Act for Speech and Language Pathologists and Audiologists.

§ 90-292. Declaration of policy.

It is declared to be a policy of the State of North Carolina that, in order to safeguard the public health, safety, and welfare; to protect the public from being misled by incompetent, unscrupulous, and unauthorized persons and from unprofessional conduct on the part of qualified speech and language pathologists and audiologists and to help assure the availability of the highest possible quality speech and language pathology and audiology services to the communicatively handicapped people of this State, it is necessary to provide regulatory authority over persons offering speech and language pathology and audiology services to the public. (1975, c. 773, s. 1.)

CASE NOTES

Speech and language pathology and audiology are two separate and distinct fields. North Carolina Bd. of Exmrs. v. North Carolina State Bd. of Educ., 77 N.C. App. 159, 334 S.E.2d 503 (1985).

Practice of Audiology by One Certified Only in Pathology. — The General Assembly did not intend for one certified by the Department of Public Instruction in speech and language pathology to practice audiology, as the hearing impaired child would not be receiving the highest possible quality audiological services. It would defeat the legislature's intent if one licensed in one field only were allowed to practice in the other field. North Carolina Bd. of Exmrs. v. North Carolina State Bd. of Educ., 77 N.C. App. 159, 334 S.E.2d 503 (1985).

State Board of Education does not have the power to credential speech pathologists pursuant to their regulatory authority over the qualifications of school employees; the Licensure Act for Speech and Language Pathologists and Audiologists alone governs the qualification of persons practicing speech pathology, no matter what the setting. North Carolina Bd. of Exmrs. for Speech & Language Pathologists & Audiologists v. North Carolina State Bd. of Educ., 122 N.C. App. 15, 468 S.E.2d 826 (1996), aff'd, 345 N.C. 493, 480 S.E.2d 50 (1997).

§ 90-293. Definitions.

As used in this Article, unless the context otherwise requires:

(1) "Audiologist" means any person who engages in the practice of audiology. A person is deemed to be an audiologist if he offers services to the public under any title incorporating the terms of "audiology," "audiologist," "audiological," "hearing clinic," "hearing clinician," "hearing therapist," or any similar title or description of service.

(2) "Board" means the Board of Examiners for Speech and Language Pathologists and Audiologists.

(3) "License" means a license issued by the Board under the provisions of this Article, including a temporary license.

(4) "Person" means an individual, organization, or corporate body, except that only individuals can be licensed under this Article.

(5) "Speech and language pathologist" means any person who represents himself or herself to the public by title or by description of services, methods, or procedures as one who evaluates, examines, instructs, counsels, or treats persons suffering from conditions or disorders affecting speech and language or swallowing. A person is deemed to be a speech and language pathologist if the person offers such services under any title incorporating the words "speech pathology," "speech pathologist," "speech correction," "speech correctionist," "speech therapy," "speech therapist," "speech clinic," "speech clinician," "language pathologist," "language therapist," "logopedist," "communication disorders," "communicologist," "voice therapist," "voice pathologist," or any similar title or description of service.

(6) "The practice of audiology" means the application of principles, methods, and procedures of measurement, testing, evaluation, prediction, consultation, counseling, instruction, habilitation, or rehabilitation related to hearing and vestibular disorders for the purpose of identifying, preventing, ameliorating, or modifying such disorders and conditions in individuals or groups of individuals. For the purpose of this subdivision, the words "habilitation" and "rehabilitation" shall include auditory training, speech reading, aural rehabilitation, hearing aid use evaluation and recommendations, and fabrication of earmolds and similar accessories for clinical testing purposes.

(7) "The practice of speech and language pathology" means the application of principles, methods, and procedures for the measurement, testing, evaluation, prediction, counseling, treating, instruction, habilitation, or rehabilitation related to the development and disorders of speech,

voice, language, and swallowing for the purpose of identifying, preventing, ameliorating, or modifying such disorders.

(8) Repealed by Session Laws 1987, c. 665, s. 1.

(9) "Accredited college or university" means an institution of higher learning accredited by the Southern Association of Colleges and Universities, or accredited by a similarly recognized association of another locale. (1975, c. 773, s. 1; 1987, c. 665, s. 1; 2007-436, s. 1.)

Effect of Amendments. — Session Laws 2007-436, s. 1, effective August 23, 2007, in subdivision (5), in the first sentence, inserted "or herself" following "himself," substituted "counsels, or treats" for "or counsels," inserted "or swallowing" at the end, and substituted "the person" for "he" in the second sentence; in subdivision (6), substituted "hearing and vestibular disorders" for "hearing and disorders of hearing," in the first sentence and inserted "and vestibular disorders," inserted "aural rehabilitation" and deleted "only" at the end of the second sentence, and made minor grammatical changes; in subdivision (7), inserted "treating" and substituted "language, and swallowing" for "or language."

CASE NOTES

Speech and language pathology and audiology are two separate and distinct fields. North Carolina Bd. of Exmrs. v. North Carolina State Bd. of Educ., 77 N.C. App. 159, 334 S.E.2d 503 (1985).

Cited in North Carolina Bd. of Exmrs. for Speech & Language Pathologists & Audiologists v. North Carolina State Bd. of Educ., 122 N.C. App. 15, 468 S.E.2d 826 (1996), aff'd, 345 N.C. 493, 480 S.E.2d 50 (1997).

§ 90-294. License required; Article not applicable to certain activities.

(a) Licensure shall be granted in either speech and language pathology or audiology independently. A person may be licensed in both areas if qualified in both areas.

(b) No person may practice or hold himself or herself out as being able to practice speech and language pathology or audiology in this State unless the person holds a current, unsuspended, unrevoked license issued by the Board or is registered with the Board as an assistant. The license required by this section shall be kept conspicuously posted in the person's office or place of business at all times. Nothing in this Article, however, shall be construed to prevent a qualified person licensed in this State under any other law from engaging in the profession or occupation for which such person is licensed.

(c) The provisions of this Article do not apply to:

(1) The activities, services and use of an official title by a person employed by an agency of the federal government and solely in connection with such employment.

(2) The activities and services of a student or trainee in speech and language pathology or audiology pursuing a course of study in an accredited college or university, or working in a training center program approved by the Board, if these activities and services constitute a part of such person's course of study.

(3) Repealed by Session Laws 1987, c. 665, s. 2.

(4) A person who holds a valid and current credential as a speech and language pathologist or audiologist issued by the North Carolina Department of Public Instruction or who is employed by the North Carolina Schools for the Deaf and Blind, if such person practices speech and language pathology or audiology in a salaried position solely within the confines or under the jurisdiction of the Department of Public Instruction or the Department of Health and Human Services respectively.

(5) through (7) Repealed by Session Laws 2007-436, s. 2.

(8) Individuals licensed under Chapter 93D of the General Statutes.

(d) Nothing in this Article shall apply to a physician licensed to practice medicine, or to any person employed by a physician licensed to practice medicine in the course of the physician's practice of medicine.

(e) This Article shall not be construed to prevent any person licensed in this State under Chapter 93D of the General Statutes of North Carolina from the practice of fitting and selling hearing aids.

(f) The provisions of this Article do not apply to registered nurses and licensed practical nurses or other certified technicians trained to perform audiometric screening tests and whose work is under the supervision of a physician, consulting physician, or licensed audiologist.

(g) The provisions of this Article do not apply to persons who are now or may become engaged in counseling or instructing laryngectomees in the methods, techniques or problems of learning to speak again.

(h) No license under this Article is required for persons originally employed by any agency of State government between October 1, 1975, and July 1, 1977, for the practice of speech and language pathology or audiology within and during the course and scope of employment with such agency.

(i) Nothing in this Article shall apply to a licensed physical therapy or occupational therapy practitioner providing evaluation and treatment of swallowing disorders, cognitive/communication deficits, and balance functions within the context of his or her licensed practice. (1975, c. 773, s. 1; 1977, c. 692, s. 3; 1981, c. 572, ss. 1, 2; 1987, c. 665, s. 2; 1989, c. 770, s. 17; 1993 (Reg. Sess., 1994), c. 688, s. 1; 1997-443, s. 11A.118(a); 2007-436, ss. 2, 3(a), 3(b).)

Effect of Amendments. — Session Laws 2007-436, ss. 2, 3(a), 3(b), effective August 23, 2007, deleted subdivisions (c)(5) through (c)(7) related to persons and activities to which this Article does not apply; in subsection (d), deleted "such," inserted "licensed to practice medicine in," and substituted "the physician's" for "his"; added subsection (i).

CASE NOTES

Speech and language pathology and audiology are two separate and distinct fields. North Carolina Bd. of Exmrs. v. North Carolina State Bd. of Educ., 77 N.C. App. 159, 334 S.E.2d 503 (1985).

Practice of Audiology by One Certified Only in Pathology. — The General Assembly did not intend for one certified by the Department of Public Instruction in speech and language pathology to practice audiology, as the hearing impaired child would not be receiving the highest possible quality audiological services. It would defeat the legislature's intent if one licensed in one field only were allowed to practice in the other field. North Carolina Bd. of Exmrs. v. North Carolina State Bd. of Educ., 77 N.C. App. 159, 334 S.E.2d 503 (1985).

Valid and Current Credential. — For purposes of subdivision (c)(4), a valid and current credential will be one which denotes that a person is competent to practice speech pathology, who nevertheless falls short of the requirements for permanent licensure. North Carolina Bd. of Exmrs. for Speech & Language Pathologists & Audiologists v. North Carolina State Bd. of Educ., 122 N.C. App. 15, 468 S.E.2d 826 (1996), aff'd, 345 N.C. 493, 480 S.E.2d 50 (1997).

State Board of Education does not have the power to credential speech pathologists pursuant to their regulatory authority over the qualifications of school employees, the Licensure Act for Speech and Language Pathologists and Audiologists alone governs the qualification of persons practicing speech pathology, no matter what the setting. North Carolina Bd. of Exmrs. for Speech & Language Pathologists & Audiologists v. North Carolina State Bd. of Educ., 122 N.C. App. 15, 468 S.E.2d 826 (1996), aff'd, 345 N.C. 493, 480 S.E.2d 50 (1997).

§ 90-295. Qualifications of applicants for permanent licensure.

(a) To be eligible for permanent licensure by the Board as a speech and language pathologist, the applicant must:

- (1) Possess at least a master's degree in speech and language pathology or qualifications deemed equivalent by the Board under rules duly adopted by the Board under this Article. The degree or equivalent qualifications shall be from an accredited institution.
- (2) Submit transcripts from one or more accredited colleges or universities presenting evidence of the completion of 75 semester hours constituting a well-integrated program of course study dealing with the normal aspects of human communication, development thereof, disorders thereof, and clinical techniques for evaluation and management of such disorders.
  - a. Fifteen of these 75 semester hours must be obtained in courses that provide information that pertains to normal development and use of speech, language and hearing.
  - b. Thirty-six of these 75 semester hours must be in courses that provide information relative to communication disorders and information about and training in evaluation and management of speech, language, and hearing disorders. At least 24 of these 30 semester hours must be in courses in speech and language pathology.
  - c. Credit for study of information pertaining to related fields that augment the work of the clinical practitioner of speech and language pathology or audiology may also apply toward the total 75 semester hours.
  - d. Thirty-six of the total 75 semester hours that are required for a license must be in courses that are acceptable toward a graduate degree by the college or university at which they are taken. Moreover, 21 of those semester hours must be in graduate level courses in speech and language pathology.
- (3) Submit evidence of the completion of a minimum of 400 clock hours of supervised, direct clinical experience with individuals who present a variety of communication disorders. This experience must have been obtained within the training institution or in one of its cooperating programs in the following areas: (i) Speech — Adult (200 diagnostic and 200 therapeutic); Children (200 diagnostic and 200 therapeutic); or (ii) Language — Adult (200 diagnostic and 200 therapeutic); Children (200 diagnostic and 200 therapeutic). Each new applicant must submit a verified clinical clock hour summary sheet signed by the clinic or program director, in addition to completion of the license application.
- (4) Present written evidence of nine months of full-time professional experience in which bona fide clinical work has been accomplished in speech and language pathology. The professional work must have been supervised by a speech and language pathologist who is State-licensed or certified by the American Speech-Language-Hearing Association. This experience must follow the completion of the requirements listed in subdivisions (1), (2) and (3). Full time is defined as at least nine months in a calendar year and a minimum of 30 hours per week. Half time is defined as at least 18 months in two calendar years and a minimum of 20 hours per week. The supervision must be performed by a person who holds a valid license under this Article, or certificate of clinical competence from the American Speech-Language-Hearing Association, in speech and language pathology.

(5) Pass an examination established or approved by the Board.

(b) To be eligible for permanent licensure by the Board as an audiologist, the applicant must:

(1) Possess a doctoral degree in audiology or qualifications deemed equivalent by the Board under rules duly adopted by the Board under this Article. The degree or equivalent qualifications shall be from an accredited institution.

(2) Persons who were engaged in the practice of audiology and do not possess a doctoral degree in audiology before October 1, 2007, shall be exempt from the degree requirement in subdivision (1) of this subsection provided those persons remain continuously licensed in the field.

(3) Submit transcripts from one or more accredited colleges or universities presenting evidence of the completion of 90 semester hours constituting a well-integrated program of course study dealing with the normal aspects of human communication, the development of human communication, the disorders associated with human communication, and the clinical techniques for evaluation and management of such disorders.

(4) Present written evidence documenting 1,800 clock hours of professional experience directly supervised by an audiologist who is State-licensed or certified by the American Speech-Language-Hearing Association or other Board-approved agency. The clock hours of professional experience must be with individuals who present a variety of communication and auditory disorders and must have been obtained within the training program at an accredited college or university or in one of its cooperating programs.

(5) Pass an examination established or approved by the Board. (1975, c. 773, s. 1; 1987, c. 665, s. 3; 2007-436, s. 4.)

Effect of Amendments. — Session Laws 2007-436, s. 4, effective October 1, 2007, rewrote the existing provisions as subsection (a), and added subsection (b).

CASE NOTES

Speech and language pathology and audiology are two separate and distinct fields. North Carolina Bd. of Exmrs. v. North Carolina State Bd. of Educ., 77 N.C. App. 159, 334 S.E.2d 503 (1985).

Applied in North Carolina Bd. of Exmrs. for Speech & Language Pathologists & Audiologists v. North Carolina State Bd. of Educ., 122 N.C. App. 15, 468 S.E.2d 826 (1996), aff'd, 345 N.C. 493, 480 S.E.2d 50 (1997).

§ 90-296. Examinations.

(a) An applicant for permanent licensure who has satisfied the academic requirements of G.S. 90-295, shall pass a written examination approved or established by the Board. A person who holds a temporary license during the supervised experience year must take and pass the examination required by the Board for permanent licensure before the end of the temporary license period.

(b) The Board shall administer or approve at least two examinations of the type described in subsection (a) of this section each year, and additional examinations as the volume of applications makes appropriate.

(c) An examination shall not be required as a prerequisite for a license for:

(1) A person who holds a certificate of clinical competence issued by the American Speech-Hearing-Language Association in the specialized area for which such person seeks licensure; or

(2) A person who has met the educational, practical experience, and examination requirements of another state or jurisdiction which has

requirements equivalent to or higher than those in effect pursuant to this Article for the practice of audiology or speech pathology. (1975, c. 773, s. 1; 1981, c. 572, s. 3; 1987, c. 665, s. 4.)

§ 90-297: Repealed by Session Laws 1987, c. 665, s. 5.

§ 90-298. Qualifications for applicants for temporary licensure.

(a) To be eligible for temporary licensure an applicant must:
 (1) Meet the academic and clinical practicum requirements of G.S. 90-295(1), (2), and (3); and
 (2) Submit a plan of supervised experience complying with the provisions of G.S. 90-295(4); and
 (3) Pay the temporary license fee required by G.S. 90-305(5).

(b) A temporary license is required when an applicant has not completed the required supervised experience and passed the required examination. A person who holds a temporary license during the supervised experience year must take and pass the examination required by the Board for permanent licensure before the end of the temporary license period.

(c) A temporary license issued under this section shall be valid only during the period of supervised experience required by G.S. 90-295(4), and shall not be renewed. (1975, c. 773, s. 1; 1987, c. 665, s. 6.)

CASE NOTES

Cited in North Carolina Bd. of Exmrs. v. North Carolina State Bd. of Educ., 77 N.C. App. 159, 334 S.E.2d 503 (1985).

§ 90-298.1. Registered assistant.

A licensed speech and language pathologist or a licensed audiologist may register with the Board an assistant who works under the licensee's supervision if all of the following requirements are met:
 (1) The assistant meets the qualifications for registered assistants adopted by the Board.
 (2) The licensee who supervises the assistant pays the registration fee set by the Board.

A registration of an assistant must be renewed annually. To renew the registration of an assistant, the licensee who supervises the assistant must submit an application for renewal and pay the renewal fee. An initial or renewal fee for registering an assistant may not exceed the renewal license fee set under G.S. 90-305. (1993 (Reg. Sess., 1994), c. 688, s. 2.)

§ 90-299. Licensee to notify Board of place of practice.

(a) A person who holds a license shall notify the Board in writing of the address of the place or places where he engages or intends to engage in the practice of speech and language pathology or audiology.

(b) The Board shall keep a record of the places of practice of licensees.

(c) Any notice required to be given by the Board to a licensee may be given by mailing it to him at the address of the last place of practice of which he has notified the Board. (1975, c. 773, s. 1.)

CASE NOTES

Cited in North Carolina Bd. of Exmrs. v. North Carolina State Bd. of Educ., 77 N.C. App. 159, 334 S.E.2d 503 (1985).

§ 90-300. Renewal of licenses.

A licensee shall annually pay to the Board a fee in an amount established by the General Assembly for a renewal of his license. A 30-day grace period shall be allowed after expiration of a license during which the license may be renewed on payment of a fee in an amount established by the General Assembly. The Board may suspend the license of any person who fails to renew his license before the expiration of the 30-day grace period. After expiration of the grace period, the Board may renew such a license upon the payment of a fee in an amount established by the General Assembly. No person who applies for renewal whose license was suspended for failure to renew shall be required to submit to any examination as a condition of renewal. (1975, c. 773, s. 1.)

§ 90-301. Grounds for suspension or revocation of license.

Any person licensed under this Article may have his license revoked or suspended for a fixed period by the Board under the provisions of North Carolina General Statutes, Chapter 150B, for any of the following causes:

(1) His license has been secured by fraud or deceit practiced upon the Board.
(2) Fraud or deceit in connection with his services rendered as an audiologist or speech pathologist.
(3) Unethical conduct as defined in this Article or in a code of ethics adopted by the Board.
(4) Violation of any lawful order, rule or regulation rendered or adopted by the Board.
(5) Failure to exercise a reasonable degree of professional skill and care in the delivery of professional services.
(6) Any violation of the provisions of this Article. (1975, c. 773, s. 1; 1981, c. 572, s. 4; 1987, c. 665, s. 7; c. 827, s. 1.)

§ 90-301A. Unethical acts and practices.

Unethical acts and practices shall be defined as including:

(1) Obtaining or attempting to obtain any fee by fraud or misrepresentation.
(2) Employing directly or indirectly any suspended or unlicensed person to perform any work covered by this Article.
(3) Using, or causing or promoting the use of any advertising matter, promotional literature, testimonial, guarantee, warranty, label, brand, insignia, or any other representation, however disseminated or published, which is misleading, deceiving, improbable, or untruthful.
(4) Aiding, abetting, or assisting any other person or entity in violating the provisions of this Article.
(5) Willfully harming any person in the course of the delivery of professional services licensed by this Article.
(6) Treating a person who cannot reasonably be expected to benefit from treatment.
(7) Charging a fee for treatment or services not rendered.
(8) Providing or attempting to provide services or supervision of services by persons not properly prepared or legally qualified to perform or

permitting services to be provided by a person under such person's supervision who is not properly prepared or legally qualified to perform such services.

(9) Guaranteeing the result of any therapeutic or evaluation procedure. (1987, c. 665, s. 8.)

§ 90-302. Prohibited acts and practices.

No person, partnership, corporation, or other entity may:

(1) Sell, barter, transfer or offer to sell or barter a license.

(2) Purchase or procure by barter a license with intent to use it as evidence of the holder's qualification to practice audiology or speech pathology.

(3) Alter a license.

(4) Use or attempt to use a valid license which has been purchased, fraudulently obtained, counterfeited or materially altered.

(5) Make a false, material statement in an application for a North Carolina license.

(6) Aid, assist, abet, or direct any person licensed under this Article in violation of the provisions of this Article. (1975, c. 773, s. 1; 1987, c. 665, s. 9.)

CASE NOTES

Cited in North Carolina Bd. of Exmrs. v. North Carolina State Bd. of Educ., 77 N.C. App. 159, 334 S.E.2d 503 (1985).

§ 90-303. Board of Examiners for speech and language pathology and audiology; qualifications, appointment and terms of members; vacancies; meetings, etc.

(a) There shall be a Board of Examiners for Speech and Language Pathologists and Audiologists, which shall be composed of seven members, who shall all be residents of this State. Two members shall have a paid work experience in audiology for at least five years and hold a North Carolina license as an audiologist. Two members shall have paid work experience in speech pathology for at least five years and hold a North Carolina license as a speech and language pathologist. One member shall be a physician who is licensed to practice medicine in the State of North Carolina. Two members shall be appointed by the Governor to represent the interest of the public at large. These two members shall be neither licensed speech and language pathologists nor audiologists. These members shall be appointed not later than July 1, 1981; one shall be initially appointed for a term of two years; the other shall be appointed for a term of three years. Thereafter all public members shall serve three-year terms.

(b) The members of the Board shall be appointed by the Governor.

(c) The initial Board shall have members appointed for terms of one year, two years, three years, four years, and five years. All board members serving on June 30, 1981, shall be eligible to complete their respective terms. No member appointed to a term on or after July 1, 1981, shall serve more than two complete consecutive three-year terms.

(d) Members of the Board shall receive no compensation for their service, but shall receive the same per diem, subsistence and travel allowance as provided in G.S. 138-5. (1975, c. 773, s. 1; 1981, c. 572, ss. 5, 6; 2007-436, s. 5.)

Effect of Amendments. — Session Laws 2007-436, s. 5, effective August 23, 2007, in subsection (a), substituted "North Carolina license as an audiologist" for "certificate of clinical competence in audiology of the American Speech and Hearing Association," and substituted "North Carolina license as a speech and language pathologist" for "certificate of clinical competence in speech pathology of the American Speech and Hearing Association."

§ 90-304. Powers and duties of Board.

(a) The powers and duties of the Board are as follows:

(1) To administer, coordinate, and enforce the provisions of this Article, establish fees, evaluate the qualifications of applicants, supervise the examination of applicants, and issue subpoenas, examine witnesses, and administer oaths, and investigate persons engaging in practices which violate the provisions of this Article.

(2) To conduct hearings and keep records and minutes as necessary to an orderly dispatch of business.

(3) To adopt responsible rules including rules that establish ethical standards of practice and require continuing professional education and to amend or repeal the same.

(4) To issue annually a list stating the names of persons currently licensed under the provisions of this Article.

(5) To employ such personnel as determined by its needs and budget.

(6) To adopt seals by which it shall authenticate their proceedings, copies of the proceedings, records and the acts of the Board, and licenses.

(7) To bring an action to restrain or enjoin violations of this Article in addition to and not in lieu of criminal prosecution or proceedings to revoke or suspend licenses issued under this Article.

(b) The Board shall not adopt or enforce any rule or regulation which prohibits advertising except for false or misleading advertising. (1975, c. 773, s. 1; 1981, c. 572, s. 7; 1987, c. 665, s. 10; 2007-436, s. 6.)

Effect of Amendments. — Session Laws 2007-436, s. 6, effective August 23, 2007, in subdivision (a)(3), substituted "including rules that" for "and regulations including but not limited to regulations which" and inserted "and require continuing professional education."

§ 90-305. Fees.

Persons subject to licensure under this Article shall pay fees to the Board not to exceed the following:

(1) Application fee	$30.00
(2) Examination fee	30.00
(3) Initial license fee	100.00
(4) Renewal license fee	100.00
(5) Temporary license	40.00
(6) Delinquency fee	25.00.

(1975, c. 773, s. 1; 1987, c. 665, s. 11; 2003-222, s. 1.)

§ 90-306. Penalty for violation.

Any person, partnership, or corporation who or which willfully violates the provisions of this Article shall be guilty of a Class 2 misdemeanor. (1975, c. 773, s. 1; 1987, c. 665, s. 12; 1993, c. 539, s. 650; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 90-307. Severability.

If any part of this Article is for any reason held unconstitutional, inoperative, or void, such holding of invalidity shall not affect the remaining portions of the

Article; and it shall be construed to have been the legislative intent to pass this Article without such unconstitutional, invalid, or inoperative part therein; and the remainder of this Article, after the exclusion of such part or parts, shall be valid as if such parts were not contained therein. (1975, c. 773, s. 1.)

§§ 90-308 through 90-319: Reserved for future codification purposes.

ARTICLE 23.

Right to Natural Death; Brain Death.

§ 90-320. General purpose of Article.

(a) The General Assembly recognizes as a matter of public policy that an individual's rights include the right to a peaceful and natural death and that a patient or the patient's representative has the fundamental right to control the decisions relating to the rendering of the patient's own medical care, including the decision to have life-prolonging measures withheld or withdrawn in instances of a terminal condition. This Article is to establish an optional and nonexclusive procedure by which a patient or the patient's representative may exercise these rights. A military advanced medical directive executed in accordance with 10 U.S.C. § 1044 or other applicable law is valid in this State.

(b) Nothing in this Article shall be construed to authorize any affirmative or deliberate act or omission to end life other than to permit the natural process of dying. Nothing in this Article shall impair or supersede any legal right or legal responsibility which any person may have to effect the withholding or withdrawal of life-prolonging measures in any lawful manner. In such respect the provisions of this Article are cumulative. (1977, c. 815; 1979, c. 715, s. 1; 1983, c. 313, s. 1; 2007-502, s. 10.)

Editor's Note. — Session Laws 2007-502, s. 18, provides: "The Legislative Research Commission shall study the issue of whether North Carolina law should be amended to allow a person to require life-prolonging measures. The LRC shall involve all stakeholders in the study. The LRC shall report its recommendations to the 2008 Session of the 2007 General Assembly."

Session Laws 2007-502, s. 19, provides: "The North Carolina Institute of Medicine (Institute) shall study issues related to the provision of end-of-life medical care in North Carolina. As part of the study, the Division of Health Service Regulation, Department of Health and Human Services, and the North Carolina Board of Medicine shall provide to the Institute nonidentifying information regarding claims and complaints related to end-of-life medical treatment by health care providers that was contrary to the express wishes of either the patient or a person authorized by law to make treatment decisions on behalf of the patient. The Institute may review any other data related to end-of-life medical care and treatment the Institute determines is relevant.

"The purpose of this study is to determine whether statutory changes related to advance directives and health care powers of attorney impact the type and quantity of end-of-life medical care provided to patients, whether the patient's or patient representative's express wishes regarding the provision of treatment at the end of life are being honored, and whether there is any change in the number of persons who request continued treatment at the end of their lives, but do not receive that treatment.

"The Institute shall report its findings to the following entities no later than January 30, 2013:

"(1) The 2013 General Assembly.

"(2) The North Carolina Bar Association.

"(3) The North Carolina Medical Society."

Effect of Amendments. — Session Laws 2007-502, s. 10, effective October 1, 2007, in subsection (a), substituted "the patient's" for "his" in three places, substituted "life-prolonging measures" for "extraordinary means," and added the last sentence; substituted "life-prolonging measures" for "life-sustaining procedures" in subsection (b).

Legal Periodicals. — For comment discussing North Carolina's Natural Death Act, see 14 Wake Forest L. Rev. 771 (1978).

For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For article, "Constitutional Development of Judicial Criteria in Right-To-Die Cases: From Brain Dead to Persistent Vegetative State," see 23 Wake Forest L. Rev. 721 (1988).

The Elderly Incompetent: The Right to Die with Dignity, 13 Campbell L. Rev. 57 (1990).

For article, "The Limits of Advance Directives: A History and Assessment of the Patient Self-Determination Act," see 32 Wake Forest L. Rev. 249 (1997).

For note, "First Health Care Corp. v. Rettinger: Are Living Wills Dead in North Carolina?" see 32 Wake Forest L. Rev. 591 (1997).

For comment, "Compensating Post-Conception Prenatal Medical Malpractice While Respecting Life: A Recommendation to North Carolina Legislators," see 29 Campbell L. Rev. 761 (2007).

§ 90-321. Right to a natural death.

(a) The following definitions apply in this Article:

(1) Declarant. — A person who has signed a declaration in accordance with subsection (c) of this section.

(1a) Declaration. — Any signed, witnessed, dated, and proved document meeting the requirements of subsection (c) of this section.

(2) Repealed by Session Laws 2007-502, s. 11(a), effective October 1, 2007.

(2a) Life-prolonging measures. — As defined in G.S. 32A-16(4).

(3) Physician. — Any person licensed to practice medicine under Article 1 of Chapter 90 of the laws of the State of North Carolina.

(4) Repealed by Session Laws 2007-502, s. 11(a), effective October 1, 2007.

(b) If a person has expressed through a declaration, in accordance with subsection (c) of this section, a desire that the person's life not be prolonged by life-prolonging measures, and the declaration has not been revoked in accordance with subsection (e) of this section; and

(1) It is determined by the attending physician that the declarant's present condition is a condition described in subsection (c) of this section and specified in the declaration for applying the declarant's directives, and

(2) There is confirmation of the declarant's present condition as set out in subdivision (b)(1) of this section by a physician other than the attending physician;

then the life-prolonging measures identified by the declarant shall or may, as specified by the declarant, be withheld or discontinued upon the direction and under the supervision of the attending physician.

(c) The attending physician shall follow, subject to subsections (b), (e), and (k) of this section, a declaration:

(1) That expresses a desire of the declarant that life-prolonging measures not be used to prolong the declarant's life if, as specified in the declaration as to any or all of the following:

a. The declarant has an incurable or irreversible condition that will result in the declarant's death within a relatively short period of time; or

b. The declarant becomes unconscious and, to a high degree of medical certainty, will never regain consciousness; or

c. The declarant suffers from advanced dementia or any other condition resulting in the substantial loss of cognitive ability and that loss, to a high degree of medical certainty, is not reversible.

(2) That states that the declarant is aware that the declaration authorizes a physician to withhold or discontinue the life-prolonging measures; and

(3) That has been signed by the declarant in the presence of two witnesses who believe the declarant to be of sound mind and who state that they (i) are not related within the third degree to the declarant or to the declarant's spouse, (ii) do not know or have a reasonable expectation

that they would be entitled to any portion of the estate of the declarant upon the declarant's death under any will of the declarant or codicil thereto then existing or under the Intestate Succession Act as it then provides, (iii) are not the attending physician, licensed health care providers who are paid employees of the attending physician, paid employees of a health facility in which the declarant is a patient, or paid employees of a nursing home or any adult care home in which the declarant resides, and (iv) do not have a claim against any portion of the estate of the declarant at the time of the declaration; and

(4) That has been proved before a clerk or assistant clerk of superior court, or a notary public who certifies substantially as set out in subsection (d1) of this section. A notary who takes the acknowledgement may but is not required to be a paid employee of the attending physician, a paid employee of a health facility in which the declarant is a patient, or a paid employee of a nursing home or any adult care home in which the declarant resides.

(d) Repealed by Session Laws 2007-502, s. 11(b), effective October 1, 2007.

(d1) The following form is specifically determined to meet the requirements of subsection (c) of this section:

ADVANCE DIRECTIVE FOR A NATURAL DEATH ("LIVING WILL")

NOTE: YOU SHOULD USE THIS DOCUMENT TO GIVE YOUR HEALTH CARE PROVIDERS INSTRUCTIONS TO WITHHOLD OR WITHDRAW LIFE-PROLONGING MEASURES IN CERTAIN SITUATIONS. THERE IS NO LEGAL REQUIREMENT THAT ANYONE EXECUTE A LIVING WILL.

GENERAL INSTRUCTIONS: *You can use this Advance Directive ("Living Will") form to give instructions for the future if you want your health care providers to withhold or withdraw life-prolonging measures in certain situations. You should talk to your doctor about what these terms mean. The Living Will states what choices you would have made for yourself if you were able to communicate. Talk to your family members, friends, and others you trust about your choices. Also, it is a good idea to talk with professionals such as your doctors, clergypersons, and lawyers before you complete and sign this Living Will.*

You do not have to use this form to give those instructions, but if you create your own Advance Directive you need to be very careful to ensure that it is consistent with North Carolina law.

This Living Will form is intended to be valid in any jurisdiction in which it is presented, but places outside North Carolina may impose requirements that this form does not meet.

If you want to use this form, you must complete it, sign it, and have your signature witnessed by two qualified witnesses and proved by a notary public. Follow the instructions about which choices you can initial very carefully. ***Do not sign this form until*** *two witnesses and a notary public are present to watch you sign it. You then should consider giving a copy to your primary physician and/or a trusted relative, and should consider filing it with the Advanced Health Care Directive Registry maintained by the North Carolina Secretary of State:* http://www.nclifelinks.org/ahcdr/

My Desire for a Natural Death

I, ________________________________, being of sound mind, desire that, as specified below, my life not be prolonged by life-prolonging measures:

1. When My Directives Apply

My directions about prolonging my life shall apply *IF* my attending physician determines that I lack capacity to make or communicate health care decisions and:

NOTE: YOU MAY INITIAL ANY AND ALL OF THESE CHOICES.

________ *(Initial)* I have an incurable or irreversible condition that will result in my death within a relatively short period of time.

________ *(Initial)* I become unconscious and my health care providers determine that, to a high degree of medical certainty, I will never regain my consciousness.

________ *(Initial)* I suffer from advanced dementia or any other condition which results in the substantial loss of my cognitive ability and my health care providers determine that, to a high degree of medical certainty, this loss is not reversible.

2. These are My Directives about Prolonging My Life:

In those situations I have initialed in Section 1, I direct that my health care providers:

NOTE: INITIAL ONLY IN ONE PLACE.

________ *(Initial)* may withhold or withdraw life-prolonging measures.

________ *(Initial)* shall withhold or withdraw life-prolonging measures.

3. Exceptions — "Artificial Nutrition or Hydration"

NOTE: INITIAL ONLY IF YOU WANT TO MAKE EXCEPTIONS TO YOUR INSTRUCTIONS IN PARAGRAPH 2.

EVEN THOUGH I do not want my life prolonged in those situations I have initialed in Section 1:

________ *(Initial)* I *DO* want to receive BOTH artificial hydration AND artificial nutrition (for example, through tubes) in those situations.

NOTE: DO NOT INITIAL THIS BLOCK IF ONE OF THE BLOCKS BELOW IS INITIALED.

________ *(Initial)* I *DO* want to receive ONLY artificial hydration (for example, through tubes) in those situations.

NOTE: DO NOT INITIAL THE BLOCK ABOVE OR BELOW IF THIS BLOCK IS INITIALED.

________ *(Initial)* I *DO* want to receive ONLY artificial nutrition (for example, through tubes) in those situations.

NOTE: **DO NOT INITIAL EITHER OF THE TWO BLOCKS ABOVE IF THIS BLOCK IS INITIALED.**

4. I Wish to be Made as Comfortable as Possible

I direct that my health care providers take reasonable steps to keep me as clean, comfortable, and free of pain as possible so that my dignity is maintained, even though this care may hasten my death.

5. I Understand my Advance Directive

I am aware and understand that this document directs certain life-prolonging measures to be withheld or discontinued in accordance with my advance instructions.

6. If I have an Available Health Care Agent

If I have appointed a health care agent by executing a health care power of attorney or similar instrument, and that health care agent is acting and available and gives instructions that differ from this Advance Directive, then I direct that:

________ *(Initial)*	Follow Advance Directive: This Advance Directive will override instructions my health care agent gives about prolonging my life.
________ *(Initial)*	Follow Health Care Agent: My health care agent has authority to override this Advance Directive.

NOTE: DO NOT INITIAL BOTH BLOCKS. *IF YOU DO NOT INITIAL EITHER BOX, THEN YOUR HEALTH CARE PROVIDERS WILL FOLLOW THIS ADVANCE DIRECTIVE AND IGNORE THE INSTRUCTIONS OF YOUR HEALTH CARE AGENT ABOUT PROLONGING YOUR LIFE.*

7. My Health Care Providers May Rely on this Directive

My health care providers shall not be liable to me or to my family, my estate, my heirs, or my personal representative for following the instructions I give in this instrument. Following my directions shall not be considered suicide, or the cause of my death, or malpractice or unprofessional conduct. If I have revoked this instrument but my health care providers do not know that I have done so, and they follow the instructions in this instrument in good faith, they shall be entitled to the same protections to which they would have been entitled if the instrument had not been revoked.

8. I Want this Directive to be Effective Anywhere

I intend that this Advance Directive be followed by any health care provider in any place.

9. I have the Right to Revoke this Advance Directive

I understand that at any time I may revoke this Advance Directive in a writing I sign or by communicating in any clear and consistent manner my intent to revoke it to my attending physician. I understand that if I revoke this instrument I should try to destroy all copies of it.

This the ________ day of ________, ________.

____

Print Name ______________________

I hereby state that the declarant, ____________________, being of sound mind, signed (or directed another to sign on declarant's behalf) the foregoing Advance Directive for a Natural Death in my presence, and that I am not related to the declarant by blood or marriage, and I would not be entitled to any portion of the estate of the declarant under any existing will or codicil of the declarant or as an heir under the Intestate Succession Act, if the declarant died on this date without a will. I also state that I am not the declarant's attending physician, nor a licensed health care provider who is (1) an employee of the declarant's attending physician, (2) nor an employee of the health facility in which the declarant is a patient, or (3) an employee of a nursing home or any adult care home where the declarant resides. I further state that I do not have any claim against the declarant or the estate of the declarant.

Date: ______________________________ Witness:
____

Date: ______________________________ Witness:
____

______________ COUNTY, ______________ STATE
Sworn to (or affirmed) and subscribed before me this day by

____
(type/print name of declarant)

____
(type/print name of witness)

____
(type/print name of witness)

Date ____________________ ____________________
(Official Seal) *Signature of Notary Public*

____________________, Notary Public
Printed or typed name

My commission expires: ____________________ "

(e) A declaration may be revoked by the declarant, in writing or in any manner by which the declarant is able to communicate the declarant's intent to revoke in a clear and consistent manner, without regard to the declarant's mental or physical condition. A health care provider shall have no liability for acting in accordance with a revoked declaration unless the provider has actual notice of the revocation. A health care agent may not revoke a declaration unless the health care power of attorney explicitly authorizes that revocation; however, a health care agent may exercise any authority explicitly given to the health care agent in a declaration. A guardian of the person of the declarant or general guardian may not revoke a declaration.

(f) The execution and consummation of declarations made in accordance with subsection (c) shall not constitute suicide for any purpose.

(g) No person shall be required to sign a declaration in accordance with subsection (c) as a condition for becoming insured under any insurance contract or for receiving any medical treatment.

(h) The withholding or discontinuance of life prolonging measures in accordance with this section shall not be considered the cause of death for any civil or criminal purposes nor shall it be considered unprofessional conduct or a lack of professional competence. Any person, institution or facility against whom criminal or civil liability is asserted because of conduct in compliance with this section may interpose this section as a defense. The protections of this section extend to any valid declaration, including a document valid under subsection (l) of this section; these protections are not limited to declarations prepared in accordance with the statutory form provided in subsection (d1) of this section, or to declarations filed with the Advance Health Care Directive Registry maintained by the Secretary of State. A health care provider may rely in good faith on an oral or written statement by legal counsel that a document appears to meet the statutory requirements for a declaration.

(i) Use of the statutory form prescribed in subsection (d1) of this section is an optional and nonexclusive method for creating a declaration and does not affect the use of other forms of a declaration, including previous statutory forms.

(j) The form provided by this section may be combined with or incorporated into a health care power of attorney form meeting the requirements of Article 3 of Chapter 32A of the General Statutes; provided, however, that the resulting form shall be signed, witnessed, and proved in accordance with the provisions of this section.

(k) Notwithstanding subsection (c) of this section:

(1) An attending physician may decline to honor a declaration that expresses a desire of the declarant that life-prolonging measures not be used if doing so would violate that physician's conscience or the conscience-based policy of the facility at which the declarant is being treated; provided, an attending physician who declines to honor a declaration on these grounds must not interfere, and must cooperate reasonably, with efforts to substitute an attending physician whose conscience would not be violated by honoring the declaration, or transfer the declarant to a facility that does not have policies in force that prohibit honoring the declaration.

(2) An attending physician may decline to honor a declaration if after reasonable inquiry there are reasonable grounds to question the genuineness or validity of a declaration. The subsection imposes no duty on the attending physician to verify a declaration's genuineness or validity.

(*l*) Notwithstanding subsection (c) of this section, a declaration or similar document executed in a jurisdiction other than North Carolina shall be valid in this State if it appears to have been executed in accordance with the applicable requirements of that jurisdiction or this State. (1977, c. 815; 1979, c. 112, ss. 1-6; 1981, c. 848, ss. 1-3; 1991, c. 639, s. 3; 1993, c. 553, s. 28; 2001-455, s. 4; 2001-513, s. 30(b); 2007-502, ss. 11(a)-(e).)

Editor's Note. — Session Laws 1981, c. 848, s. 4 provides that the act does not affect the validity of any "Declaration Of A Desire For A Natural Death" executed prior to the effective date of the act.

Session Laws 2007-502, s. 18, provides: "The Legislative Research Commission shall study the issue of whether North Carolina law should be amended to allow a person to require life-prolonging measures. The LRC shall involve all stakeholders in the study. The LRC shall report its recommendations to the 2008 Session of the 2007 General Assembly."

Session Laws 2007-502, s. 19, provides: "The North Carolina Institute of Medicine (Institute) shall study issues related to the provision of end-of-life medical care in North Carolina. As part of the study, the Division of Health Service Regulation, Department of Health and Human Services, and the North Carolina Board of Medicine shall provide to the Institute nonidentifying information regarding claims and complaints related to end-of-life medical treatment by health care providers that was contrary to the express wishes of either the patient or a person authorized by law to make treatment decisions on behalf of the patient. The Institute may review any other data related to end-of-life medical care and treatment the Institute determines is relevant.

"The purpose of this study is to determine whether statutory changes related to advance directives and health care powers of attorney impact the type and quantity of end-of-life medical care provided to patients, whether the patient's or patient representative's express wishes regarding the provision of treatment at the end of life are being honored, and whether there is any change in the number of persons who request continued treatment at the end of their lives, but do not receive that treatment.

"The Institute shall report its findings to the following entities no later than January 30, 2013:

"(1) The 2013 General Assembly.

"(2) The North Carolina Bar Association.

"(3) The North Carolina Medical Society."

Effect of Amendments. — Session Laws 2007-502, ss. 11(a) through 11(e), effective October 1, 2007, rewrote subsections (a) through (c), (e), (h), and (i); deleted subsection (d) which provided the "Declaration Of A Desire For A Natural Death" form; added subsection (d1) which provides the "ADVANCE DIRECTIVE FOR A NATURAL DEATH ("LIVING WILL")" form; added subsections (k) and (l).

Legal Periodicals. — For survey of 1977 constitutional law, see 56 N.C.L. Rev. 943 (1978).

For comment discussing North Carolina's Natural Death Act, see 14 Wake Forest L. Rev. 771 (1978).

For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For article, "Constitutional Development of Judicial Criteria in Right-To-Die Cases: From Brain Dead to Persistent Vegetative State," see 23 Wake Forest L. Rev. 721 (1988).

The Elderly Incompetent: The Right to Die with Dignity, 13 Campbell L. Rev. 57 (1990).

For note, "Unanswered Implications — The Clouded Rights of the Incompetent Patient Under Cruzan v. Director, Missouri Department of Health," see 69 N.C.L. Rev. 1293 (1991).

For survey on living wills, see 70 N.C.L. Rev. 2108 (1992).

For note, "First Health Care Corp. v. Rettinger: Are Living Wills Dead in North Carolina?", see 32 Wake Forest L. Rev. 591 (1997).

OPINIONS OF ATTORNEY GENERAL

The North Carolina legislature did not "create" the right to a natural death, but instead, "recognized" that right. See Opinion of Attorney General to C. Robin Britt, Sr., Secretary, Department of Human Resources, — N.C.A.G. — (January 5, 1995).

Nonexclusive Procedure. — The Right to Natural Death Act was not intended to create an exclusive procedure for accomplishing a natural death, thereby rendering all other procedures unlawful. See Opinion of Attorney General to C. Robin Britt, Sr., Secretary, Department of Human Resources, — N.C.A.G. — (January 5, 1995).

The procedure established under G.S. 90-322 by which a physician may withhold or discontinue extraordinary or artifical nutrition or hydration in the absence of a declaration for a natural death executed pursuant to this section, is nonexclusive. See Opinion of Attorney General to C. Robin Britt, Sr., Secretary, Department of Human Resources, — N.C.A.G. — (January 5, 1995).

It is not unlawful for a physician to deviate from the procedures set out in this Act, but the physician who does so will lose the benefit of the absolute defense. As a result, the standard of care by which the physician's acts or omissions will be judged will be the general standard of care for physicians which is set out in statutory and common law. See Opinion of Attorney General to C. Robin Britt, Sr., Secretary, Department of Human Resources, — N.C.A.G. — (January 5, 1995).

§ 90-322. Procedures for natural death in the absence of a declaration.

(a) If the attending physician determines, to a high degree of medical certainty, that a person lacks capacity to make or communicate health care decisions and the person will never regain that capacity, and:

(1) Repealed by Session Laws 2007-502, s. 12, effective October 1, 2007.

(1a) That the person:

a. Has an incurable or irreversible condition that will result in the person's death within a relatively short period of time; or

b. Is unconscious and, to a high degree of medical certainty, will never regain consciousness; and

(2) There is confirmation of the person's present condition as set out above in this subsection, in writing by a physician other than the attending physician; and

(3) A vital bodily function of the person could be restored or is being sustained by life-prolonging measures;

(4) Repealed by Session Laws 2007-502, s. 12, effective October 1, 2007.

then, life-prolonging measures may be withheld or discontinued in accordance with subsection (b) of this section.

(b) If a person's condition has been determined to meet the conditions set forth in subsection (a) of this section and no instrument has been executed as provided in G.S. 90-321, then life-prolonging measures may be withheld or discontinued upon the direction and under the supervision of the attending physician with the concurrence of the following persons, in the order indicated:

(1) A guardian of the patient's person, or a general guardian with powers over the patient's person, appointed by a court of competent jurisdiction pursuant to Article 5 of Chapter 35A of the General Statutes; provided that, if the patient has a health care agent appointed pursuant to a valid health care power of attorney, the health care agent shall have the right to exercise the authority to the extent granted in the health care power of attorney and to the extent provided in G.S. 32A-19(b) unless the Clerk has suspended the authority of that health care agent in accordance with G.S. 35A-1208(a);
(2) A health care agent appointed pursuant to a valid health care power of attorney, to the extent of the authority granted;
(3) An attorney-in-fact, with powers to make health care decisions for the patient, appointed by the patient pursuant to Article 1 or Article 2 of Chapter 32A of the General Statutes, to the extent of the authority granted;
(4) The patient's spouse;
(5) A majority of the patient's reasonably available parents and children who are at least 18 years of age;
(6) A majority of the patient's reasonably available siblings who are at least 18 years of age; or
(7) An individual who has an established relationship with the patient, who is acting in good faith on behalf of the patient, and who can reliably convey the patient's wishes.

If none of the above is reasonably available then at the discretion of the attending physician the life-prolonging measures may be withheld or discontinued upon the direction and under the supervision of the attending physician.

(c) Repealed by Session Laws 1979, c. 715, s. 2.

(d) The withholding or discontinuance of such life-prolonging measures shall not be considered the cause of death for any civil or criminal purpose nor shall it be considered unprofessional conduct. Any person, institution or facility against whom criminal or civil liability is asserted because of conduct in compliance with this section may interpose this section as a defense. (1977, c. 815; 1979, c. 715, s. 2; 1981, c. 848, s. 5; 1983, c. 313, ss. 2-4; c. 768, s. 5.1; 1991, c. 639, s. 4; 1993, c. 553, s. 29; 2007-502, s. 12.)

Editor's Note. — Session Laws 1981, c. 848, s. 4 provides that the act does not affect the validity of any "Declaration Of A Desire For A Natural Death" executed prior to the effective date of the act.

Session Laws 2007-502, s. 18, provides: "The Legislative Research Commission shall study the issue of whether North Carolina law should be amended to allow a person to require life-prolonging measures. The LRC shall involve all stakeholders in the study. The LRC shall report its recommendations to the 2008 Session of the 2007 General Assembly."

Session Laws 2007-502, s. 19, provides: "The North Carolina Institute of Medicine (Institute) shall study issues related to the provision of end-of-life medical care in North Carolina. As part of the study, the Division of Health Service Regulation, Department of Health and Human Services, and the North Carolina Board of Medicine shall provide to the Institute nonidentifying information regarding claims and complaints related to end-of-life medical treatment by health care providers that was contrary to the express wishes of either the patient or a person authorized by law to make treatment decisions on behalf of the patient. The Institute may review any other data related to end-of-life medical care and treatment the Institute determines is relevant.

"The purpose of this study is to determine whether statutory changes related to advance directives and health care powers of attorney impact the type and quantity of end-of-life medical care provided to patients, whether the patient's or patient representative's express wishes regarding the provision of treatment at the end of life are being honored, and whether there is any change in the number of persons who request continued treatment at the end of their lives, but do not receive that treatment.

"The Institute shall report its findings to the following entities no later than January 30, 2013:

"(1) The 2013 General Assembly.

"(2) The North Carolina Bar Association.

"(3) The North Carolina Medical Society."

Effect of Amendments. — Session Laws 2007-502, s. 12, effective October 1, 2007, rewrote the section.

Legal Periodicals. — For survey of 1977 constitutional law, see 56 N.C.L. Rev. 943 (1978).

For comment discussing North Carolina's Natural Death Act, see 14 Wake Forest L. Rev. 771 (1978).

For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

The Elderly Incompetent: The Right to Die with Dignity, 13 Campbell L. Rev. 57 (1990).

For note, "First Health Care Corp. v. Rettinger: Are Living Wills Dead in North Carolina?," see 32 Wake Forest L. Rev. 591 (1997).

Limiting a Surrogate's Authority to Terminate Life-Support for An Incompetent Adult, see 79 N.C.L. Rev. 1815 (2001).

CASE NOTES

This section has no application to a homicide case. The procedures in subsections (a) and (b) and the exculpatory clause in subsection (d) are not for the protection of criminal assailants. State v. Holsclaw, 42 N.C. App. 696, 257 S.E.2d 650, appeal dismissed, 298 N.C. 571, 261 S.E.2d 126 (1979).

OPINIONS OF ATTORNEY GENERAL

Nonexclusive Procedure. — The Right to Natural Death Act was not intended to create an exclusive procedure for accomplishing a natural death, thereby rendering all other procedures unlawful. See Opinion of Attorney General to C. Robin Britt, Sr., Secretary, Department of Human Resources, — N.C.A.G. — (January 5, 1995).

The procedure established under this section by which a physician may withhold or discontinue extraordinary means or artifical nutrition or hydration in the absence of a declaration for a natural death executed pursuant to G.S. 90-321, is nonexclusive. See Opinion of Attorney General to C. Robin Britt, Sr., Secretary, Department of Human Resources, — N.C.A.G. — (January 5, 1995).

It is not unlawful for a physician to deviate from the procedures set out in this Act, but the physician who does so will lose the benefit of the absolute defense. As a result, the standard of care by which the physician's acts or omissions will be judged will be the general standard of care for physicians which is set out in statutory and common law. See Opinion of Attorney General to C. Robin Britt, Sr., Secretary, Department of Human Resources, — N.C.A.G. — (January 5, 1995).

§ 90-323. Death; determination by physician.

The determination that a person is dead shall be made by a physician licensed to practice medicine applying ordinary and accepted standards of medical practice. Brain death, defined as irreversible cessation of total brain function, may be used as a sole basis for the determination that a person has died, particularly when brain death occurs in the presence of artificially maintained respiratory and circulatory functions. This specific recognition of brain death as a criterion of death of the person shall not preclude the use of other medically recognized criteria for determining whether and when a person has died. (1979, c. 715, s. 3.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For note, "Unanswered Implications — The Clouded Rights of the Incompetent Patient Under Cruzan v. Director, Missouri Department of Health," see 69 N.C.L. Rev. 1293 (1991).

CASE NOTES

Applied in State v. Hefler, 310 N.C. 135, 310 S.E.2d 310 (1984).

§§ 90-324 through 90-328: Reserved for future codification purposes.

ARTICLE 24.

Licensed Professional Counselors Act.

§ 90-329. Declaration of policy.

It is declared to be the public policy of this State that the activities of persons who render counseling services to the public be regulated to insure the protection of the public health, safety, and welfare. (1983, c. 755, s. 1; 1993, c. 514, s. 1.)

Cross References. — As to a civil action remedy for persons who are sexually exploited by their psychotherapists, see the Psychotherapy Patient/Client Sexual Exploitation Act, G.S. 90-21.41 et seq.

CASE NOTES

Cited in Reich v. Price, 110 N.C. App. 255, 429 S.E.2d 372 (1993).

§ 90-330. Definitions; practice of marriage and family therapy.

(a) Definitions. — As used in this Article certain terms are defined as follows:

(1) Repealed by Session Laws 1993, c. 514, s. 1.

(1a) The "Board" means the Board of Licensed Professional Counselors.

(2) A "licensed professional counselor" is a person engaged in the practice of counseling who holds a license as a licensed professional counselor issued under the provisions of this Article.

(3) The "practice of counseling" means holding oneself out to the public as a professional counselor offering counseling services that include, but are not limited to, the following:

a. Counseling. — Assisting individuals, groups, and families through the counseling relationship by treating mental disorders and other conditions through the use of a combination of clinical mental health and human development principles, methods, diagnostic procedures, treatment plans, and other psychotherapeutic techniques, to develop an understanding of personal problems, to define goals, and to plan action reflecting the client's interests, abilities, aptitudes, and mental health needs as these are related to personal-social-emotional concerns, educational progress, and occupations and careers.

b. Appraisal Activities. — Administering and interpreting tests for assessment of personal characteristics.

c. Consulting. — Interpreting scientific data and providing guidance and personnel services to individuals, groups, or organizations.

d. Referral Activities. — Identifying problems requiring referral to other specialists.

e. Research Activities. — Designing, conducting, and interpreting research with human subjects.

The "practice of counseling" does not include the facilitation of communication, understanding, reconciliation, and settlement of conflicts by mediators at community mediation centers authorized by G.S. 7A-38.5.

(4) A "supervisor" means any licensed professional counselor or, when one is inaccessible, an equivalently credentialed mental health professional, as determined by the Board, with a minimum of five years of counseling experience who meets the qualifications established by the Board.

(b) Repealed by Session Laws 1993, c. 514, s. 1.

(c) Practice of Marriage and Family Therapy, Psychology, or Social Work. — No person licensed as a licensed professional counselor under the provisions of this Article shall be allowed to hold himself or herself out to the public as a licensed marriage and family therapist, licensed practicing psychologist, psychological associate, or licensed clinical social worker unless specifically authorized by other provisions of law. (1983, c. 755, s. 1; 1993, c. 514, s. 1; 1995, c. 157, s. 4; 1999-354, s. 3; 2001-487, s. 40(j).)

CASE NOTES

Cited in Trayford v. N.C. Psychology Bd., 174 N.C. App. 118, 619 S.E.2d 862, 2005 N.C. App. LEXIS 2286 (2005), aff'd, 360 N.C. 396, 627 S.E.2d 462 (2006).

§ 90-331. Prohibitions.

It shall be unlawful for any person who is not licensed under this Article to engage in the practice of counseling, use the title "licensed professional counselor", use the letters "LPC", use any facsimile or combination of these words or letters, abbreviations, or insignia, or indicate or imply orally, in writing, or in any other way that the person is a licensed professional counselor. (1983, c. 755, s. 1; 1993, c. 514, s. 1; 2001-487, s. 40(k).)

§ 90-332. Use of title by firm.

It shall be unlawful for any firm, partnership, corporation, association, or other business or professional entity to assume or use the title of licensed professional counselor unless each of the members of the firm, partnership, or association is licensed by the Board. (1983, c. 755, s. 1; 1993, c. 514, s. 1.)

§ 90-332.1. Exemptions from licensure.

(a) It is not the intent of this Article to regulate members of other regulated professions who do counseling in the normal course of the practice of their profession. Accordingly, this Article does not apply to:

(1) Lawyers licensed under Chapter 84, doctors licensed under Chapter 90, and any other person registered, certified, or licensed by the State to practice any other occupation or profession while rendering counseling services in the performance of the occupation or profession for which the person is registered, certified, or licensed.

(2) Any school counselor certified by the State Board of Education while counseling within the scope of employment by a board of education or private school.

(3) Any student intern or trainee in counseling pursuing a course of study in counseling in a regionally accredited institution of higher learning

or training institution, if the intern or trainee is a designated "counselor intern" and the activities and services constitute a part of the supervised course of study.

(4) Any person counseling as a supervised counselor in a supervised professional practice under G.S. 90-336(b)(2).

(4a) Any person counseling within the scope of employment at a local community college.

(4b) Any person counseling within the scope of employment at a private higher education institution as defined in G.S. 116-22(1).

(5) Any ordained minister or other member of the clergy while acting in a ministerial capacity who does not charge a fee for the service, or any person invited by a religious organization to conduct, lead, or provide counseling to its members when the service is not performed for more than 30 days a year.

(6) Any nonresident temporarily employed in this State to render counseling services for not more than 30 days in a year, if the person holds a license or certificate required for counselors in another state.

(7) Any person employed by State, federal, county, or municipal government while counseling within the scope of employment.

(8) Any person performing counseling solely as an employee of an area facility, as defined in G.S. 122C-3(14)a., if both of the following apply:

a. The services are provided by (i) a qualified professional as defined in G.S. 122C-3(31) and subject to the rules adopted by the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services, or (ii) an employee supervised by a qualified professional as defined in G.S. 122C-3(31);

b. The area facility has obtained written verification from the following boards that the employee has not had his or her license, registration, or certification revoked, rescinded, or suspended: the North Carolina Board of Licensed Professional Counselors, the North Carolina State Board of Examiners of Practicing Psychologists, the North Carolina Social Work Certification and Licensure Board, and the North Carolina Marriage and Family Therapy Licensure Board;

(9) Any person performing counseling as an employee of a hospital or other health care facility licensed under Chapter 131D, 131E, or 122C who is performing this counseling under the supervision of a qualified professional as defined in G.S. 122C-3(31); and

(10) Any employee assistance professional providing core-specific employee assistance program (EAP) activities, as defined by the Employee Assistance Professionals Association Standards for Employee Assistance Programs Part II: Professional Guidelines (1988).

(b) Persons who claim to be exempt under subsection (a) of this section are prohibited from advertising or offering themselves as "licensed professional counselors".

(c) Persons licensed under this Article are exempt from rules pertaining to counseling adopted by other occupational licensing boards.

(d) Nothing in this Article shall prevent a person from performing substance abuse counseling or substance abuse prevention consulting as defined in Article 5C of this Chapter. (1993, c. 514, s. 1; 1993 (Reg. Sess., 1994), c. 591, ss. 12, 16(a), 16(b); c. 685, s. 2; 1997-456, s. 27; 2001-487, s. 40(l).)

CASE NOTES

Psychology Board's Authority Over a Professional Counseling Practice. — North Carolina Psychology Board could not place a psychological associate's license on probation under G.S. 90-270.4(g) because the psychological assistant, who maintained both a psychological associate's practice and a licensed professional counselor's practice, could continue his licensed professional counselor's practice without interference from the Psychology Board, pursuant to G.S. 90-332.1(c), as long as he remained a qualified licensed professional counselor and did not promote that practice by holding himself out as a licensed psychological associate. Trayford v. N.C. Psychology Bd., 174 N.C. App. 118, 619 S.E.2d 862, 2005 N.C. App. LEXIS 2286 (2005), aff'd, 360 N.C. 396, 627 S.E.2d 462 (2006).

Applied in Foster v. Crandell, — N.C. App. —, 638 S.E.2d 526, 2007 N.C. App. LEXIS 73 (2007).

§ 90-333. North Carolina Board of Licensed Professional Counselors; appointments; terms; composition.

(a) For the purpose of carrying out the provisions of this Article, there is hereby created the North Carolina Board of Licensed Professional Counselors which shall consist of seven members appointed by the Governor in the manner hereinafter prescribed. Any nationally recognized association representing professional counselors may submit recommendations to the Governor for Board membership. The Governor may remove any member of the Board for neglect of duty or malfeasance or conviction of a felony or other crime of moral turpitude, but for no other reason.

(b) At least five members of the Board shall be licensed professional counselors except that initial appointees shall be persons who meet the educational and experience requirements for licensure as licensed professional counselors under the provisions of this Article; and two members shall be public-at-large members appointed from the general public. Composition of the Board as to the race and sex of its members shall reflect the composition of the population of the State and each member shall reside in a different congressional district.

(c) At all times the Board shall include at least one counselor primarily engaged in counselor education, at least one counselor primarily engaged in the public sector, at least one counselor primarily engaged in the private sector, and two licensed professional counselors at large.

(d) All members of the Board shall be residents of the State of North Carolina, and, with the exception of the public-at-large members, shall be licensed by the Board under the provisions of this Article. Professional members of the Board must be actively engaged in the practice of counseling or in the education and training of students in counseling, and have been for at least three years prior to their appointment to the Board. The engagement in this activity during the two years preceding the appointment shall have occurred primarily in this State.

(e) The term of office of each member of the Board shall be three years; provided, however, that of the members first appointed, three shall be appointed for terms of one year, two for terms of two years, and two for terms of three years. No member shall serve more than two consecutive three-year terms.

(f) Each term of service on the Board shall expire on the 30th day of June of the year in which the term expires. As the term of a member expires, the Governor shall make the appointment for a full term, or, if a vacancy occurs for any other reason, for the remainder of the unexpired term.

(g) Members of the Board shall receive compensation for their services and reimbursement for expenses incurred in the performance of duties required by this Article, at the rates prescribed in G.S. 93B-5.

(h) The Board may employ, subject to the provisions of Chapter 126 of the General Statutes, the necessary personnel for the performance of its functions, and fix their compensation within the limits of funds available to the Board. (1983, c. 755, s. 1; 1993, c. 514, s. 1.)

CASE NOTES

Cited in Trayford v. N.C. Psychology Bd., 174 N.C. App. 118, 619 S.E.2d 862, 2005 N.C. App. LEXIS 2286 (2005), aff'd, 360 N.C. 396, 627 S.E.2d 462 (2006).

§ 90-334. Functions and duties of the Board.

(a) The Board shall administer and enforce the provisions of this Article.

(b) The Board shall elect from its membership, a chairperson, a vice-chairperson, and secretary-treasurer, and adopt rules to govern its proceedings. A majority of the membership shall constitute a quorum for all Board meetings.

(c) The Board shall examine and pass on the qualifications of all applicants for licenses under this Article, and shall issue a license or renewal of license to each successful applicant therefor.

(d) The Board may adopt a seal which may be affixed to all licenses issued by the Board.

(e) The Board may authorize expenditures deemed necessary to carry out the provisions of this Article from the fees which it collects, but in no event shall expenditures exceed the revenues of the Board during any fiscal year. No State appropriations shall be subject to the administration of the Board.

(f) The Board shall establish and receive fees not to exceed one hundred dollars ($100.00) for initial or renewal application, not to exceed one hundred dollars ($100.00) for examination, and not to exceed twenty-five dollars ($25.00) for late renewal, maintain Board accounts of all receipts, and make expenditures from Board receipts for any purpose which is reasonable and necessary for the proper performance of its duties under this Article.

(g) The Board shall have the power to establish or approve study or training courses and to establish reasonable standards for licensure and license renewal, including but not limited to the power to adopt or use examination materials and accreditation standards of any recognized counselor accrediting agency and the power to establish reasonable standards for continuing counselor education.

(h) Subject to the provisions of Chapter 150B of the General Statutes, the Board shall have the power to adopt, amend, or repeal rules to carry out the purposes of this Article, including but not limited to the power to adopt ethical and disciplinary standards.

(i) The Board shall establish the criteria for determining the qualifications constituting "supervised professional practice".

(j) The Board may examine counselor applicants, approve, issue, deny, revoke, suspend, and renew the licenses of counselor applicants and licensees under this Article, and conduct hearings in connection with these actions.

(k) The Board shall investigate, subpoena individuals and records, and take necessary appropriate action to properly discipline persons licensed under this Article and to enforce this Article. (1983, c. 755, s. 1; 1987, c. 827, s. 1; 1993, c. 514, s. 1.)

§ 90-335. Board general provisions.

The Board shall be subject to the provisions of Chapter 93B of the General Statutes. (1983, c. 755, s. 1.)

§ 90-336. Title and qualifications for licensure.

(a) Each person desiring to be a licensed professional counselor shall make application to the Board upon such forms and in such manner as the Board shall prescribe, together with the required application fee.

(b) The Board shall issue a license as "licensed professional counselor" to an applicant who meets all of the following criteria:

(1) Has earned one of the following:
  a. A masters degree in counseling from a regionally accredited institution of higher education, which includes a minimum of 48 semester hours.
  b. A graduate degree in a related field supplemented with courses that the Board determines to be substantially equivalent.

(2) Has had no less than two years of masters or post-masters counseling experience, or of both, in a professional setting, including a minimum of 2,000 hours of supervised professional practice as defined by the Board.

(3) Has passed an examination as adopted by the Board. (1983, c. 755, s. 1; 1993, c. 514, s. 1.)

CASE NOTES

Applied in Foster v. Crandell, — N.C. App. —, 638 S.E.2d 526, 2007 N.C. App. LEXIS 73 (2007).

§ 90-337. Persons credentialed in other states.

The Board may license any person who is currently licensed, certified, or registered by another state if the individual has met requirements determined by the Board to be substantially similar to or exceeding those established under this Article. (1983, c. 755, s. 1; 1993, c. 514, s. 1.)

§ 90-338. Exemptions.

Applicants holding certificates of registration as Registered Practicing Counselors and in good standing with the Board shall be issued licenses as licensed professional counselors without meeting the requirements of G.S. 90-336(b). The following applicants shall be exempt from the academic qualifications required by this Article for licensed professional counselors and shall be licensed upon passing the Board examination and meeting the experience requirements:

(1) An applicant who was engaged in the practice of counseling before July 1, 1993, and who applies to the Board prior to January 1, 1996.

(2) An applicant who holds a masters degree from a college or university accredited by one of the regional accrediting associations or from a college or university determined by the Board to have standards substantially equivalent to a regionally accredited institution, provided the applicant was enrolled in the masters program prior to July 1, 1994. (1983, c. 755, s. 1; 1993, c. 514, s. 1; 1993 (Reg. Sess., 1994), c. 685, s. 3; c. 769, s. 25.19; 1995, c. 157, s. 3.)

§ 90-339. Renewal of licenses.

(a) All licenses shall be effective upon the date of issuance by the Board, and shall expire on the second June 30 thereafter.

(b) All licenses issued hereunder shall be renewed at the times and in the manner provided by this section. At least 45 days prior to expiration of each license, the Board shall mail a notice for license renewal to the person licensed for the current licensure period. At least 10 days before the current license expires, the applicant must return the notice properly completed, together with a renewal fee established by the Board and evidence of continuing counselor education as approved by the Board, upon receipt of which the Board shall issue to the person to be licensed the renewed license for the period stated on the license.

(c) Any person licensed who allows the license to lapse for failure to apply for renewal within 45 days after notice shall be subject to the late renewal fee. Failure to apply for renewal of a license within one year after the license's expiration date will require that a license be reissued only upon application as for an original license. (1983, c. 755, s. 1; 1993, c. 514, s. 1.)

§ 90-340. Protection of the public.

The Board may, in accordance with the provisions of Chapter 150B of the General Statutes, refuse to grant or to renew, may suspend, or may revoke the license of any person licensed under this Article on one or more of the following grounds:

(1) Conviction of a misdemeanor under this Article.
(2) Conviction of a felony under the laws of the United States or of any state of the United States.
(3) Gross unprofessional conduct, dishonest practice or incompetence in the practice of counseling.
(4) Procuring or attempting to procure a license by fraud, deceit, or misrepresentation.
(5) Any fraudulent or dishonest conduct in counseling.
(6) Inability of the person to perform the functions for which a license has been issued due to impairment of mental or physical faculties.
(7) Violations of any of the provisions of this Article or rules of the Board.
(8) Violations of the American Counseling Association Ethical Standards adopted by the Board. (1983, c. 755, s. 1; 1987, c. 827, s. 1; 1993, c. 514, s. 1.)

§ 90-341. Violation a misdemeanor.

Any person violating any provision of this Article is guilty of a Class 1 misdemeanor. (1983, c. 755, s. 1; 1993, c. 539, s. 651; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 90-342. Injunction.

As an additional remedy, the Board may proceed in a superior court to enjoin and restrain any person from violating the prohibitions of this Article. The Board shall not be required to post bond in connection with such proceeding. (1983, c. 755, s. 1.)

§ 90-343. Disclosure.

Any individual, or employer of an individual, who is licensed under this Article may not charge a client or receive remuneration for professional counseling services unless, prior to the performance of those services, the client is furnished a copy of a Professional Disclosure Statement that includes the licensee's professional credentials, the services offered, the fee schedule, and other provisions required by the Board. (1993, c. 514, s. 1.)

§ 90-344. Third-party reimbursements.

Nothing in this Article shall be construed to require direct third-party reimbursement to persons licensed under this Article. (1993, c. 514, s. 1.)

§§ 90-345 through 90-349: Reserved for future codification purposes.

ARTICLE 25.

Dietetics/Nutrition.

§ 90-350. Short title.

This Article shall be known as the Dietetics/Nutrition Practice Act. (1991, c. 668, s. 1.)

§ 90-351. Purpose.

It is the purpose of this Article to safeguard the public health, safety and welfare and to protect the public from being harmed by unqualified persons by providing for the licensure and regulation of persons engaged in the practice of dietetics/nutrition and by the establishment of educational standards for those persons. (1991, c. 668, s. 1.)

§ 90-352. Definitions.

As used in this Article, unless the context otherwise requires, the term:

(1) "Board" means the North Carolina Board of Dietetics/Nutrition.

(2) "Dietetics/nutrition" means the integration and application of principles derived from the science of nutrition, biochemistry, physiology, food, and management and from behavioral and social sciences to achieve and maintain a healthy status. The primary function of dietetic/nutrition practice is the provision of nutrition care services.

(3) "Licensed dietitian/nutritionist" means an individual licensed in good standing to practice dietetics/nutrition.

(4) "Nutrition care services" means any, part or all of the following:

a. Assessing the nutritional needs of individuals and groups, and determining resources and constraints in the practice setting.

b. Establishing priorities, goals, and objectives that meet nutritional needs and are consistent with available resources and constraints.

c. Providing nutrition counseling in health and disease.

d. Developing, implementing, and managing nutrition care systems.

e. Evaluating, making changes in, and maintaining appropriate standards of quality in food and nutrition services.

"Nutrition care services" does not include the retail sale of food products or vitamins. (1991, c. 668, s. 1.)

§ 90-353. Creation of Board.

(a) The North Carolina Board of Dietetics/Nutrition is created. The Board shall consist of seven members as follows:

(1) One member shall be a professional whose primary practice is clinical dietetics/nutrition;

(2) One member shall be a professional whose primary practice is community or public health dietetics/nutrition;

(3) One member shall be a professional whose primary practice is consulting in dietetics/nutrition;

(4) One member shall be a professional whose primary practice is in management of nutritional services;

(5) One member shall be an educator on the faculty of a college or university specializing in the field of dietetics/nutrition;
(6) Two members shall represent the public at large.

(b) Professional members of the Board shall:
(1) Be citizens of the United States and residents of this State;
(2) Have practiced in the field of dietetics/nutrition for at least five years; and
(3) Be licensed under this Article, except that initial appointees shall be licensed under this Article no later than March 31, 1992.

(c) The members of the Board appointed from the public at large shall be citizens of the United States and residents of this State and shall not be any of the following:
(1) A dietician/nutritionist.
(2) An agent or employee of a person engaged in the profession of dietetics/nutrition.
(3) A licensed health care professional or enrolled in a program to become prepared to be a licensed health care professional.
(4) An agent or employee of a health care institution, a health care insurer, or a health care professional school.
(5) A member of any allied health profession or enrolled in a program to become prepared to be a member of an allied health profession.
(6) The spouse of an individual who may not serve as a public member of the Board. (1991, c. 668, s. 1.)

§ 90-354. Appointments and removal of Board members, terms and compensation.

(a) The members of the Board shall be appointed as follows:
(1) The Governor shall appoint the professional member described in G.S. 90-353(a)(5) and the two public members described in G.S. 90-353(a)(6);
(2) The General Assembly upon the recommendation of the Speaker of the House of Representatives shall appoint the professional members described in G.S. 90-353(a)(1) and G.S. 90-353(a)(2) in accordance with G.S. 120-121, one of whom shall be a nutritionist with a masters or higher degree in a nutrition-related discipline; and
(3) The General Assembly upon the recommendation of the President Pro Tempore of the Senate shall appoint the professional members described in G.S. 90-353(a)(3) and G.S. 90-353(a)(4) in accordance with G.S. 120-121, one of whom shall be a nutritionist with a masters or higher degree in a nutrition-related discipline.

(b) Members of the Board shall take office on the first day of July immediately following the expired term of that office and shall serve for a term of three years and until their successors are appointed and qualified.

(c) No member shall serve on the Board for more than two consecutive terms.

(d) The Governor may remove members of the Board, after notice and opportunity for hearing, for:
(1) Incompetence;
(2) Neglect of duty;
(3) Unprofessional conduct;
(4) Conviction of any felony;
(5) Failure to meet the qualifications of this Article; or
(6) Committing any act prohibited by this Article.

(e) Any vacancy shall be filled by the appointing authority originally filling that position, except that any vacancy in appointments by the General Assembly shall be filled in accordance with G.S. 120-122.

(f) Members of the Board shall receive no compensation for their services, but shall be entitled to travel, per diem, and other expenses authorized by G.S. 93B-5. (1991, c. 668, s. 1; 1995, c. 490, s. 16; 2001-342, s. 1.)

§ 90-355. Election of officers; meetings of Board.

(a) The Board shall elect a chairman and a vice-chairman who shall hold office according to rules adopted by the Board.

(b) The Board shall hold at least two regular meetings each year as provided by rules adopted by the Board. The Board may hold additional meetings upon the call of the chairman or any two Board members. A majority of the Board membership shall constitute a quorum. (1991, c. 668, s. 1; 2001-342, s. 2.)

§ 90-356. Power and responsibility of Board.

The Board shall:

(1) Determine the qualifications and fitness of applicants for licenses, renewal of licenses, and reciprocal licenses;
(2) Adopt rules necessary to conduct its business, carry out its duties, and administer this Article;
(3) Adopt and publish a code of ethics;
(4) Deny, issue, suspend, revoke, and renew licenses in accordance with this Article;
(5) Conduct investigations, subpoena individuals and records, and do all other things necessary and proper to discipline persons licensed under this Article and to enforce this Article;
(6) Employ professional, clerical, investigative or special personnel necessary to carry out the provisions of this Article, and purchase or rent office space, equipment and supplies;
(7) Adopt a seal by which it shall authenticate its proceedings, official records, and licenses;
(8) Conduct administrative hearings in accordance with Article 3A of Chapter 150B of the General Statutes when a "contested case" as defined in G.S. 150B-2(2) arises under this Article;
(9) Establish reasonable fees for applications for examination; initial, provisional, and renewal licenses; and other services provided by the Board;
(10) Submit an annual report to the Governor and General Assembly of all its official actions during the preceding year, together with any recommendations and findings regarding improvements of the practice of dietetics/nutrition;
(11) Publish and make available upon request the licensure standards prescribed under this Article and all rules adopted by the Board;
(12) Request and receive the assistance of State educational institutions or other State agencies;
(13) Approve educational curricula, clinical practice and continuing education requirements for persons seeking licensure under this Article. (1991, c. 668, s. 1; 2001-342, ss. 3, 4.)

§ 90-357. License requirements.

Each applicant for a license as a licensed dietitian/nutritionist shall meet the following requirements:

(1) Submit a completed application as required by the Board;
(2) Submit any fees required by the Board; and
(3) Either:

a. Provide evidence of current registration as a Registered Dietitian by the Commission on Dietetic Registration; or

b.1. Have received a minimum of a baccalaureate degree from a regionally accredited college or university with a major course of study in human nutrition, foods and nutrition, dietetics, community nutrition, public health nutrition, or an equivalent major course of study, as approved by the Board. Regardless of the course of study, applicants must have successfully completed the Board's minimum course requirements in food sciences, social and behavioral sciences, chemistry, biology, human nutrition, diet therapy, advanced nutrition, and food systems management. Applicants who have obtained their education outside of the United States and its territories must have their academic degree validated by the Board as equivalent to a baccalaureate or masters degree conferred by a regionally accredited college or university in the United States; and

2. Have completed a planned, continuous program in approved clinical practice of not less than 900 hours under the supervision of a licensed dietitian/nutritionist as approved by the Board; and

3. Have passed an examination as defined by the Board; or

c.1. Have received from a regionally accredited college or university a masters degree in human nutrition, nutrition education, foods and nutrition, public health nutrition or an equivalent major course of study as approved by the Board. Applicants who have obtained their education outside of the United States and its territories must have their academic degree validated by the Board as being equivalent to a masters degree conferred by a regionally accredited college or university in the United States; and

2. Have a documented supervised practice experience component in dietetic practice of not less than 900 hours under the supervision of a licensed health care provider; and

3. Have passed an examination as defined by the Board; or

d. Have received from a regionally accredited college or university a doctorate in human nutrition, nutrition education, foods and nutrition, public health nutrition, or an equivalent major course of study as approved by the Board, or have received a Doctor of Medicine. Regardless of the course of study, applicants must have successfully completed the Board's minimum course requirements in social and behavioral sciences, chemistry, biology, human nutrition, diet therapy and advanced nutrition. Applicants who have obtained their education outside of the United States and its territories must have their academic degree validated by the Board as being equivalent to a doctorate or Doctor of Medicine conferred by a regionally accredited college or university in the United States. (1991, c. 668, s. 1.)

§ 90-358. Notification of applicant following evaluation of application.

After evaluation of the application and of any other evidence submitted, the Board shall notify each applicant that the application and evidence submitted are satisfactory and accepted, or unsatisfactory and rejected. If rejected, the notice shall state the reasons for the rejection. (1991, c. 668, s. 1.)

§ 90-359. Examinations.

Competency examinations shall be administered at least twice each year to qualified applicants for licensing. The examinations may be administered by a national testing service. The Board shall prescribe or develop the examinations which may include an examination given by the Commission on Dietetic Registration of the American Dietetic Association or any other examination approved by two-thirds vote of the entire Board. (1991, c. 668, s. 1.)

§ 90-360. Granting license without examination.

The Board may grant, upon application and payment of proper fees, a license without examination to a person who at the time of application holds a valid license as a licensed dietitian/nutritionist issued by another state or any political territory or jurisdiction acceptable to the Board if in the Board's opinion the requirements for that license are substantially the same as the requirements of this Article. (1991, c. 668, s. 1.)

§ 90-361. Provisional licenses.

The Board may grant a provisional license for a period not exceeding 12 months to any individual who has successfully completed the educational and clinical practice requirements and has made application to take the examination required under G.S. 90-357. A provisional license shall allow the individual to practice as a dietitian/nutritionist under the supervision of a dietitian/nutritionist licensed in this State and shall be valid until revoked by the Board. (1991, c. 668, s. 1.)

§ 90-362. License as constituting property of Board; display requirement; renewal; inactive status.

(a) A license issued by the Board is the property of the Board and must be surrendered to the Board on demand.

(b) The licensee shall display the license certificate in the manner prescribed by the Board.

(c) The licensee shall inform the Board of any change of the licensee's address.

(d) The license shall be reissued by the Board annually upon payment of a renewal fee if the licensee is not in violation of this Article at the time of application for renewal and if the applicant fulfills current requirements of continuing education as established by the Board.

(e) Each person licensed under this Article is responsible for renewing his license before the expiration date. The Board shall notify a licensee of pending license expiration at least 30 days in advance thereof.

(f) The Board may provide for the late renewal of a license upon the payment of a late fee, but no such late fee renewal may be granted more than five years after a license expires.

(g) Under procedures and conditions established by the Board, a licensee may request that his license be declared inactive. The licensee may apply for active status at any time and upon meeting the conditions set by the Board shall be declared in active status. (1991, c. 668, s. 1.)

§ 90-363. Suspension, revocation and refusal to renew license.

(a) The Board may deny or refuse to renew a license, may suspend or revoke a license, or may impose probationary conditions on a license if the licensee or applicant for licensure has engaged in any of the following conduct:

(1) Employment of fraud, deceit or misrepresentation in obtaining or attempting to obtain a license, or the renewal of a license;
(2) Committing an act or acts of malpractice, gross negligence or incompetence in the practice of dietetics/nutrition;
(3) Practicing as a licensed dietitian/nutritionist without a current license;
(4) Engaging in conduct that could result in harm or injury to the public;
(5) Conviction of or a plea of guilty or nolo contendere to any crime involving moral turpitude;
(6) Adjudication of insanity or incompetency, until proof of recovery from the condition can be established;
(7) Engaging in any act or practice violative of any of the provisions of this Article or any rule adopted by the Board, or aiding, abetting or assisting any person in such a violation.

(b) Denial, refusal to renew, suspension, revocation or imposition of probationary conditions upon a license may be ordered by the Board after a hearing held in accordance with Chapter 150B of the General Statutes and rules adopted by the Board. An application may be made to the Board for reinstatement of a revoked license if the revocation has been in effect for at least one year. (1991, c. 668, s. 1.)

§ 90-364. Fees.

The Board shall establish fees in accordance with Chapter 150B of the General Statutes for the following purposes:
(1) For an initial application, a fee not to exceed one hundred dollars ($100.00).
(2) For examination or reexamination, a fee not to exceed two hundred dollars ($200.00).
(3) For issuance of a license, a fee not to exceed two hundred dollars ($200.00).
(4) For the renewal of a license, a fee not to exceed one hundred twenty-five dollars ($125.00).
(5) For the late renewal of a license, an additional late fee not to exceed one hundred dollars ($100.00).
(6) For a provisional license, a fee not to exceed one hundred dollars ($100.00).
(7) For copies of Board rules and licensure standards, charges not exceeding the actual cost of printing and mailing. (1991, c. 668, s. 1; 2001-342, s. 5.)

§ 90-365. Requirement of license.

After March 31, 1992, it shall be unlawful for any person who is not currently licensed under this Article to do any of the following:
(1) Engage in the practice of dietetics/nutrition.
(2) Use the title “dietitian/nutritionist”.
(3) Use the words “dietitian,” “nutritionist,” or “licensed dietitian/nutritionist” alone or in combination.
(4) Use the letters “LD,” “LN,” or “LDN,” or any facsimile or combination in any words, letters, abbreviations, or insignia.
(5) To imply orally or in writing or indicate in any way that the person is a licensed dietitian/nutritionist. (1991, c. 668, s. 1.)

§ 90-366. Violation a misdemeanor.

Any person who violates any provision of this Article shall be guilty of a Class 1 misdemeanor. Each act of such unlawful practice shall constitute a distinct and separate offense. (1991, c. 668, s. 1; 1993, c. 539, s. 652; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 90-367. Injunctions.

The Board may make application to any appropriate court for an order enjoining violations of this Article, and upon a showing by the Board that any person has violated or is about to violate this Article, the court may grant an injunction, restraining order, or take other appropriate action. (1991, c. 668, s. 1.)

§ 90-368. Persons and practices not affected.

The requirements of this Article shall not apply to:

(1) A health care professional duly licensed in accordance with Chapter 90 of the General Statutes.

(2) A student or trainee, working under the direct supervision of a licensed dietitian/nutritionist while fulfilling an experience requirement or pursuing a course of study to meet requirements for licensure, for a limited period of time as determined by the Board.

(3) A dietitian/nutritionist serving in the Armed Forces or the Public Health Service of the United States or employed by the Veterans Administration when performing duties associated with that service or employment.

(4) A person aiding the practice of dietetics/nutrition if the person works under the direct supervision of a licensed dietitian/nutritionist and performs only support activities that do not require formal academic training in the basic food, nutrition, chemical, biological, behavioral, and social sciences that are used in the practice of dietetics.

(5) An employee of the State, a local political subdivision, or a local school administrative unit or a person that contracts with the State, a local political subdivision, or a local school administrative unit while engaged in the practice of dietetics/nutrition within the scope of that employment.

(6) A retailer who does not hold himself out to be a dietitian or nutritionist when that retailer furnishes nutrition information to customers on food, food materials, dietary supplements and other goods sold at his retail establishment in connection with the marketing and distribution of those goods at his retail establishment.

(7) A person who provides weight control services; provided the program has been reviewed by, consultation is available from, and no program change can be initiated without prior approval of:

   a. A licensed dietitian/nutritionist;

   b. A dietitian/nutritionist licensed in another state that has licensure requirements that are at least as stringent as under this Article; or

   c. A dietitian registered by the Commission on Dietetic Registration of the American Dietetic Association.

(8) Employees or independent contractors of a hospital or health care facility licensed under Article 5 or Part A of Article 6 of Chapter 131E or Article 2 of Chapter 122C of the General Statutes.

(9) A person who does not hold himself out to be a dietitian or nutritionist when that person furnishes nutrition information on food, food materials, or dietary supplements. This Article does not prohibit that person from making explanations to customers about foods or food products in connection with the marketing and distribution of these products.

(10) An herbalist or other person who does not hold himself out to be a dietitian or nutritionist when the person furnishes nonfraudulent specific nutritional information and counseling about the reported or historical use of herbs, vitamins, minerals, amino acids, carbohydrates, sugars, enzymes, food concentrates, or other foods. (1991, c. 668, s. 1; 1995, c. 509, s. 135.2(s).)

§ 90-369. Third party reimbursement; limitation on modifications.

Nothing in this Article shall be construed to require direct third-party reimbursement to persons licensed under this Article. (1991, c. 668, s. 1; 2007-123, s. 1.)

Effect of Amendments. — Session Laws 2007-123, s. 1, effective June 27, 2007, deleted the former last sentence which read: "In no event shall there be any substantive change to G.S. 90-352, 90-357, or 90-368 unless the change is reviewed by the Legislative Committee on New Licensing Boards pursuant to Article 18A of Chapter 120 of the General Statutes."

§§ 90-370 through 90-379: Reserved for future codification purposes.

ARTICLE 26.

Fee-Based Practicing Pastoral Counselors.

§ 90-380. Title.

This Article shall be known as the "Fee-Based Practicing Pastoral Counselor Certification Act". (1991, c. 670, s. 1.)

Cross References. — As to a civil action remedy for persons who are sexually exploited by their psychotherapists, see the Psychotherapy Patient/Client Sexual Exploitation Act, G.S. 90-21.41 et seq.

Editor's Note. — The numbers 90-380 to 90-396 were assigned by the Revisor of Statutes, the numbers in the enacting act having been 90-350 to 90-366.

§ 90-381. Purpose.

It is the purpose of this Article to protect the public safety and welfare by providing for the certification and regulation of persons engaged in the practice of fee-based pastoral counseling and pastoral psychotherapy. (1991, c. 670, s. 1.)

§ 90-382. Definitions.

The following definitions apply in this Article:

(1) Accredited educational institution. — A college, university, or theological seminary chartered by the State and accredited by the appropriate regional association of colleges and secondary schools or by the appropriate association of theological schools and seminaries.

(2) Board. — The North Carolina State Board of Examiners of Fee-Based Practicing Pastoral Counselors.

(3) Fee-based pastoral counseling associate. — An individual, certified under this Article, who renders or offers professional pastoral counseling services only under qualified supervision in accordance with rules adopted by the Board.

(4) Fee-based pastoral counselor. — A minister who receives fees from the practice of pastoral counseling.

(5) Fee-based practice of pastoral counseling. — To render or offer for a fee or other compensation professional pastoral counseling services, whether to the general public or to organizations, either public or private; to individuals, singly or in groups; to couples, married or in other relationships; and to families.

(6) Fee-based professional pastoral counseling services. — The application of pastoral care and pastoral counseling principles and procedures for a fee or other compensation with the purpose of understanding, anticipating, or influencing the behavior of individuals in order to assist in their attainment of maximum personal growth; optimal work, marital, family, church, school, social, and interpersonal relationships; and healthy personal adaptation. The application of pastoral care and pastoral psychotherapy principles and procedures includes sustaining, healing, shepherding, nurturing, guiding, and reconciling; interviewing, counseling, and using psychotherapy, diagnosing, preventing, and ameliorating difficulties in living; and resolving interpersonal and social conflict. Teaching, writing, the giving of public speeches or lectures, and research concerned with pastoral care and counseling principles are not included in professional pastoral counseling services within the meaning of this Article.

(7) Minister. — A person who has been called, elected, or otherwise authorized by a church, denomination, or faith group through ordination, consecration or equivalent means, to exercise within and on behalf of the denomination or faith group specific religious leadership and service that furthers its purpose and mission and that differs from the religious service of the laity of the denomination or faith group.

(8) Pastoral counseling. — Used interchangeably with pastoral psychotherapy to mean a process in which a pastoral counselor utilizes insights and principles derived from the disciplines of theology and the behavioral sciences to help persons achieve wholeness and health.

(9) Pastoral psychotherapy. — The use of pastoral care and pastoral counseling methods in a professional relationship to assist a person in modifying feelings, attitudes, and behavior that are intellectually, socially, emotionally, or spiritually maladjustive, ineffectual, or that otherwise contribute to difficulties in living. (1991, c. 670, s. 1.)

§ 90-383. Exemptions.

(a) Nothing in this Article shall be construed as limiting the ministry, activities, or services of a minister called, elected, or otherwise authorized by a church, denomination, or faith group to perform the ordinary duties or functions of the clergy.

(b) Nothing in this Article shall be construed as limiting the activities, services, or use of a title to designate a training status of a student, intern, or fellow preparing for the practice of pastoral care and counseling under qualified supervision in an accredited educational institution or service facility, provided that those activities and services constitute a part of the course of study.

(c) Nothing in this Article shall be construed to limit or restrict physicians, optometrists, or psychologists licensed to practice under the laws of North Carolina; or to restrict qualified members of other professional groups who render counseling and other helping services including counselors, social workers, and other similar professions; or to restrict qualified members of any other professional groups in the practice of their respective professions, provided they do not claim to the public by any title or description stating or implying that they are certified fee-based practicing pastoral counselors or certified fee-based pastoral counseling associates, or that they are certified to receive fees for the practice of pastoral counseling.

(d) Except as otherwise provided in this Article, if a person exempt from the provisions of this Article, becomes certified under this Article, he or she shall be required to comply with the requirements of this Article and rules adopted by the Board. (1991, c. 670, s. 1.)

§ 90-384. Temporary certificates.

The Board may issue a temporary pastoral counseling certificate to any person who is otherwise qualified under this Article until the next annual examination is given. (1991, c. 670, s. 1.)

§ 90-385. Creation of Board; appointment and removal of members; terms and compensation; powers.

(a) The North Carolina State Board of Examiners of Fee-Based Practicing Pastoral Counselors is created. The Board shall consist of seven members as follows:

(1) Three members appointed by the governor, two of whom shall be certified fee-based practicing pastoral counselors and one of whom shall be a certified fee-based pastoral counseling associate.

(2) Two members appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives, one of whom shall be a certified fee-based practicing pastoral counselor and one of whom shall be a public member who has no direct affiliation with the practice of pastoral counseling.

(3) Two members appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, one of whom shall be a certified fee-based practicing pastoral counselor and one of whom shall be a public member who has no direct affiliation with the practice of pastoral counseling.

Initial appointees shall be persons who meet the education and experience requirements for certification under this Article and shall be deemed certified upon appointment. In making appointments, consideration shall be given to adequate representation from the various fields and areas of the practice of pastoral counseling. Legislative appointments shall be made in accordance with G.S. 120-121.

(b) Of the members initially appointed, three members, including one certified fee-based practicing pastoral counselor appointed by the Governor, one certified fee-based practicing pastoral counseling associate appointed by the Governor, and one public member who has no direct affiliation with the practice of pastoral counseling appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, shall serve for a term of two years. Two members, including one certified fee-based practicing pastoral counselor appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives and one public member who has no direct affiliation with the practice of pastoral counseling appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives, shall serve for a term of three years. Two members, including the certified fee-based practicing pastoral counselor appointed by the Governor and the certified fee-based practicing pastoral counselor appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, shall serve for a term of four years.

(c) After the initial terms specified in this section, each member shall be appointed to serve a term of four years or until a successor is appointed and qualified. A vacancy shall be filled by the appointing authority originally filling that position, except that any vacancy in appointments by the General Assembly shall be filled in accordance with G.S. 120-122. No person may be appointed more than once to fill an unexpired term nor to more than two consecutive terms.

(d) The Governor may remove any member of the Board for neglect of duty, malfeasance, conviction of a felony or conviction of a crime involving moral turpitude while in office, but for no other reason.

(e) Five Board members shall constitute a quorum. The Governor shall designate one Board member who is a certified fee-based practicing pastoral counselor to serve as chairperson during the term of his or her appointment to the Board. No person may serve as chairperson for more than four years. The Board shall specify the location of its principal office.

(f) The Board shall meet at least annually at a time set by the Board. The Board may hold additional meetings and conduct any proceeding or investigation necessary to its purposes and may empower its agents or counsel to conduct any investigation necessary to its purposes. The Board may order that any records concerning the provision of pastoral counseling services relevant to a complaint received by the Board or any inquiry or investigation conducted by or on behalf of the Board be produced for inspection and copying by representatives of the Board. The Board shall adopt an official seal, which shall be affixed to all certificates issued by the Board. The Board shall adopt rules necessary to conduct its business, carry out its duties, and administer this Article in accordance with Chapter 150B of the General Statutes.

(g) Board members shall receive no compensation for their services, but may be compensated for their expenses incurred in the performance of duties required by this Article, as provided in G.S. 138-6, from funds generated by examination fees or from contributions made to the Board. The Board may employ and compensate necessary personnel for the performance of its functions, within the limits of funds available to the Board. In no event shall the State be liable for expenses incurred by the Board in excess of the income derived from this Article. (1991, c. 670, s. 1.)

§ 90-386. Annual report.

Within 90 days of the end of each fiscal year, beginning with fiscal year 1992-93, the Board shall submit to the Governor a report of the Board's activities since the preceding July 1, including the names of all fee-based practicing pastoral counselors and fee-based pastoral counseling associates to whom certificates have been granted under this Article during that fiscal year. (1991, c. 670, s. 1.)

§ 90-387. Certification and examination.

(a) The Board shall issue a certificate to practice fee-based pastoral counseling to an applicant who:

(1) Pays an application fee of one hundred dollars ($100.00);
(2) Pays an examination fee set by the Board of not more than four hundred dollars ($400.00);
(3) Passes a Board examination in pastoral counseling;
(4) Submits evidence verified by oath and satisfactory to the Board that the applicant:
    a. Is at least 21 years of age;
    b. Is of good moral character;

c. Has received a masters of divinity or higher degree, or its equivalent, from an accredited educational institution;

d. Has received a masters or doctoral degree in pastoral counseling, or its equivalent, based on a planned and directed program of studies in pastoral counseling from an accredited educational institution; has completed satisfactorily one unit of full-time clinical pastoral education in a program accredited by the Association of Clinical Pastoral Education, or its equivalent; and has completed at least 1,375 hours of pastoral counseling while receiving a minimum of 250 hours of supervision during those hours of pastoral counseling;

e. Is a member of a recognized denomination or faith group that recognizes the applicant's status as a rabbi, priest, minister, or religious leader, as defined in the Federal Internal Revenue Code;

f. Has completed three years of full-time work as a rabbi, priest, minister, or religious leader, or its equivalent;

g. Has been ordained, or its equivalent as determined by the applicant's denomination or faith group, and has been endorsed to function as a pastoral counselor; and

h. Has not within the preceding six months failed an examination given by the Board.

(b) The Board shall issue a certificate to practice as a fee-based pastoral counseling associate to an applicant who:

(1) Pays an application fee of one hundred dollars ($100.00);

(2) Pays an examination fee set by the Board of not more than four hundred dollars ($400.00);

(3) Passes an examination in pastoral counseling satisfactory to the Board;

(4) Submits evidence verified by oath and satisfactory to the Board that the applicant:

a. Is at least 21 years of age;

b. Is of good moral character;

c. Has received a masters of divinity or higher degree, or its equivalent, from an accredited educational institution;

d. Is a member of a recognized denomination or faith group that recognizes the applicant's status as a rabbi, priest, minister, or religious leader;

e. Has completed three years of full-time work as a rabbi, priest, minister, or religious leader, or its equivalent;

f. Has been ordained, or its equivalent as determined by the applicant's denomination or faith group, and has been endorsed to function as a pastoral counselor;

g. Has not within the preceding six months failed an examination given by the Board; and

h. Has satisfactorily completed one unit of full-time clinical pastoral education in a program accredited by the American Association of Clinical Education, or its equivalent, and has completed at least 375 hours of pastoral counseling including a minimum of 125 hours of supervision of those pastoral counseling hours.

(c) A pastoral counseling associate may become a certified fee-based practicing pastoral counselor if the applicant complies with the requirements set forth in subsection (a) of this section and pays an examination fee set by the Board of not more than four hundred dollars ($400.00).

(d) The examinations required by subsections (a) and (b) of this section shall be in a form and content prescribed by the Board and shall be oral and written. The examinations shall be administered at least annually at a time and place to be determined by the Board. (1991, c. 670, s. 1; c. 761, s. 12.4.)

§ 90-388. Equivalent certification and memberships recognized.

(a) The Board may grant a certificate as a fee-based practicing pastoral counselor to any person meeting the requirements of G.S. 90-387(a) who at the time of application is certified as a pastoral counselor by a board of another state whose standards, in the opinion of the Board, are at least equal to those required by this Article. This section applies only when the state grants similar privileges to residents of this State. To determine a candidate's qualifications, the Board may require a personal interview and any other documentation the Board deems necessary.

(b) The Board may grant a certificate as a practicing pastoral counselor to any person who has been certified as a Fellow or Diplomate by the American Association of Pastoral Counselors if application is made by December 31, 1991. To determine a candidate's qualifications the Board may require a personal interview and any other documentation the Board deems necessary.

(c) The Board may grant a certificate as a fee-based pastoral counseling associate to any person who has been certified as a member of the American Association of Pastoral Counselors if application is made by December 31, 1991. To determine a candidate's qualifications, the Board may require a personal interview and any other documentation the Board deems necessary. (1991, c. 670, s. 1.)

§ 90-389. Renewal of certificate.

A certificate issued under this Article must be renewed annually on or before the first day of January of each year. Each application for renewal must be accompanied by a renewal fee set by the Board of not more than one hundred dollars ($100.00). If a certificate is not renewed on or before the first day of January of each year, an additional fee of not more than twenty-five dollars ($25.00) as set by the Board shall be charged for late renewal. The Board may establish requirements for continuing education for pastoral counselors and pastoral counseling associates certified in this State as an additional condition for renewal. (1991, c. 670, s. 1.)

§ 90-390. Refusal, suspension, or revocation of a certificate.

(a) A certificate applied for or issued under this Article may be refused, suspended, revoked, or otherwise limited as provided in subsection (e) of this section by the Board upon proof that the applicant or person to whom a certificate was issued:

(1) Has been convicted of a felony;

(2) Has been convicted of a misdemeanor involving moral turpitude, misrepresentation or fraud in dealing with the public, or an offense relevant to fitness to practice certified fee-based pastoral counseling;

(3) Has engaged in fraud or deceit in securing or attempting to secure a certificate or the renewal of a certificate or has willfully concealed from the Board material information in connection with application for or renewal of a certificate under this Article;

(4) Is a habitual drunkard or is addicted to deleterious habit-forming drugs;

(5) Has made fraudulent or misleading statements pertaining to his education, licensure, professional credentials, or related to his qualification or fitness for the practice of pastoral counseling;

(6) Has had a license for the practice of pastoral counseling in any other state or any other country suspended or revoked;

(7) Has been guilty of unprofessional conduct as defined by the relevant code of ethics published by the American Association of Pastoral Counselors; or

(8) Has violated any provision of this Article or the rules of the Board.

(b) A certificate issued under this Article shall be automatically suspended by the Board after failure to renew a certificate for a period of more than three months after the annual renewal date.

(c) Except as otherwise provided in this Article, the procedure for revocation, suspension, refusal, or other limitations of the certificate shall be in accordance with the provisions of Chapter 150B of the General Statutes. In any proceeding or record of any hearing before the Board, and in any complaint or notice of charges against any certified fee-based pastoral counselor or certified fee-based pastoral counseling associate and in any decision rendered by the Board, the Board shall endeavor to withhold from public disclosure the identity of any counselees or clients who have not consented to the public disclosure of treatment by the certified fee-based pastoral counselor or certified fee-based pastoral counseling associate. The Board may close a hearing to the public and receive in a closed session evidence concerning the treatment or delivery of pastoral counseling services to a counselee or a client who has not consented to public disclosure of treatment or services, as may be necessary for the protection of the counselee's or client's rights and the full presentation of relevant evidence. All records, papers, and documents containing information collected and compiled by or on behalf of the Board as a result of investigations, inquiries, or interviews conducted in connection with certification or disciplinary matters are not public records within the meaning of Chapter 132 of the General Statutes. However, any notice or statement of charges against any certified fee-based pastoral counselor or certified fee-based pastoral counseling associate, any notice to any certified fee-based pastoral counselor or certified fee-based pastoral counseling associate of a hearing in any proceeding, or any decision rendered in connection with a hearing in any proceeding is a public record within the meaning of Chapter 132 of the General Statutes, except that identifying information concerning the treatment or delivery of services to a counselee or client who has not consented to the public disclosure of such treatment or services may be deleted. Any record, paper, or other document containing information collected and compiled by or on behalf of the Board, as provided in this section, that is received and admitted in evidence in any hearing before the Board shall be a public record within the meaning of Chapter 132 of the General Statutes, subject to any deletions of identifying information concerning the treatment or delivery of pastoral counseling services to a counselee or client who has not consented to public disclosure of the treatment or services.

(d) The Board may reinstate a suspended certificate upon payment by an applicant of a fee of twenty dollars ($20.00), and may require that the applicant file a new application, submit to reexamination for reinstatement, and pay other authorized fees as required by the Board.

(e) Upon proof that a certified fee-based pastoral counselor or certified fee-based pastoral counseling associate certified under this Article has engaged in any of the prohibited actions specified in subsection (a) of this section, the Board may, in lieu of refusal, suspension, or revocation, do any one or more of the following:

(1) Issue a formal reprimand;

(2) Formally censure the certified fee-based pastoral counselor or certified fee-based pastoral counseling associate;

(3) Place the certified fee-based pastoral counselor or certified fee-based pastoral counseling associate on probation with any conditions the Board may deem advisable; or

(4) Limit or circumscribe the professional pastoral counseling services provided by the certified fee-based pastoral counselor or the certified fee-based pastoral counseling associate as the Board deems advisable.

(f) The Board may impose conditions of probation or restrictions on continued practice at the conclusion of a period of suspension or as a condition for the restoration of a revoked or suspended certificate. In lieu of or in connection with any disciplinary proceedings or investigation, the Board may enter into a consent order relating to the discipline, censure, proceeding costs, probation, or limitations on the practice of a certified fee-based pastoral counselor or certified fee-based pastoral counseling associate. (1991, c. 670, s. 1; 1993 (Reg. Sess., 1994), c. 570, s. 8.)

§ 90-391. Prohibited acts.

No person shall represent himself to be a certified fee-based practicing pastoral counselor or a certified fee-based pastoral counseling associate, or engage in or offer to engage in the practice of certified fee-based pastoral counseling, without a valid certificate issued under this Article. No person shall use these titles or descriptions, or any of their derivatives, in a manner that implies the person is certified under this Article. No called or elected pastor during his active full-time pastorate shall practice as a certified fee-based pastoral counselor even if certified under this Article. (1991, c. 670, s. 1.)

§ 90-392. Disposition of fees.

The fees derived from the operation of this Article shall be used by the Board in carrying out its functions. The operations of the Board are subject to the oversight of the State Auditor pursuant to Article 5A of Chapter 147 of the General Statutes. (1991, c. 670, s. 1.)

§ 90-393. Injunction for violations.

The Board may apply to superior court for an injunction to prevent violations of this Article or of any rules adopted by the Board, and the court has the authority to grant an injunction. (1991, c. 670, s. 1.)

§ 90-394. Duplicate and replacement certificates.

A certified fee-based pastoral counselor may request that the Board issue a duplicate or replacement certificate for a fee set by the Board not to exceed fifty dollars ($50.00). Upon receipt of the request, a showing of good cause for the issuance of a duplicate or replacement certificate, and payment of the fee, the Board shall issue a duplicate or replacement certificate. (1991, c. 670, s. 1; 1991 (Reg. Sess., 1992), c. 1030, s. 23.)

§ 90-395. Practice of medicine and psychology not authorized.

Nothing in this Article shall authorize the practice of medicine as defined in Article 1 of this Chapter or the practice of psychology as defined in Article 18A of this Chapter. (1991, c. 670, s. 1.)

§ 90-396: Repealed by Session Laws 1999-186, s. 1.1, effective June 18, 1999.

§§ 90-397 through 90-399: Reserved for future codification purposes.

ARTICLE 27.

Referral Fees and Payment for Certain Solicitations Prohibited.

§ 90-400. Definition.

As used in this Article, a health care provider is a person holding any license issued under this Chapter. (1991 (Reg. Sess., 1992), c. 858, s. 1; 1993 (Reg. Sess., 1994), c. 689, s. 1.)

§ 90-401. Referral fees and payment for certain solicitations prohibited.

A health care provider shall not financially compensate in any manner a person, firm, or corporation for recommending or securing the health care provider's employment by a patient, or as a reward for having made a recommendation resulting in the health care provider's employment by a patient. No health care provider who refers a patient of that health care provider to another health care provider shall receive financial or other compensation from the health care provider receiving the referral as a payment solely or primarily for the referral. This section shall not be construed to prohibit a health care provider's purchase of advertising which does not entail direct personal contact or telephone contact of a potential patient. (1991 (Reg. Sess., 1992), c. 858, s. 1; 1993 (Reg. Sess., 1994), c. 689, s. 2.)

§ 90-401.1. Direct solicitation prohibited.

It shall be unlawful for a health care provider or the provider's employee or agent to initiate direct personal contact or telephone contact with any injured, diseased, or infirmed person, or with any other person residing in the injured, diseased, or infirmed person's household, for a period of 90 days following the injury or the onset of the disease or infirmity, if the purpose of initiating the contact, in whole or in part, is to attempt to induce or persuade the injured, diseased, or infirmed person to become a patient of the health care provider. This section shall not be construed to prohibit a health care provider's use of posted letters, brochures, or information packages to solicit injured, diseased, or infirmed persons, so long as such use does not entail direct personal contact with the person. (1993 (Reg. Sess., 1994), c. 689, s. 3.)

§ 90-402. Sanctions.

Violation of the provisions of this Article shall be grounds for the offending health care provider's licensing board to suspend or revoke the health care provider's license, to refuse to renew the health care provider's license, or to take any other disciplinary action authorized by law. (1991 (Reg. Sess., 1992), c. 858, s. 1; 1993 (Reg. Sess., 1994), c. 689, s. 4.)

§§ 90-403, 90-404: Reserved for future codification purposes.

Article 28.

Self-Referrals by Health Care Providers.

§ 90-405. Definitions.

As used in this Article, the term

(1) "Board" means any of the following boards created in Chapter 90 of this Article relating respectively to the professions of medicine, dentistry, optometry, osteopathy, chiropractic, nursing, podiatry, psychology, physical therapy, occupational therapy, speech and language pathology and audiology.

(2) "Department" means the Department of Health and Human Services of the State of North Carolina.

(3) "Designated health care services" means, and includes for purposes of this section, any health care procedure and service provided by a health care provider that is covered by or insured under any health benefit plan regulated by Chapter 58 of the General Statutes, any employee welfare benefit plan regulated by the Employee Retirement Income Security Act of 1974, any federal or State employee insurance program, Medicare or Medicaid.

(4) "Entity" means any individual, partnership, firm, corporation, or other business that provides health care services.

(5) "Fair market value" means the value of the rental property for commercial purposes not adjusted to reflect the additional value that one party (either the prospective lessee or lessor) would attribute to the property as a result of its proximity or convenience to sources of referrals or business.

(6) "Group practice" means a group of two or more health care providers legally organized as a partnership, professional corporation, or similar association:

   a. In which each health care provider who is a member of the group provides services including consultation, diagnosis, or treatment, through the joint use of shared facilities, equipment, and personnel;

   b. For which substantially all the services of the health care providers who are members of the group are provided through the group and are billed in the name of the group and amounts so received are treated as receipts of the group; and

   c. In which the overhead expenses of and the income from the practice are distributed in accordance with methods previously determined by members of the group.

(7) "Health care provider" is any person who, pursuant to Chapter 90 of the General Statutes, is licensed, or is otherwise registered or certified to engage in the practice of any of the following: medicine, dentistry, optometry, osteopathy, chiropractic, nursing, podiatry, psychology, physical therapy, occupational therapy or speech and language pathology and audiology.

(8) "Immediate family member" means a health care provider's spouse or dependent minor child.

(9) "Investment interest" means an equity or debt security issued by an entity, or a lease or retained interest in real property held by an entity, including, without limitation, shares of stock in a corporation, units or

other interests in a partnership, bonds, debentures, notes, leases, options or contracts related to real property or other equity interests or debt instruments. "Investment interest" and legal or beneficial interest shall not include any interest in:

a. Bonds or other debt instruments issued pursuant to the provisions of Chapter 159 of the General Statutes;

b. A written lease of real property entered into on or before January 1, 1990, for a term of five years or more or a written lease of real property for a term of one year or more, which fully describes the leased premises, the terms and conditions for the lease thereof, with the aggregate rental charge, set in advance, consistent with fair market value in arms-length transactions and not determined in a manner that takes into account the volume or value of any referrals or business otherwise generated between the parties to the lease;

c. An employee's stock purchase, savings, pension, profit sharing or other similar benefit plan in which the investor does not direct investments;

d. Investment interests (including shares of stock, bonds, debentures, notes or other debt instruments) in any corporation that is listed for trading on the New York Stock Exchange, the American Stock Exchange, or is a national market system security traded under automated interdealer quotation system operated by the National Association of Securities Dealers and has, at the end of the corporation's most recent fiscal year, total assets exceeding fifty million dollars ($50,000,000), provided that one of the following requirements is satisfied:

1. The investment interests are purchased in a nonissuer transaction as permitted by G.S. 78A-17(3); or

2. The investment interests are issued in a transaction terminating a health care provider's legal, beneficial, or investment interest in a privately held entity which such health care provider acquired before April 1, 1993, provided that such transaction is completed before July 1, 1995, and the health care provider liquidates the investment interests by July 1, 1997.

(10) "Investor" means an individual or entity owning a legal or beneficial ownership or investment interest, directly or indirectly (including without limitation, through an immediate family member, trust, affiliate, or another entity related to the investor).

(11) "Referral" means any referral of a patient for designated health care services, including, without limitation:

a. The forwarding of a patient by one health care provider to another health care provider or to an entity that provides any designated health care service; or

b. The request or establishment of a plan of care by a health care provider, which includes the provision of designated health care services.

"Referral" does not mean any designated health care service or any referral to an entity for a designated health care service which is provided by, or provided under the personal supervision of, a sole health care provider or by a member of a group practice to the patients of that health care provider or group practice. (1993, c. 482, s. 1; 1995, c. 509, s. 46; 1997-443, s. 11A.118(a).)

Legal Periodicals. — For comment, "The Physician as Entrepreneur: State and Federal Restrictions on Physician Joint Ventures," see 73 N.C.L. Rev. 293 (1994).

CASE NOTES

Cited in Jacobs v. Physicians Weight Loss Ctr. of Am., Inc., 173 N.C. App. 663, 620 S.E.2d 232, 2005 N.C. App. LEXIS 2280 (2005).

§ 90-406. Self-referrals prohibited.

(a) A health care provider shall not make any referral of any patient to any entity in which the health care provider or group practice or any member of the group practice is an investor.

(b) No invoice or claim for payment shall be presented by any entity or health care provider to any individual, third-party payer, or other entity for designated health care services furnished pursuant to a referral prohibited under this Article.

(c) If any entity collects any amount pursuant to an invoice or claim presented in violation of this section, the entity shall refund such amount to the payor or individual, whichever is applicable, within 10 working days of receipt.

(d) Any health care provider or other entity that enters into an arrangement or scheme, such as a cross-referral arrangement that the health care provider or entity knows or should know is intended to induce referrals of patients for designated health care services to a particular entity and that, if the health care provider directly made referrals to such entity, would constitute a prohibited referral under this section, shall be in violation of this section. (1993, c. 482, s. 1.)

Legal Periodicals. — For comment, "The Physician as Entrepreneur: State and Federal Restrictions on Physician Joint Ventures," see 73 N.C.L. Rev. 293 (1994).

CASE NOTES

Private Right of Action. — There is no private right of action for violations of G.S. 90-406. Jacobs v. Physicians Weight Loss Ctr. of Am., Inc., 173 N.C. App. 663, 620 S.E.2d 232, 2005 N.C. App. LEXIS 2280 (2005).

§ 90-407. Disciplinary action and penalties.

(a) Any violation of this Article shall constitute grounds for disciplinary action to be taken by the applicable Board pursuant to Chapter 90 of the General Statutes.

(b) Any health care provider who refers a patient in violation of G.S. 90-406(a), or any health care provider or entity who

(1) Presents or causes to be presented a bill or claim for service that the health care provider or entity knows or should know is prohibited by G.S. 90-406(b), or

(2) Fails to make a refund as required by G.S. 90-406(c),

shall be subject to a civil penalty of not more than twenty thousand dollars ($20,000) for each such bill or claim, to be recovered in an action instituted either in Wake County Superior Court, or any other county, by the Attorney General for the use of the State of North Carolina.

(c) Any health care provider or other entity that enters into an arrangement or scheme, such as cross-referral arrangement, that the health care provider or entity knows or should know is intended to induce referrals or patients for designated health care services to a particular entity and that, if the health care provider directly made referrals to such entity, would violate G.S. 90-406(d), shall be subject to a civil penalty of not more than seventy-five thousand dollars ($75,000) for each such circumvention arrangement or scheme, to be recovered in an action instituted either in Wake County Superior Court, or any other county, by the Attorney General for the use of the State of North Carolina. No civil penalty shall be assessed hereunder for any arrangement fully disclosed to the Attorney General in writing which receives a favorable determination by the Attorney General that, in his opinion, such arrangement is not a violation of G.S. 90-406, until a contrary determination is made in a court of law.

(d) The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1993, c. 482, s. 1; 1998-215, s. 74.)

Legal Periodicals. — For comment, "The Physician as Entrepreneur: State and Federal Restrictions on Physician Joint Ventures," see 73 N.C.L. Rev. 293 (1994).

CASE NOTES

Cited in Jacobs v. Physicians Weight Loss Ctr. of Am., Inc., 173 N.C. App. 663, 620 S.E.2d 232, 2005 N.C. App. LEXIS 2280 (2005).

§ 90-408. Exceptions for underserved areas.

(a) The provisions of G.S. 90-406 shall not apply to the referral by any health care provider to any entity in which such health care provider has a legal, beneficial, or investment interest upon receipt by such health care provider of a determination by the Department of Health and Human Services that:

(1) There is a demonstrated need in the county where the entity is located or is proposed to be located; and

(2) Alternative financing is not available on reasonable terms from other sources to develop such entity.

(b) The Department shall promulgate regulations governing the form and content of the applications to be filed by health care providers making application for exemption from G.S. 90-406, the business conduct of any such entity and the fair and reasonable access by all health care providers in such county to the entity. Any determination made by the Department under this section shall be applicable for a period of five years from the date of issuance.

(c) In all cases in which a health care provider refers a patient to a health care facility outside that health care provider's practice in which the health care provider has a legal, beneficial, or investment interest, the health care provider shall disclose to the patient the health care provider's investment interest. Patients shall be given a list of effective alternative facilities if any such facilities become reasonably available, informed that they have the option to use one of the alternative facilities, and assured that they will not be treated differently by the health care provider if they do not choose the health care provider's facility. (1993, c. 482, s. 1; 1997-443, s. 11A.118(a).)

Legal Periodicals. — For comment, "The Physician as Entrepreneur: State and Federal Restrictions on Physician Joint Ventures," see 73 N.C.L. Rev. 293 (1994).

§ 90-409: Reserved for future codification purposes.

Article 29.

Medical Records.

§ 90-410. Definitions.

As used in this Article:

(1) "Health care provider" means any person who is licensed or certified to practice a health profession or occupation under this Chapter or Chapters 90B or 90C of the General Statutes, a health care facility licensed under Chapters 131E or 122C of the General Statutes, and a representative or agent of a health care provider.

(2) "Medical records" means personal information that relates to an individual's physical or mental condition, medical history, or medical treatment, excluding X rays and fetal monitor records. (1993, c. 529, s. 4.3.)

Editor's Note. — The number of this Article was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 529, s. 4, having been 28.

§ 90-411. Record copy fee.

A health care provider may charge a reasonable fee to cover the costs incurred in searching, handling, copying, and mailing medical records to the patient or the patient's designated representative. The maximum fee for each request shall be seventy-five cents (75¢) per page for the first 25 pages, fifty cents (50¢) per page for pages 26 through 100, and twenty-five cents (25¢) for each page in excess of 100 pages, provided that the health care provider may impose a minimum fee of up to ten dollars ($10.00), inclusive of copying costs. If requested by the patient or the patient's designated representative, nothing herein shall limit a reasonable professional fee charged by a physician for the review and preparation of a narrative summary of the patient's medical record. This section shall only apply with respect to liability claims for personal injury, and claims for social security disability, except that charges for medical records and reports related to claims under Article 1 of Chapter 97 of the General Statutes shall be governed by the fees established by the North Carolina Industrial Commission pursuant to G.S. 97-26.1. This section shall not apply to Department of Health and Human Services Disability Determination Services requests for copies of medical records made on behalf of an applicant for Social Security or Supplemental Security Income disability. (1993, c. 529, s. 4.3; 1993 (Reg. Sess., 1994), c. 679, s. 5.5; 1995 (Reg. Sess., 1996), c. 742, s. 36; 1997-443, ss. 11.3, 11A.118(b).)

CASE NOTES

Cited in Street v. Smart Corp., 157 N.C. App. 303, 578 S.E.2d 695 (2003).

§ 90-412. Electronic medical records.

(a) Notwithstanding any other provision of law, any health care provider or facility licensed, certified, or registered under the laws of this State or any unit of State or local government may create and maintain medical records in an electronic format. The health care provider, facility, or governmental unit shall not be required to maintain a separate paper copy of the electronic medical record. A health care provider, facility, or governmental unit shall maintain electronic medical records in a legible and retrievable form, including adequate data backup.

(b) Notwithstanding any other provision of law, any health care provider or facility licensed, certified, or registered under the laws of this State or any unit of State or local government may permit authorized individuals to authenticate orders and other medical record entries by written signature, or by electronic or digital signature in lieu of a signature in ink. Medical record entries shall be authenticated by the individual who made or authorized the entry. For purposes of this section, "authentication" means identification of the author of an entry by that author and confirmation that the contents of the entry are what the author intended.

(c) The legal rights and responsibilities of patients, health care providers, facilities, and governmental units shall apply to records created or maintained in electronic form to the same extent as those rights and responsibilities apply to medical records embodied in paper or other media. This subsection applies with respect to the security, confidentiality, accuracy, integrity, access to, and disclosure of medical records. (1999-247, s. 2; 2007-248, s. 3.)

Effect of Amendments. — Session Laws 2007-248, s. 3, effective July 20, 2007, deleted "however, when a consent to treatment or authorization to disclose medical record information is contained in a paper writing, the writing shall be preserved in a durable medium, and its existence and location shall be noted in the electronic record" at the end of the second sentence of subsection (a).

§§ **90-413 through 90-449:** Reserved for future codification purposes.

Article 30.

Practice of Acupuncture.

§ 90-450. Purpose.

It is the purpose of this Article to promote the health, safety, and welfare of the people of North Carolina by establishing an orderly system of acupuncture licensing and to provide a valid, effective means of establishing licensing requirements. (1993, c. 303, s. 1.)

§ 90-451. Definitions.

The following definitions apply in this Article:

(1) Acupuncture. — A form of health care developed from traditional and modern Chinese medical concepts that employ acupuncture diagnosis and treatment, and adjunctive therapies and diagnostic techniques, for the promotion, maintenance, and restoration of health and the prevention of disease.

(2) Board. — The Acupuncture Licensing Board.

(3) Practice of acupuncture or practice acupuncture. — The insertion of acupuncture needles and the application of moxibustion to specific areas of the human body based upon acupuncture diagnosis as a primary mode of therapy. Adjunctive therapies within the scope of acupuncture may include massage, mechanical, thermal, electrical, and electromagnetic treatment and the recommendation of herbs, dietary guidelines, and therapeutic exercise. (1993, c. 303, s. 1.)

§ 90-452. Practice of acupuncture without license prohibited.

(a) Unlawful Acts. — It is unlawful to engage in the practice of acupuncture without a license issued pursuant to this Article. It is unlawful to advertise or otherwise represent oneself as qualified or authorized to engage in the practice of acupuncture without having the license required by this Article. A violation of this subsection is a Class 1 misdemeanor.

(b) Exemptions. — This section shall not apply to any of the following persons:

(1) A physician licensed under Article 1 of this Chapter.
(2) A student practicing acupuncture under the direct supervision of a licensed acupuncturist as part of a course of study approved by the Board.
(3) A chiropractor licensed under Article 8 of this Chapter. (1993, c. 303, s. 1; 1994, Ex. Sess., c. 14, s. 48.)

§ 90-453. Acupuncture Licensing Board.

(a) Membership. — The Acupuncture Licensing Board shall consist of nine members, three appointed by the Governor and six by the General Assembly. The six members appointed by the General Assembly shall be licensed to practice acupuncture in this State and shall not be licensed physicians under Article 1 of this Chapter. The persons initially appointed to those positions by the General Assembly need not be licensed at the time of selection but shall have met the qualifications under G.S. 90-455(a)(4) and (5). Of the Governor's three appointments, one shall be a layperson who is not employed in a health care profession; one shall be a physician licensed under Article 1 of this Chapter who has successfully completed 200 hours of Category I American Medical Association credit in medical acupuncture training as recommended by the American Academy of Medical Acupuncture; and one shall be licensed to practice acupuncture in this State. Of the members to be appointed by the General Assembly, three shall be appointed upon the recommendation of the Speaker of the House of Representatives, and three shall be appointed upon the recommendation of the President Pro Tempore of the Senate. The members appointed by the General Assembly must be appointed in accordance with G.S. 120-121.

Members serve at the pleasure of the appointing authority. Vacancies shall be filled by the original appointing authority and the term shall be for the balance of the unexpired term. A vacancy by a member appointed by the General Assembly must be filled in accordance with G.S. 120-122.

(b) Terms. — The members appointed initially by the Governor shall each serve a term ending on June 30, 1994. Of the General Assembly's initial appointments upon the recommendation of the Speaker of the House of Representatives, one shall serve a term ending June 30, 1995, and the other shall serve a term ending June 30, 1996. Of the General Assembly's initial appointments upon the recommendation of the President Pro Tempore of the Senate, one shall serve a term ending June 30, 1995, and the other shall serve a term ending June 30, 1996. After the initial appointments, all members shall be appointed for terms of three years beginning on July 1. No person may serve more than two consecutive full terms as a member of the Board.

(c) Meetings. — The Board shall meet at least once each year within 45 days after the appointment of the new members. At the Board's first meeting each year after the new members have been appointed, the members shall elect a chair of the Board and a secretary for the year. No person shall chair the Board for more than five consecutive years. The Board shall meet at other times as needed to perform its duties. A majority of the Board shall constitute a quorum for the transaction of business.

(d) Compensation. — Members of the Board are entitled to compensation and to reimbursement for travel and subsistence as provided in G.S. 93B-5. (1993, c. 303, s. 1; 2007-472, s. 1.)

Editor's Note. — Session Laws 2007-472, s. 2, provides: "Notwithstanding the provisions of G.S. 90-453(a), as enacted in Section 1 of this act, the member appointed by the Governor who shall be licensed to practice acupuncture in this State and the two members appointed by the General Assembly, one upon the recommendation of the Speaker of the House of Representatives and one upon the recommendation of the President Pro Tempore of the Senate, shall each serve a three-year term commencing July 1, 2007, and ending June 30, 2010. Members described in this section shall serve for the terms for which they were appointed and until their successors are appointed and qualified."

Effect of Amendments. — Session Laws 2007-472, s. 1, effective August 29, 2007, in subsection (a), in the first sentence, substitued "nine members" for "six members," substituted "three appointed" for "two appointed" and substituted "six by" for "four by," substituted "six members" for "four members" in the second sentence, in the fourth sentence, substituted "three appointments" for "two appointments," substituted "one" for "the other," and inserted "one shall be licensed to practice acupuncture in this State" at the end of the sentence, substituted "three" for "two" twice in the fifth sentence.

§ 90-454. Powers and duties of Board.

The Board may:

(1) Deny, issue, suspend, and revoke licenses in accordance with rules adopted by the Board, and may collect fees, investigate violations of this Article, and otherwise administer the provisions of this Article.

(2) Sponsor or authorize other entities to offer continuing education programs, and approve continuing education requirements for license renewal.

(3) Establish requirements for, collect fees from, and approve schools of acupuncture in this State. The requirements shall be at least as stringent as the core curricula standards of the Council of Colleges of Acupuncture and Oriental Medicine.

(4) Sue to enjoin violations of G.S. 90-452. The court may issue an injunction even though no person has yet been injured as a result of the unauthorized practice.

(5) Adopt and use a seal to authenticate official documents of the Board.

(6) Employ and fix the compensation of personnel and professional advisors, including legal counsel, as may be needed to carry out its functions, and purchase, lease, rent, sell, or otherwise dispose of personal and real property for the operations of the Board.

(7) Expend funds as necessary to carry out the provisions of this Article from revenues and interest generated by fees collected under this Article.

(8) Adopt rules to implement this Article in accordance with Chapter 150B of the General Statutes.

(9) Establish practice parameters to become effective July 1, 1995. The practice parameters shall be applicable to general and specialty areas of practice. The Board shall review the parameters on a regular basis and shall require licensees to identify parameters being utilized, the plan of care, and treatment modalities utilized in accordance with the plan of care. (1993, c. 303, s. 1; 2005-379, s. 1.)

§ 90-455. Qualifications for license; renewal; inactive, suspended, expired, or lapsed license.

(a) Initial License. — To receive a license to practice acupuncture, a person shall meet all of the following requirements:

- (1) Submit a completed application as required by the Board.
- (2) Submit any fees required by the Board.
- (3) Submit proof of successful completion of a licensing examination administered or approved by the Board.
- (4) Provide documentary evidence of having met one of the following standards of education, training, or demonstrated experience:
  - a. Successful completion of a three-year postgraduate acupuncture college or training program approved by the Board.
  - b. Continuous licensure to practice acupuncture by an agency of another state or another state whose qualifications for licensure meet or exceed those of this State for at least 10 years before application for licensure in this State during which time no disciplinary actions were taken or are pending against the applicant and submitting proof to the Board that the applicant has fulfilled at least an average of 20 continuing education units in acupuncture or health care-related studies for each of the 10 years preceding application for licensure.
- (5) Submit proof of successful completion of the Clean Needle Technique Course offered by the Council of Colleges of Acupuncture and Oriental Medicine.
- (6) Be of good moral character.
- (7) Is not currently or has not engaged in any practice or conduct that would constitute grounds for disciplinary action pursuant to G.S. 90-456.
- (8) Submit a form signed by the applicant attesting to the intention of the applicant to adhere fully to the ethical standards adopted by the Board.

(b) Renewal of License. — The license to practice acupuncture shall be renewed every two years. Upon submitting all required declarations, documents, and fees required by the Board for renewal, the applicant's license shall remain in good standing for a period of up to 120 days during which time the Board shall meet to review and act upon the application for renewal. To renew a license, an applicant shall:

- (1) Submit a completed application as required by the Board.
- (2) Submit any fees required by the Board.
- (3) Upon request by the Board, submit proof of completion of 40 hours of Board-approved continuing education units within each renewal period.

(c) Inactive License. — A licensed acupuncturist who is not actively engaged in the practice of acupuncture in this State and who does not wish to renew the license may direct the Board to place the license on inactive status. A license may remain on inactive status for a period not to exceed eight years from the date the license was placed on inactive status. Upon an applicant's proof of completion of 40 hours of Board-approved continuing education units, payment of all fees, a determination by the Board that the applicant is not engaged in any prohibited activities that would constitute the basis for discipline as set forth in G.S. 90-456, and has not engaged in any of those prohibited activities during the period of time the license has been on inactive status, the Board may activate the license of the applicant.

(d) Suspended License. — A suspended license is subject to the renewal requirements of this section and may be renewed as provided in this section.

This renewal does not entitle the licensed person to engage in the licensed activity or in any other conduct or activity in violation of the order or judgment by which the license was suspended, until the license is reinstated. If a license revoked on disciplinary grounds is reinstated and requires renewal, the licensed person shall pay the renewal fee and any applicable late fee.

(e) Expired License. — A license that has expired as a result of failure to renew pursuant to subsection (b) of this section may be renewed no later than two years after its expiration. The date of renewal shall be the date the Board acts to approve the renewal. To apply for renewal of an expired license, the applicant shall:

(1) File an application for renewal on a form provided by the Board.
(2) Submit proof of completion of all continuing education requirements.
(3) Pay all accrued renewal fees, along with an expired license fee.

(f) Lapsed License. — A license that has lapsed as a result of not being renewed within two years after the license expired or not reactivated within eight years after the license lapsed is deemed inactive. A lapsed license may not be renewed, reactivated, or reinstated. A person with a lapsed license may apply to obtain a new license pursuant to subsection (a) of this section. (1993, c. 303, s. 1; 2005-379, s. 2.)

§ 90-456. Prohibited activities.

The Board may deny, suspend, or revoke a license, require remedial education, or issue a letter of reprimand, if a licensed acupuncturist or applicant:

(1) Engages in false or fraudulent conduct which demonstrates an unfitness to practice acupuncture, including any of the following activities:
  a. Misrepresentation in connection with an application for a license or an investigation by the Board.
  b. Attempting to collect fees for services which were not performed.
  c. False advertising, including guaranteeing that a cure will result from an acupuncture treatment.
  d. Dividing, or agreeing to divide, a fee for acupuncture services with anyone for referring a patient.
(2) Fails to exercise proper control over one's practice by any of the following activities:
  a. Aiding an unlicensed person in practicing acupuncture.
  b. Delegating professional responsibilities to a person the acupuncturist knows or should know is not qualified to perform.
  c. Failing to exercise proper control over unlicensed personnel working with the acupuncturist in the practice.
(3) Fails to maintain records in a proper manner by any of the following:
  a. Failing to keep written records describing the course of treatment for each patient.
  b. Refusing to provide to a patient upon request records that have been prepared for or paid for by the patient.
  c. Revealing personally identifiable information about a patient, without consent, unless otherwise allowed by law.
(4) Fails to exercise proper care for a patient, including either of the following:
  a. Abandoning or neglecting a patient without making reasonable arrangements for the continuation of care.
  b. Exercising, or attempting to exercise, undue influence within the acupuncturist/patient relationship by making sexual advances or requests for sexual activity or making submission to such conduct a condition of treatment.

(5) Displays habitual substance abuse or mental impairment so as to interfere with the ability to provide effective treatment.
(6) Is convicted of or pleads guilty or no contest to any crime which demonstrates an unfitness to practice acupuncture.
(7) Negligently fails to practice acupuncture with the level of skill recognized within the profession as acceptable under such circumstances.
(8) Willfully violates any provision of this Article or rule of the Board.
(9) Has had a license denied, suspended, or revoked in another jurisdiction for any reason which would be grounds for this action in this State. (1993, c. 303, s. 1.)

§ 90-457. Fees.

The Board may establish fees, not to exceed the following amounts:

(1) Application and an examination, one hundred dollars ($100.00).
(2) Issuance of a license, five hundred dollars ($500.00).
(3) Renewal of a license, three hundred dollars ($300.00).
(4) Renewal of a license, an additional late fee of two hundred dollars ($200.00).
(5) Duplicate license fee, twenty-five dollars ($25.00).
(6) Duplicate wall certificate fee, fifty dollars ($50.00).
(7) Labels for licensed acupuncturists, one hundred fifty dollars ($150.00).
(8) Returned check fee, forty dollars ($40.00).
(9) Licensure verification, forty dollars ($40.00).
(10) Name change, twenty-five dollars ($25.00).
(11) Continuing education program approval fee, fifty dollars ($50.00).
(12) Continuing education provider approval fee, two hundred dollars ($200.00).
(13) Initial school application fee, one thousand dollars ($1,000).
(14) Renewal school approval fee, seven hundred fifty dollars ($750.00).
(15) Inactive license renewal fee, fifty dollars ($50.00), payment due for each two-year extension. (1993, c. 303, s. 1; 2005-379, s. 3.)

§ 90-457.1. Continuing education.

(a) Applicants for license renewal shall complete all required continuing education units during the two calendar years immediately preceding the license renewal date.

(b) The Board shall set the minimum hours for study of specific subjects within the scope of practice of acupuncture. The Board shall set the maximum hours for subjects that have content relating to any health service and are relevant to the practice of acupuncture. In addition to formally organized courses, the Board may approve courses, such as personal training in nonaccredited programs and teaching diagnosis and treatment, as long as these courses have received prior approval by the Board.

(c) For purposes of this Article, one continuing education unit is defined as one contact hour or 50 minutes.

(d) The Board may choose to audit the records of any licensee who has reported and sworn compliance with the continuing education requirement. The audit of any licensee shall not take place more than every two years.

(e) Failure to comply with the continuing education requirements shall prohibit license renewal and result in the license reverting to expired status at the end of the renewal period.

(f) A licensee may apply to the Board for an extension of time to complete the portion of continuing education requirements that the licensee is unable to meet due to such unforeseeable events as military duty, family emergency, or prolonged illness. The Board may, at its discretion, grant an extension for a maximum of one licensing period. The Board shall receive the request no later than 30 days before the license renewal date. The applicant shall attest that the request is a complete and accurate statement, and the request shall contain the following:

(1) An explanation of the licensee's failure to complete the continuing education requirements.
(2) A list of continuing education courses and hours that the licensee has completed.
(3) The licensee's plan for satisfying the continuing education requirements. (2005-379, s. 4.)

§ 90-458. Use of titles and display of license.

The titles "Licensed Acupuncturist" or "Acupuncturist" shall be used only by persons licensed under this Article. Possession of a license under this Article does not by itself entitle a person to identify oneself as a doctor or physician. Each person licensed to practice acupuncture shall post the license in a conspicuous location at the person's place of practice. (1993, c. 303, s. 1.)

§ 90-459. Third-party reimbursements.

Nothing in this Article shall be construed to require direct third-party reimbursement to persons licensed under this Article. (1993, c. 303, s. 1.)

§§ 90-460 through 90-469: Reserved for future codification purposes.

Article 31.

Institute of Medicine.

§ 90-470. Institute of Medicine.

The persons appointed under the provisions of this section are declared to be a body politic and corporate under the name and style of the North Carolina Institute of Medicine, and by that name may sue and be sued, make and use a corporate seal and alter the same at pleasure, contract and be contracted with, and shall have and enjoy all the rights and privileges necessary for the purposes of this section. The corporation shall have perpetual succession.

The purposes for which the corporation is organized are to:

(1) Be concerned with the health of the people of North Carolina;
(2) Monitor and study health matters;
(3) Respond authoritatively when found advisable;
(4) Respond to requests from outside sources for analysis and advice when this will aid in forming a basis for health policy decisions.

The 18 initial members of the North Carolina Institute of Medicine shall be appointed by the Governor.

The initial members are authorized, prior to expanding the membership, to establish bylaws, to procure facilities, employ a director and staff, to solicit, receive and administer funds in the name of the North Carolina Institute of Medicine, and carry out other activities necessary to fulfill the purposes of this section.

The members shall select with the approval of the Governor additional members, so that the total membership will not exceed a number determined by the Board of Directors in its bylaws. The membership should be distinguished and influential leaders from the major health professions, the hospital industry, the health insurance industry, State and county government and other political units, education, business and industry, the universities, and the university medical centers.

The North Carolina Institute of Medicine may receive and administer funds from private sources, foundations, State and county governments, federal agencies, and professional organizations.

The director and staff of the North Carolina Institute of Medicine should be chosen from those well established in the field of health promotion and medical care.

For the purposes of Chapter 55A of the General Statutes, the members appointed under this section shall be considered the initial board of directors.

The North Carolina Institute of Medicine is declared to be under the patronage and control of the State.

The General Assembly reserves the right to alter, amend, or repeal this section. (1983, c. 923, s. 197; 1995, c. 297, s. 1; 2007-25, s. 1.)

Editor's Note. — Session Laws 2007-323, s. 10-53A(a)-(e), provides: "(a) The three hundred thousand dollars ($300,000) appropriated in this act to the Department of Health and Human Services for allocation to the North Carolina Institute of Medicine (NC IOM) shall be used by the IOM to hire new staff, to undertake additional studies annually at the request of the General Assembly, and to support a rapid-response capacity to analyze secondary data sources on health or health-related data to the General Assembly and to State and local government agencies.

"(b) The North Carolina Institute of Medicine shall use a portion of the funds allocated to it in subsection (a) of this section to convene a task force to study substance abuse services in North Carolina. The NC IOM shall provide staff and arrange for meeting facilities for the Task Force.

"(c) The Task Force shall include the following:

"(1) Members of the North Carolina Senate and the North Carolina House of Representatives. Senate members shall be appointed by the President Pro Tempore of the Senate. Members of the House of Representatives shall be appointed by the Speaker of the House of Representatives.

"(2) Representatives of the North Carolina Department of Health and Human Services, local management entities, the North Carolina Department of Justice, the NC Office of the Attorney General, the North Carolina Community College System, and the North Carolina Department of Public Instruction.

"(3) Providers of substance abuse services, academics and researchers with substance abuse expertise, local governmental agencies, business and industry, domestic violence organizations, consumer and family members, and other interested members of the public.

"The IOM shall appoint as cochairs of the Task Force one member of the North Carolina House of Representatives, one member of the North Carolina Senate, and one member who provides substance abuse services selected from the Task Force.

"(d) The Task Force shall:

"(1) Identify the continuum of services needed for treatment of substance abuse services, including, but not limited to, prevention, outpatient services, residential treatment, and recovery supports. The Task Force shall examine what public and private organizations currently provide services, where services are offered, and gaps in the current service delivery system. The Task Force shall examine services that are available through public and private systems, but shall focus on the availability of substance abuse services through the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services and local management entities. The Task Force shall identify which services should be available locally throughout the State, and which services should be offered regionally or statewide.

"(2) Identify evidence-based models of care or promising practices in coordination with the NC Practice Improvement Collaborative for the prevention and treatment of substance abuse and develop recommendations to incorporate these models into the current substance abuse service system of care.

"(3) Examine different financing options to pay for substance abuse services at the local, regional, and State levels. The Task Force shall also consider different reimbursement methodology, including, but not limited to, fee-for-service, grant funding, case rates, and capitation.

"(4) Examine the adequacy of the current and future substance abuse workforce, including, but not limited to, credentialed substance abuse counselors, availability of substance abuse workers throughout the State, and reimbursement levels. The Task Force shall develop a workforce education plan, if needed, to address current or future workforce shortages.

"(5) Develop strategies to identify people in need of substance abuse services, including people who are dually diagnosed as having mental health and substance abuse problems. In addition, the Task Force shall examine strategies for providing substance abuse services to people with substance abuse problems identified through the State hospitals, and the judicial and social services systems.

"(6) Examine barriers that people with substance abuse problems have in accessing publicly funded substance abuse services and explore possible strategies for improving access.

"(7) Examine current outcome measures and identify other appropriate outcome measures to assess the effectiveness of substance abuse services, if necessary.

"(8) Examine the economic impact of substance abuse in North Carolina. If data are available, the Task Force shall estimate the impact of substance abuse on the court system, health care system (e.g., through preventable hospitalizations), social services, and worker productivity.

"(9) Make recommendations on the implementation of a cost-effective plan for prevention, early screening, diagnosis, and treatment of North Carolinians with substance abuse problems. In so doing, the Task Force shall identify any policy changes needed to implement the plan and develop cost estimates associated with different recommendations. The Task Force shall also examine existing public and private financing options and explore how existing funding could be used more effectively to pay for the recommended services.

"(e) The North Carolina Institute of Medicine's Substance Abuse Services Task Force shall submit its interim report and recommendations to the 2008 General Assembly upon its convening and to the chairs of the Senate Health Committee, the House of Representatives Health Committee, the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services, and the Governor. The final report shall be submitted no later than the convening of the 2009 General Assembly. Upon submission of this report, the Task Force shall terminate."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-25, s. 1, effective April 25, 2007, and applicable to appointments made on or after that date, substituted "a number determined by the Board of Directors in its bylaws" for "100" in the first sentence of the fifth undesignated paragraph.

§§ **90-471 through 90-499:** Reserved for future codification purposes.

ARTICLE 32.

Employee Assistance Professionals.

§ 90-500. Definitions.

As used in this Article, unless the context requires otherwise:

(1) "Board" means the Board of Employee Assistance Professionals.

(2) "Certified employee assistance professional" means an employee assistance professional who is certified by the Employee Assistance Certification Commission and who has the necessary professional qualifications to provide the employee assistance program services listed in subdivision (2) of this section, which services can be worksite based and are designed to assist in the identification and resolution of productivity problems associated with employees impaired by personal concerns.

(3) "Consultation" means the act of giving expert advice on the role of an employee assistance professional in assisting troubled employees.

(4) "Employee Assistance Certification Commission" means the national body with the authority to certify employee assistance professionals based on experience and the passing of a national examination.

(5) "Employee assistance professional" means a person who provides the following services to the public in a program designed to assist in the identification and resolution of job performance problems in the workplace:

a. Expert consultation and training of appropriate persons in the identification and resolution of job performance issues related to the employees' personal concerns.

b. The confidential, appropriate, and timely assessment of problems.

c. Short-term problem resolution for issues that do not require clinical counseling or treatment.

d. Referrals for appropriate diagnosis, treatment, and assistance to certified or licensed professionals when clinical counseling or treatment is required.

e. Establishment of linkages between workplace and community resources that provide such services.

f. Follow-up services for employees and dependents who use such services. (1995 (Reg. Sess., 1996), c. 720, s. 1.)

Editor's Note. — This Article was enacted by Session Laws 1995 (Reg. Sess., 1996), c. 720, s. 1 as Article 31. The number of this Article was assigned by the Revisor of Statutes.

§ 90-501. Board of Employee Assistance Professionals; members.

(a) The Board of Employee Assistance Professionals is created.

(b) The Board consists of five members to be appointed by the Governor. Members shall serve for terms of five years. All members must be residents of North Carolina.

(c) The following requirements shall apply to appointments to the Board:

(1) Two members shall be licensed employee assistance professionals who are privately employed.

(2) One member shall not be directly or indirectly engaged in the employee assistance profession.

(3) Two members shall be licensed employee assistance professionals.

(d) The licensed employee assistance professionals appointed pursuant to subdivision (1) or (3) of subsection (c) of this section must have been engaged in the active practice of being an employee assistance professional for no less than five years.

(e) The North Carolina Chapter of the Employee Assistance Professionals Association shall submit a list of at least three nominees for each appointment. The Governor may make appointments from this list.

(f) Any member of the Board shall be removed from the Board upon certification by the Board to the Governor that the member no longer satisfies the employment requirements set forth in subsection (c) of this section for appointment to the Board. The Governor shall appoint a replacement from a list of nominees submitted by the North Carolina Chapter of the Employee Assistance Professionals Association within 60 days of the Governor's receiving the list of nominees.

(g) Members shall serve until their successors are appointed and duly qualified. Any vacancy occurring on the Board shall be filled by the Governor appointing a member for the balance of the unexpired term. A Board member who has served a five-year term shall not be eligible for reappointment during the one-year period following the appointment of that member's successor.

(h) In making appointments to the Board, the Governor shall strive to ensure that at least one member serving on the Board is 60 years of age or older and that at least one member serving on the Board is a member of a racial minority.

(i) For each day engaged in the business of the Board, members shall receive compensation of fifty dollars ($50.00) and shall receive reimbursement for actual expenses.

(j) Annually, the members of the Board shall elect a chair and a secretary.

(k) The Board shall meet as frequently as is reasonably necessary to implement the provisions of this Article. Three or more members of the Board shall constitute a quorum for the purpose of transacting business.

(*l*) For administrative purposes, the Board shall be an independent entity. The Department of Health and Human Services shall provide staff to the Board to assist the Board in transacting its business. (1995 (Reg. Sess., 1996), c. 720, s. 1; 1997-443, s. 11A.118(a).)

§ 90-502. Powers and duties of the Board.

The Board shall:

(1) Approve educational programs and establish and prescribe the curricula and minimum standards for training required to prepare persons for licensure and licensure renewal under this Article.
(2) Adopt rules governing the issuance, renewal, suspension, and revocation of licenses.
(3) Establish minimum standards governing the activities and operations of licensed employee assistance professionals.
(4) Issue licenses.
(5) Establish and collect fees.
(6) Assess civil penalties as provided in this Article. (1995 (Reg. Sess., 1996), c. 720, s. 1.)

§ 90-503. License requirements.

(a) An applicant must satisfy all of the following requirements to be eligible to be licensed under this Article:

(1) Have obtained a masters degree.
(2) Have obtained a degree in any field of human services at either the undergraduate degree level or the masters degree level.
(3) Be certified by the Employee Assistance Certification Commission.
(4) Maintain certification by being recertified by the Employee Assistance Certification Commission every three years by either passing an examination or by completing continuing education in accordance with rules adopted by the Board.

(b) Notwithstanding the requirements of subsection (a) of this section, a person who has received a certification as an employee assistance professional from the Employee Assistance Certification Commission may apply until January 1, 2000, to the Board for licensure and shall receive a license as an employee assistance professional upon proof of such certification and upon payment of a fee in an amount established by the Board.

(c) Licenses must be obtained by each individual employee assistance professional. A company or organization shall not be issued a license.

(d) Any person desiring to be licensed under this Article as an employee assistance professional shall apply to the Board on a form approved by the Board. The applicant shall submit with the application form a fee in an amount established by the Board. The applicant shall complete the application, submitting all information the Board deems necessary to evaluate the applicant.

(e) Each license shall be valid for a period of up to three years. (1995 (Reg. Sess., 1996), c. 720, s. 1.)

§ 90-504. License renewals.

(a) Renewal of any license issued under the provisions of this Article may be accomplished by paying a fee in an amount established by the Board, submitting a renewal application, and otherwise complying with rules adopted by the Board.

(b) Any person licensed as an employee assistance professional shall renew his or her license according to rules adopted by the Board.

(c) If any licensee fails to renew his or her license within 60 days after the date the application becomes due, the license of that person shall be revoked automatically without further notice or hearing, unless the licensee specifically requests an extension. (1995 (Reg. Sess., 1996), c. 720, s. 1.)

§ 90-505. Requirements for persons licensed out-of-state.

An applicant who is currently certified by the Employee Assistance Certification Commission or licensed in another state and who:

(1) Is in good standing in another state;
(2) Meets the licensure requirements approved by the Board;
(3) Resides in this State, or resides outside the State and is employed by a service operating in this State; and
(4) Submits an application with a fee in an amount established by the Board

is eligible to apply for a license under this Article. (1995 (Reg. Sess., 1996), c. 720, s. 1.)

§ 90-506. Violations; enforcement; penalties.

(a) Whenever the Board has reason to believe that a violation of this Article, any rule adopted by the Board, or any order of the Board is occurring or about to occur, the Board may initiate any of the following enforcement measures:

(1) Commence a civil action in any court of the county in which the alleged offender resides or does business. The Board may seek and the court may grant any form of relief, including injunctive relief.
(2) If the activity involved appears to be a criminal offense, refer the matter to the appropriate district attorney for prosecution.
(3) For any person who fails to be licensed as required by this Article, the Board may assess a civil penalty against that person in an amount not to exceed fifty dollars ($50.00) per day for each violation.

(b) In assessing a penalty under subdivision (3) of subsection (a) of this section, the Board shall consider all of the following:

(1) Whether the amount of the penalty imposed will be a substantial economic deterrent to the violator.
(2) The circumstances leading to the violation.
(3) The severity of the violation and the risk of harm to the employee.
(4) Any economic benefits gained by the violator as a result of the violation.

(c) Civil penalties assessed by the Board pursuant to subdivision (3) of subsection (a) of this section are final 30 days after the date the assessment is served upon the alleged violation, unless the alleged violator seeks review by the Board within that time.

The clear proceeds of these civil penalties shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1995 (Reg. Sess., 1996), c. 720, s. 1; 1998-215, s. 133.)

§ 90-507. Hearings.

Hearings before the Board on enforcement or disciplinary actions shall be conducted in accordance with Article 3A of Chapter 150B of the General Statutes. (1995 (Reg. Sess., 1996), c. 720, s. 1.)

§ 90-508. Representation as licensed professional.

No person shall, by verbal claim, advertisement, letterhead, card, or in any other way, represent that he or she is a licensed employee assistance professional unless that person possesses a valid license pursuant to this Article. Nothing in this Article shall prohibit an unlicensed person from providing the services described in G.S. 90-500(3) if that person refrains from representing that he or she is a licensed employee assistance professional. (1995 (Reg. Sess., 1996), c. 720, s. 1.)

§ 90-509. Other prohibited activities.

The Board may deny, suspend, or revoke any license, or otherwise discipline an applicant or holder of a license who the Board finds engaged in one or more of the following activities:

(1) Willfully or repeatedly violating any provision of this Article or any rule of the Board adopted pursuant to this Article.
(2) Fraudulently or deceptively procuring or attempting to procure a license, presenting evidence of qualification to the Board, or processing the examination to secure a license.
(3) Willfully failing to display a license.
(4) Fraudulently or deceptively misrepresenting or engaging in dishonest or illegal practices in or connected with the practice of employee assistance.
(5) Circulating knowingly untrue, fraudulent, misleading, or deceptive advertising.
(6) Engaging in gross malpractice, or a pattern of continued or repeated malpractice, ignorance, negligence, or incompetence in the course of the practice of employee assistance.
(7) Unprofessionally or unethically engaging in practices in connection with the practice of employee assistance, which activities are in violation of the standards of professional conduct prescribed by the Board.
(8) Engaging in conduct reflecting unfavorably upon the profession of employee assistance professionals.
(9) Willfully making any false statement as to material in any oath or affidavit when such statement is required by this Article.
(10) Being convicted of a felony five years prior to applying for a license or while licensed.
(11) Permitting or allowing another to use another person's license for the purpose of providing or offering employee assistance services.
(12) Engaging in practice under a false or assumed name, or impersonating another practitioner of a like, similar, or different name.
(13) Failing to inform clients fully about the limits of confidentiality in a given situation, the purposes for which information is obtained, and how it may be used.
(14) Referring a client to further obtain services from a source that would directly or indirectly financially profit the referring licensed employee assistance professional when these services are not in the best interest of the client.

(15) Denying a client's reasonable requests for access to any records concerning the client, or, when providing clients with access to records, failing to take due care to protect the confidences of other information contained in those records.

(16) Failing to obtain the informed consent of a client before taping, recording, or permitting third-party observation of the client's activities.

(17) Failing to clarify the nature and directions of an employee assistance professional's loyalties and responsibilities as mandated by law and as mandated by their contractual agreement with a company.

(18) Failing to fully inform consumers as to the purpose and nature of evaluative research, treatment, or educational training or failing to freely acknowledge that a client, student, or participant in research has freedom of choice with regard to his or her participation.

(19) Failing to attempt to terminate a consulting relationship when it is reasonably clear that the relationship is not benefiting the consumer. An employee assistance professional who finds that his or her services are being used by employers beyond their contractual agreement, or beyond their licensed qualification, in a way that is not beneficial to the participants, shall make his or her observations known to the responsible persons and propose modification or termination of the engagement. Upon request, the Board shall advise and clarify in regard to such matters within a reasonable amount of time, and shall not revoke the employee assistance professional's license.

(20) Consenting through a contractual agreement to provide services such as prolonged therapy, that the employee assistance professional is not licensed to provide. (1995 (Reg. Sess., 1996), c. 720, s. 1.)

§ 90-510. Investigations; good faith reports of violations.

The Board may, on its own motion, investigate any report indicating that a licensee is or may be in violation of the provisions of this Article. Any person who in good faith reports to the Board any such information shall not be subject to suit for civil damages as a result of reporting this information. (1995 (Reg. Sess., 1996), c. 720, s. 1.)

§ 90-511. Employee assistance professional practice by members of other professional groups.

(a) Nothing in this Article shall be construed to prevent qualified members of other professional groups, as determined by the Board, including, but not limited to, licensed psychologists, licensed psychological associates, licensed clinical social workers, nurses, physicians, or members of the clergy, from doing or advertising that they perform the work of an employee assistance professional consistent with the accepted standards of their respective professions.

(b) Nothing in this Article shall be construed to prevent a staff member of a community mental health center from advertising, claiming, working, or in any other way representing that the member is an employee assistance professional consistent with the standards of a mental health center. (1995 (Reg. Sess., 1996), c. 720, s. 1.)

§§ 90-512 through 90-514: Reserved for future codification purposes.

Article 33.

Industrial Hygiene.

§ 90-515. Definitions.

The following definitions apply in this Article:

(1) "American Board of Industrial Hygiene". — A nonprofit corporation incorporated in 1960 in Pennsylvania to improve the practice of the profession of Industrial Hygiene by certifying individuals who meet its education and experience standards and who pass its examination.

(2) "Certified Industrial Hygienist (CIH)". — A person who has met the education, experience, and examination requirements established by the American Board of Industrial Hygiene for a Certified Industrial Hygienist (CIH).

(3) "Industrial Hygiene". — The applied science devoted to the anticipation, evaluation, and control of contaminants and stressors that may cause sickness, impaired health and well-being, or significant discomfort and inefficiency among workers and the general public.

(4) "Industrial Hygienist". — A person who, through special studies and training in chemistry, physics, biology, and related sciences, has acquired competence in industrial hygiene. The special studies and training must have been sufficient to confer competence in the: (i) anticipation and recognition of environmental contaminants and stressors to which workers and other members of the public could be exposed in industrial operations, office buildings, homes, and the general community; (ii) assessment of the likely effects on the health and well-being of individuals exposed to these contaminants and stressors; (iii) quantification of levels of human exposure to these contaminants and stressors through scientific measurement techniques; and (iv) designation of methods to eliminate or to control these contaminants and stressors, or to reduce the level of human exposure to them.

(5) "Industrial Hygienist in Training (IHIT)". — A person who has met the education, experience, and examination requirements established by the American Board of Industrial Hygiene for an Industrial Hygienist in Training (IHIT). (1997-195, s. 1.)

§ 90-516. Unlawful acts.

(a) No person shall practice or offer to practice as a Certified Industrial Hygienist, use any advertisement, business card, or letterhead or make any other verbal or written communication that the person is a Certified Industrial Hygienist or acquiesce in such a representation unless that person is certified by the American Board of Industrial Hygiene.

(b) No person shall practice or offer to practice as an Industrial Hygienist in Training, use any advertisement, business card, or letterhead or make any other verbal or written communication that the person is an Industrial Hygienist in Training or acquiesce in such a representation unless that person is certified by the American Board of Industrial Hygiene.

(c) A violation of this Article shall be punished as a Class 2 misdemeanor.

(d) Any person, including the Attorney General, may apply to the superior court for injunctive relief to restrain a person who has violated this Article from continuing these illegal practices. The court may grant injunctive relief regardless of whether criminal prosecution or other action has been or may be instituted as a result of the violation. In the court's consideration of the issue of whether to grant or continue an injunction sought under this subsection, a showing of conduct in violation of the terms of this Article shall be sufficient to meet any requirement of general North Carolina injunction law for irreparable harm.

(e) The venue for actions brought under this Article is the superior court of any county in which the illegal or unlawful acts are alleged to have been committed or in the county where the defendant resides.

(f) Nothing in this Article shall be construed as authorizing a person certified in accordance with this Article to engage in the practice of engineering, nor to restrict or otherwise affect the rights of any person licensed to practice engineering under Chapter 89C of the General Statutes; provided, however, that no person shall use the title "Certified Industrial Hygienist" unless the person has complied with the provisions of this Article. (1997-195, s. 1.)

§§ 90-517 through 90-521: Reserved for future codification purposes.

ARTICLE 34.

Athletic Trainers.

§ 90-522. Title; purpose.

(a) This Article may be cited as the "Athletic Trainers Licensing Act".

(b) The practice of athletic trainer services affects the public health, safety, and welfare. Licensure of the practice of athletic trainer services is necessary to ensure minimum standards of competency and to provide the public with safe athletic trainer services. It is the purpose of this Article to provide for the regulation of persons offering athletic trainer services. (1997-387, s. 1.)

§ 90-523. Definitions.

The following definitions apply in this Article:

(1) Athletes.— Members of sports teams, including professional, amateur, and school teams; or participants in sports or recreational activities, including training and practice activities, that require strength, agility, flexibility, range of motion, speed, or stamina.

(2) Athletic trainer. — A person who, under a written protocol with a physician licensed under Article 1 of Chapter 90 of the General Statutes and filed with the North Carolina Medical Board, carries out the practice of care, prevention, and rehabilitation of injuries incurred by athletes, and who, in carrying out these functions, may use physical modalities, including heat, light, sound, cold, electricity, or mechanical devices related to rehabilitation and treatment. A committee composed of two members of the North Carolina Medical Board and two members of the North Carolina Board of Athletic Trainer Examiners shall jointly define by rule the content, format, and minimum requirements for the written protocol required by this subdivision. The members shall be selected by their respective boards. The decision of this committee shall be binding on both Boards unless changed by mutual agreement of both Boards.

(3) Board. — The North Carolina Board of Athletic Trainer Examiners as created by G.S. 90-524.

(4) License. — A certificate that evidences approval by the Board that a person has successfully completed the requirements set forth in G.S. 90-528 entitling the person to perform the functions and duties of an athletic trainer. (1997-387, s. 1.)

Editor's Note. — Session Laws 1997-387, s. 1, which enacted this section, designated the definition of "Athletes" as subdivision (4). That definition has been redesignated as subdivision (1) and the remaining subdivisions redesignated accordingly at the direction of the Revisor of Statutes.

§ 90-524. Board of Examiners created.

(a) The North Carolina Board of Athletic Trainer Examiners is created.

(b) Composition and Terms. — The Board shall consist of seven members who shall serve staggered terms. Four members shall be athletic trainers certified by the National Athletic Trainers' Association Board of Certification, Inc. One member shall be a licensed orthopedic surgeon, one member shall be a licensed family practice physician or pediatrician, and one member shall represent the public at large.

The initial Board members shall be selected on or before August 1, 1997, as follows:

(1) The General Assembly, upon the recommendation of the President Pro Tempore of the Senate, shall appoint two certified athletic trainers and an orthopedic surgeon. The certified athletic trainers shall serve for terms of three years, and the orthopedic surgeon shall serve for a term of one year.

(2) The General Assembly, upon the recommendation of the Speaker of the House of Representatives, shall appoint two certified athletic trainers and a family practice physician or pediatrician. The certified athletic trainers and the family practice physician or pediatrician shall serve for terms of two years.

(3) The Governor shall appoint for a three-year term a public member to the Board.

Upon the expiration of the terms of the initial Board members, each member shall be appointed for a term of three years and shall serve until a successor is appointed. No member may serve more than two consecutive full terms.

(c) Qualifications. — The athletic trainer members shall hold current licenses and shall reside or be employed in North Carolina. They shall have at least five years' experience as athletic trainers, including the three years immediately preceding appointment to the Board, and shall remain in active practice and in good standing with the Board as a licensee during their terms. The first athletic trainers appointed to the Board pursuant to this section shall be eligible for licensure under G.S. 90-529 and, upon appointment, shall immediately apply for a license.

(d) Vacancies. — A vacancy shall be filled in the same manner as the original appointment, except that all unexpired terms of Board members appointed by the General Assembly shall be filled in accordance with G.S. 120-122 and shall be filled within 45 days after the vacancy occurs. Appointees to fill vacancies shall serve the remainder of the unexpired term and until their successors have been duly appointed and qualified.

(e) Removal. — The Board may remove any of its members for neglect of duty, incompetence, or unprofessional conduct. A member subject to disciplinary proceedings as a licensee shall be disqualified from participating in the official business of the Board until the charges have been resolved.

(f) Compensation. — Each member of the Board shall receive per diem and reimbursement for travel and subsistence as provided in G.S. 93B-5.

(g) Officers. — The officers of the Board shall be a chair, who shall be a licensed athletic trainer, a vice-chair, and other officers deemed necessary by the Board to carry out the purposes of this Article. All officers shall be elected annually by the Board for one-year terms and shall serve until their successors are elected and qualified.

(h) Meetings. — The Board shall hold at least two meetings each year to conduct business and to review the standards and rules for improving athletic training services. The Board shall establish the procedures for calling, holding, and conducting regular and special meetings. A majority of Board members constitutes a quorum. (1997-387, s. 1.)

§ 90-525. Powers of the Board.

The Board shall have the power and duty to:

(1) Administer this Article.
(2) Issue interpretations of this Article.
(3) Adopt, amend, or repeal rules as may be necessary to carry out the provisions of this Article.
(4) Employ and fix the compensation of personnel that the Board determines is necessary to carry into effect the provisions of this Article and incur other expenses necessary to effectuate this Article.
(5) Examine and determine the qualifications and fitness of applicants for licensure, renewal of licensure, and reciprocal licensure.
(6) Issue, renew, deny, suspend, or revoke licenses and carry out any disciplinary actions authorized by this Article.
(7) In accordance with G.S. 90-534, set fees for licensure, license renewal, and other services deemed necessary to carry out the purposes of this Article.
(8) Conduct investigations for the purpose of determining whether violations of this Article or grounds for disciplining licensees exist.
(9) Maintain a record of all proceedings and make available to licensees and other concerned parties an annual report of all Board action.
(10) Develop standards and adopt rules for the improvement of athletic training services in the State.
(11) Adopt a seal containing the name of the Board for use on all licenses and official reports issued by it. (1997-387, s. 1.)

§ 90-526. Custody and use of funds; contributions.

(a) All fees payable to the Board shall be deposited in the name of the Board in financial institutions designated by the Board as official depositories and shall be used to pay all expenses incurred in carrying out the purposes of this Article.

(b) The Board may accept grants, contributions, bequests, and gifts that shall be kept in a separate fund and shall be used by it to enhance the practice of athletic trainers. (1997-387, s. 1.)

§ 90-527. License required; exemptions from license requirement.

(a) On or after January 1, 1998, no person shall practice or offer to practice as an athletic trainer, perform activities of an athletic trainer, or use any card, title, or abbreviation to indicate that the person is an athletic trainer unless that person is currently licensed as provided by this Article.

(b) The provisions of this Article do not apply to:

(1) Licensed, registered, or certified professionals, such as nurses, physical therapists, and chiropractors if they do not hold themselves out to the public as athletic trainers.

(2) A physician licensed under Article 1 of Chapter 90 of the General Statutes.

(3) A person serving as a student-trainer or in a similar position under the supervision of a physician or licensed athletic trainer.

(4) An athletic trainer who is employed by, or under contract with, an organization, corporation, or educational institution located in another state and who is representing that organization, corporation, or educational institution at an event held in this State.

(5) Boxing trainers, if they do not hold themselves out to the public as athletic trainers. (1997-387, s. 1.)

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 491.

§ 90-528. Application for license; qualifications; issuance.

(a) An applicant for a license under this Article shall make a written application to the Board on a form approved by the Board and shall submit to the Board an application fee along with evidence that demonstrates good moral character and graduation from an accredited four-year college or university in a course of study approved by the Board.

(b) The applicant shall also pass the examination administered by the National Athletic Trainers' Association Board of Certification, Inc.

(c) When the Board determines that an applicant has met all the qualifications for licensure and has submitted the required fee, the Board shall issue a license to the applicant. A license is valid for a period of one year from the date of issuance and may be renewed subject to the requirements of this Article. (1997-387, s. 1.)

§ 90-529. Athletic trainers previously certified.

The Board shall issue a license to practice as an athletic trainer to a person who applies to the Board on or before August 1, 1998, and furnishes to the Board on a form approved by the Board proof of good moral character, graduation from an accredited four-year college or university in a course of study approved by the Board, and a current certificate from the National Athletic Trainers' Association Board of Certification, Inc. (1997-387, s. 1.)

§ 90-530. Athletic trainers not certified.

(a) A person who has been actively engaged as an athletic trainer since August 1, 1994, and who continues to practice up to the time of application, shall be eligible for licensure without examination by paying the required fee and by demonstrating the following:

(1) Proof of good moral character.

(2) Proof of practice in this State since August 1, 1994.

(3) Proof of graduation from an accredited four-year college or university in a course of study approved by the Board.

(4) Fulfillment of any other requirements set by the Board.

An application made pursuant to this section shall be filed with the Board on or before August 1, 1998.

(b) A person is "actively engaged" as an athletic trainer if the person is a salaried employee of, or has contracted with, an educational institution, an industry, a hospital, a rehabilitation clinic, or a professional athletic organization or another bona fide athletic organization and the person performs the duties of an athletic trainer. (1997-387, s. 1.)

§ 90-531. Reciprocity with other states.

A license may be issued to a qualified applicant holding an athletic trainer license in another state if that state recognizes the license of this State in the same manner. (1997-387, s. 1.)

§ 90-532. License renewal.

Every license issued under this Article shall be renewed during the month of January. On or before the date the current license expires, any person who desires to continue practice shall apply for a license renewal and shall submit the required fee. Licenses that are not renewed shall automatically lapse. In accordance with rules adopted by the Board, a license that has lapsed may be reissued within five years from the date it lapsed. A license that has been expired for more than five years may be reissued only in a manner prescribed by the Board. (1997-387, s. 1.)

§ 90-533. Continuing education.

(a) As a condition of license renewal, a licensee must meet the continuing education requirements set by the Board. The Board shall determine the number of hours and subject matter of continuing education required as a condition of license renewal. The Board shall determine the qualifications of a provider of an educational program that satisfies the continuing education requirement.

(b) The Board shall grant approval to a continuing education program or course upon finding that the program or course offers an educational experience designed to enhance the practice of athletic trainer, including the continuing education program of the National Athletic Trainers' Association.

(c) If a continuing education program offers to teach licensees to perform advanced skills, the Board may grant approval for the program when it finds that the nature of the procedure taught in the program and the program facilities and faculty are such that a licensee fully completing the program can reasonably be expected to carry out those procedures safely and properly. (1997-387, s. 1.)

§ 90-534. Expenses and fees.

(a) All salaries, compensation, and expenses incurred or allowed to carry out the purposes of this Article shall be paid by the Board exclusively out of the fees received by the Board as authorized by this Article or funds received from other sources. In no case shall any salary, expense, or other obligation of the Board be charged against the State treasury.

(b) The schedule of fees shall not exceed the following:

(1) Issuance of a license	$100.00
(2) License renewal	50.00
(3) Reinstatement of lapsed license	75.00

(4) Reasonable charges for duplication services and material.

(1997-387, s. 1.)

§ 90-535. Hiring of athletic trainers by school units.

Local school administrative units may hire persons who are not licensed under this Article. The persons hired may perform the activities of athletic trainers in the scope of their employment but may not claim to be licensed under this Article. The persons hired may not perform the activities of athletic trainers outside the scope of this employment unless they are authorized to do so under G.S. 90-527(b). (1997-387, s. 1.)

§ 90-536. Disciplinary authority of the Board; administrative proceedings.

(a) Grounds for disciplinary action against a licensee shall include the following:

(1) Giving false information or withholding material information from the Board in procuring a license to practice as an athletic trainer.

(2) Having been convicted of or pled guilty or no contest to a crime that indicates that the person is unfit or incompetent to practice as an athletic trainer or that indicates that the person has deceived or defrauded the public.

(3) Having a mental or physical disability or using a drug to a degree that interferes with the person's fitness to practice as an athletic trainer.

(4) Engaging in conduct that endangers the public health.

(5) Being unfit or incompetent to practice as an athletic trainer by reason of deliberate or negligent acts or omissions regardless of whether actual injury to a patient is established.

(6) Willfully violating any provision of this Article or rules adopted by the Board.

(7) Having been convicted of or pled guilty or no contest to an offense under State or federal narcotic or controlled substance laws.

(b) In accordance with Article 3A of Chapter 150B of the General Statutes, the Board may require remedial education, issue a letter of reprimand, restrict, revoke, or suspend any license to practice as an athletic trainer in North Carolina or deny any application for licensure if the Board determines that the applicant or licensee has committed any of the above acts or is no longer qualified to practice as an athletic trainer. The Board may reinstate a revoked license or remove licensure restrictions when it finds that the reasons for revocation or restriction no longer exist and that the person can reasonably be expected to practice as an athletic trainer safely and properly. (1997-387, s. 1.)

§ 90-537. Enjoining illegal practices.

If the Board finds that a person who does not have a license issued under this Article claims to be an athletic trainer or is engaging in practice as an athletic trainer in violation of this Article, the Board may apply in its own name to the Superior Court of Wake County for a temporary restraining order or other injunctive relief to prevent the person from continuing illegal practices. The court may grant injunctions regardless of whether criminal prosecution or other action has been or may be instituted as a result of a violation. (1997-387, s. 1.)

§ 90-538. Penalties.

A person who does not have a license issued under this Article who either claims to be an athletic trainer or engages in practice as an athletic trainer in violation of this Article is guilty of a Class 1 misdemeanor. Each act of unlawful practice constitutes a distinct and separate offense. (1997-387, s. 1.)

§ 90-539. Reports; immunity from suit.

A person who has reasonable cause to suspect misconduct or incapacity of a licensee, or who has reasonable cause to suspect that a person is in violation of this Article, shall report the relevant facts to the Board. Upon receipt of a charge, or upon its own initiative, the Board may give notice of an administrative hearing or may, after diligent investigation, dismiss unfounded charges. A person who, in good faith, makes a report pursuant to this section shall be immune from any criminal prosecution or civil liability resulting therefrom. (1997-387, s. 1.)

§ 90-540. No third-party reimbursement required.

Nothing in this Article shall be construed to require direct third-party reimbursement to persons licensed under this Article. (1997-387, s. 1.)

§§ 90-541 through 90-599: Reserved for future codification purposes.

Article 35.

Accident-Trauma Victim Identification.

§ 90-600. Short title.

This Article shall be known and may be cited as the Carolyn Sonzogni Act. (1997-443, s. 20.12(b).)

§ 90-601. Purpose.

The identification of accident-trauma victims is crucial to the timely notification of the next of kin of accident-trauma victims and to the recovery of organs and tissues for organ transplants. In recognition of these facts, it is the policy of this State and the purpose of this act to provide for the timely identification of accident-trauma victims by law enforcement, fire, emergency, rescue, and hospital personnel. (1997-443, s. 20.12(b).)

§ 90-602. Routine search for donor information.

(a) The following persons may make a reasonable search for a document of gift or other information identifying the bearer as an organ donor or as an individual who has refused to make an anatomical gift:

(1) A law enforcement officer, firefighter, paramedic, or other official emergency rescuer finding an individual who the searcher believes is near death; and

(2) A hospital, upon the admission of an individual at or near the time of death, if there is not immediately available any other source of that information.

(b) Any law enforcement officer or other person listed in subsection (a) of this section may conduct an administrative search of the accident-trauma victim's Division of Motor Vehicles driver record to determine the individual's authorization for organ donation or refusal of organ donation.

(c) A physical search pursuant to subsection (a) of this section may be conducted at or near the time of death or hospital admission and shall be limited to those personal effects of the individual where a drivers license reasonably may be stored. Any information, document, tangible objects, or other items discovered during the search shall be used solely for the purpose of ascertaining the individual's identity, notifying the individual's next of kin, and determining whether the individual intends to make an anatomical gift, and in no event shall any such discovered material be admissible in any subsequent criminal or civil proceeding, unless obtained pursuant to a lawful search on other grounds. (1997-443, s. 20.12(b).)

Editor's Note. — Session Laws 2007-538, s. 13, provides: "The North Carolina General Statutes Commission ('General Statutes Commission') shall review G.S. 130A-391, G.S. 90-602, and other statutes related to organ donation to determine whether the statutes should be amended to be consistent with and conform to the Revised Uniform Anatomical Gift Act as enacted in this act. The General Statutes Commission shall make its recommendations upon the convening of the 2008 Regular Session of the 2007 General Assembly."

§ 90-603. Timely notification of next of kin.

A State or local law enforcement officer shall make a reasonable effort to notify the next of kin of an accident-trauma victim if the individual is hospitalized or dead. Whenever possible, the notification should be delivered in person and without delay after ensuring positive identification. If appropriate under the circumstances, the notification may be given by telephone in accordance with State and local law enforcement departmental policies. In addition to the notification of next of kin made by law enforcement personnel, other emergency rescue or hospital personnel may contact the next of kin, or the nearest organ procurement organization, in order to expedite decision making with regard to potential organ and tissue recovery. (1997-443, s. 20.12(b).)

§ 90-604. Use of body information tags.

(a) In order to provide the identifying information necessary to facilitate organ and tissue transplants, a body information tag shall be attached to or transmitted with the body of an accident-trauma victim by the following persons:

(1) A law enforcement officer, firefighter, paramedic, or other official emergency rescuer who believes the seriously injured individual to be near death; and

(2) Hospital personnel, after the individual has been pronounced dead.

(b) The body information tag shall include information identifying the accident-trauma victim, identifying whether the individual is an organ donor, and providing any information on the next of kin. The Division of Motor Vehicles shall be responsible for producing and distributing body information tags to all State and local law enforcement departments. In addition, the tags shall be distributed by the Division of Motor Vehicles to all State and local agencies employing firefighters, paramedics, and other emergency and rescue personnel. (1997-443, s. 20.12(b).)

§§ 90-605 through 90-619: Reserved for future codification purposes.

ARTICLE 36.

Massage and Bodywork Therapy Practice.

§ 90-620. Short title.

This Article shall be known as the North Carolina Massage and Bodywork Therapy Practice Act. (1998-230, s. 10.)

§ 90-621. Declaration of purpose.

The General Assembly recognizes that the improper practice of massage and bodywork therapy is potentially harmful to the public. Mandatory licensure of those engaged in the practice of massage and bodywork therapy is necessary to ensure minimum standards of competency and to protect the public health, safety, and welfare. (1998-230, s. 10.)

§ 90-622. Definitions.

The following definitions apply in this Article:

(1) Board. — The North Carolina Board of Massage and Bodywork Therapy.

(2) Board-approved school. — Any massage and bodywork therapy school or training program in this State or another state that has met the criteria established by the Board.

(3) Massage and bodywork therapy. — Systems of activity applied to the soft tissues of the human body for therapeutic, educational, or relaxation purposes. The application may include:

a. Pressure, friction, stroking, rocking, kneading, percussion, or passive or active stretching within the normal anatomical range of movement.

b. Complementary methods, including the external application of water, heat, cold, lubricants, and other topical preparations.

c. The use of mechanical devices that mimic or enhance actions that may possibly be done by the hands.

(4) Massage and bodywork therapist. — A person licensed under this Article.

(5) Practice of massage and bodywork therapy. — The application of massage and bodywork therapy to any person for a fee or other consideration. "Practice of massage and bodywork therapy" does not include the diagnosis of illness or disease, medical procedures, chiropractic adjustive procedures, electrical stimulation, ultrasound, prescription of medicines, or the use of modalities for which a license to practice medicine, chiropractic, nursing, physical therapy, occupational therapy, acupuncture, or podiatry is required by law. (1998-230, s. 10.)

§ 90-623. License required.

(a) A person shall not practice or hold out himself or herself to others as a massage and bodywork therapist without first applying for and receiving from the Board a license to engage in that practice.

(b) A person holds out himself or herself to others as a massage and bodywork therapist when the person adopts or uses any title or description including "massage therapist", "bodywork therapist", "masseur", "masseuse", "massagist", "somatic practitioner", "body therapist", "structural integrator", or any derivation of those terms that implies this practice.

(c) It shall be unlawful to advertise using the term "massage therapist" or "bodywork therapist" or any other term that implies a soft tissue technique or method in any public or private publication or communication by a person not licensed under this Article as a massage and bodywork therapist. Any person who holds a license to practice as a massage and bodywork therapist in this State may use the title "Licensed Massage and Bodywork Therapist". No other person shall assume this title or use an abbreviation or any other words, letters, signs, or figures to indicate that the person using the title is a licensed massage and bodywork therapist. An establishment employing or contracting with persons licensed under this Article may advertise on behalf of those persons. (1998-230, s. 10.)

§ 90-624. Exemptions.

Nothing in this Article shall be construed to prohibit or affect:

(1) The practice of a profession by persons who are licensed, certified, or registered under other laws of this State and who are performing services within their authorized scope of practice.

(2) The practice of massage and bodywork therapy by a person employed by the government of the United States while the person is engaged in the performance of duties prescribed by the laws and regulations of the United States.

(3) The practice of massage and bodywork therapy by persons duly licensed, registered, or certified in another state, territory, the District of Columbia, or a foreign country when incidentally called into this State to teach a course related to massage and bodywork therapy or to consult with a person licensed under this Article.

(4) Students enrolled in a Board-approved school while completing a clinical requirement for graduation that shall be performed under the supervision of a person licensed under this Article.

(5) A person giving massage and bodywork therapy to members of that person's immediate family.

(6) The practice of movement educators such as dance therapists or teachers, yoga teachers, personal trainers, martial arts instructors, movement repatterning practitioners, and other such professions.

(7) The practice of techniques that are specifically intended to affect the human energy field.

(8) A person employed by or contracting with a not-for-profit community service organization to perform massage and bodywork therapy on persons who are members of the not-for-profit community service organization and are of the same gender as the person giving the massage or bodywork therapy. (1998-230, s. 10; 2000-140, s. 93.)

§ 90-625. North Carolina Board of Massage and Bodywork Therapy.

(a) The North Carolina Board of Massage and Bodywork Therapy is created. The Board shall consist of seven members who are residents of this State and are as follows:

(1) Five members shall be massage and bodywork therapists who have been licensed under this Article and have been in the practice of massage and bodywork therapy for at least five of the last seven years prior to their serving on the Board. The appointments may be made from lists provided by the North Carolina Therapeutic Massage and Bodywork Task Force. Consideration shall be given to geographical distribution, practice setting, clinical specialty, and other factors that will promote diversity of the profession on the Board. Two of the five members shall be appointed by the General Assembly, upon the recommendation of the Speaker of the House of Representatives, two shall be appointed by the General Assembly, upon the recommendation of the President Pro Tempore of the Senate, and one shall be appointed by the Governor.

(2) One member shall be a physician licensed pursuant to Article 1 of Chapter 90 of the General Statutes. The appointment shall be made by the Governor and may be made from a list provided by the North Carolina Medical Society.

(3) One member shall be a member of the general public who shall not be licensed under Chapter 90 of the General Statutes or the spouse of a

person who is so licensed, or have any financial interest, directly or indirectly, in the profession regulated under this Article. The appointment shall be made by the Governor.

(b) Legislative appointments shall be made in accordance with G.S. 120-121. A vacancy in a legislative appointment shall be filled in accordance with G.S. 120-122.

(c) Each member of the Board shall serve for a term of three years, ending on June 30 of the last year of the term. A member shall not be appointed to serve more than two consecutive terms.

(d) The Board shall elect annually a chair and other officers as it deems necessary. The Board shall meet as often as necessary for the conduct of business but no less than twice a year. The Board shall establish procedures governing the calling, holding, and conducting of regular and special meetings. A majority of the Board shall constitute a quorum.

(e) Each member of the Board may receive per diem and reimbursement for travel and subsistence as set forth in G.S. 93B-5.

(f) Members may be removed by the official who appointed the member for neglect of duty, incompetence, or unprofessional conduct. A member subject to disciplinary proceedings as a licensee shall be disqualified from participating in the official business of the Board until the charges have been resolved. (1998-230, s. 10.)

§ 90-626. Powers and duties.

The Board shall have the following powers and duties:

(1) Represent the diversity within the profession at all times when making decisions and stay current and informed regarding the various branches of massage and bodywork therapy practice.

(2) Evaluate the qualifications of applicants for licensure under this Article.

(3) Issue, renew, deny, suspend, or revoke licenses under this Article.

(4) Reprimand or otherwise discipline licensees under this Article.

(5) Conduct investigations to determine whether violations of this Article exist or constitute grounds for disciplinary action against licensees under this Article.

(6) Conduct administrative hearings in accordance with Chapter 150B of the General Statutes when a contested case, as defined in G.S. 150B-2(2), arises under this Article.

(7) Employ professional, clerical, or other special personnel necessary to carry out the provisions of this Article and purchase or rent necessary office space, equipment, and supplies.

(8) Establish reasonable fees for applications for examination, certificates of licensure and renewal, and other services provided by the Board.

(9) Adopt, amend, or repeal any rules necessary to carry out the purposes of this Article and the duties and responsibilities of the Board, including rules related to the approval of massage and bodywork therapy schools, continuing education providers, examinations for licensure, the practice of advanced techniques or specialties, and massage and bodywork therapy establishments. Any rules adopted or amended shall take into account the educational standards of national bodywork and massage therapy associations and professional organizations.

(10) Appoint from its own membership one or more members to act as representatives of the Board at any meeting where such representation is deemed desirable.

(11) Maintain a record of all proceedings and make available to certificate holders and other concerned parties an annual report of the Board.

(12) Adopt a seal containing the name of the Board for use on all certificates and official reports issued by it.

(13) Provide a system for grievances to be presented and resolved.

(14) Assess civil penalties pursuant to G.S. 90-634.1.

(15) Assess the costs of disciplinary actions pursuant to G.S. 90-634.1(d).

The powers and duties set out in this section are granted for the purpose of enabling the Board to safeguard the public health, safety, and welfare against unqualified or incompetent practitioners and are to be liberally construed to accomplish this objective. (1998-230, s. 10; 2003-348, s. 3.)

OPINIONS OF ATTORNEY GENERAL

Board of Massage and Bodywork Therapy Can Charge Reasonable Fee. — The Board of Massage and Bodywork Therapy can charge a reasonable fee for its auditing and approval of massage and bodywork therapy schools. See opinion of Attorney General to Charles P. Wilkins, Counsel, North Carolina Board of Massage and Bodywork Therapy, 2000 N.C. AG LEXIS 7 (6/14/2000).

§ 90-627. Custody and use of funds.

All fees and other moneys collected and received by the Board shall be used for the purposes of implementing this Article. (1998-230, s. 10.)

§ 90-628. Expenses and fees.

(a) All salaries, compensation, and expenses incurred or allowed for the purposes of this Article shall be paid by the Board exclusively out of the fees received by the Board as authorized by this Article or from funds received from other sources. In no case shall any salary, expense, or other obligations of the Board be charged against the General Fund.

(b) The Board may impose the following fees up to the amounts listed below:

(1) Application for examination	$200.00
(2) License fee	150.00
(3) License renewal	100.00
(4) Late renewal penalty	75.00
(5) License by reciprocity	50.00
(6) Duplicate license	25.00
(7) Provisional license	150.00.

(1998-230, s. 10.)

§ 90-629. Requirements for licensure.

Upon application to the Board and the payment of the required fees, an applicant may be licensed as a massage and bodywork therapist if the applicant meets all of the following qualifications:

(1) Has obtained a high school diploma or equivalent.

(2) Is 18 years of age or older.

(3) Is of good moral character as determined by the Board.

(4) Has successfully completed a course of study consisting of a minimum of 500 classroom hours of supervised instruction at a Board-approved school.

(5) Has successfully passed an examination administered by a certifying agency that has been approved by the National Commission of Certifying Agencies (NCCA) and is in good standing with such agency or has successfully passed an examination administered or approved by the Board. (1998-230, s. 10.)

§ 90-630. Reciprocity.

(a) An applicant shall be eligible for licensure if (i) the applicant has been licensed in another state within five years of the application to the Board and the other state has standards for massage and bodywork therapists that are substantially equivalent to those in this State; (ii) the applicant holds a current certification from the National Certification Board for Therapeutic Massage and Bodywork or another agency that meets NCCA standards; or (iii) the applicant meets special requirements established by the Board.

(b) Upon receipt of an application for reciprocity, the Board shall contact each jurisdiction that has previously certified or licensed the applicant to determine whether there are disciplinary proceedings or unresolved complaints pending against the applicant. In the event a disciplinary proceeding or an unresolved complaint is pending, the applicant shall not be licensed until the proceeding or the complaint has been resolved in the applicant's favor.

(c) Reciprocity may not be granted if the state in which the applicant is licensed has not granted a similar reciprocity to licensees in this State. (1998-230, s. 10.)

§ 90-631. Massage and bodywork therapy schools.

(a) The Board shall establish rules for the approval of massage and bodywork therapy schools. These rules shall include:

(1) Basic curriculum standards that ensure graduates have the education and skills necessary to carry out the safe and effective practice of massage and bodywork therapy.
(2) Standards for faculty and learning resources.
(3) Requirements for reporting changes in instructional staff and curriculum.
(4) A description of the process used by the Board to approve a school.

Any school that offers a training program in massage and bodywork therapy may make application for approval to the Board. The Board shall grant approval to schools, whether in this State or another state, that meet the criteria established by the Board. The Board shall maintain a list of approved schools and a list of community college programs operating pursuant to subsection (b) of this section.

(b) A massage and bodywork therapy program operated by a North Carolina community college that is accredited by the Southern Association of Colleges and Schools is exempt from the approval process, licensure process, or both, established by the Board. The college shall certify annually to the Board that the program meets or exceeds the minimum standards for curriculum, faculty, and learning resources established by the Board. Students who complete the program shall qualify for licenses from the Board as if the program were approved, licensed, or both, by the Board.

(c) A massage and bodywork therapy program operated by a degree or diploma granting college or university that offers a degree or diploma in massage therapy and is accredited by any accrediting agency that is recognized by the United States Department of Education and is licensed by the North Carolina Community College System or The University of North Carolina Board of Governors is exempt from the approval process, licensure process, or both, established by the Board. The college or university shall certify annually to the Board that the program meets or exceeds the minimum standards for curriculum, faculty, and learning resources established by the Board. Students who complete the program shall qualify for licenses from the Board as if the program were approved, licensed, or both, by the Board. (1998-230, s. 10; 2005-276, s. 8.15(a).)

Editor's Note. — Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.5 is a severability clause.

Effect of Amendments. — Session Laws 2005-276, s. 8.15(a), effective July 1, 2006, designated the previously undesignated introductory paragraph as subsection (a), and in the undesignated paragraph of subsection (a), added "and a list of community college programs operating pursuant to subsection (b) of this section"; and added subsections (b) and (c).

OPINIONS OF ATTORNEY GENERAL

Board of Massage and Bodywork Therapy Cannot Require Bond. — The Board of Massage and Bodywork Therapy cannot require a massage and bodywork therapy school, which it approves, to have a guaranty bond. See opinion of Attorney General to Charles P. Wilkins, Counsel, North Carolina Board of Massage and Bodywork Therapy, 2000 N.C. AG LEXIS 7 (6/14/2000).

Community Colleges. — Community colleges offering massage and bodywork therapy courses need not be licensed by the State Board of Community Colleges, although these community colleges presumably are already subject to oversight by the State Board of Community Colleges; however, community colleges offering massage and bodywork therapy courses must obtain approval from the North Carolina Board of Massage and Bodywork Therapy if these community colleges want the students who complete these courses to qualify for licenses from the North Carolina Board of Massage and Bodywork Therapy. See opinion of Attorney General to Charles P. Wilkins, Counsel, North Carolina Board of Massage and Bodywork Therapy, 2000 N.C. AG LEXIS 27 (3/15/2000).

§ 90-632. License renewal and continuing education.

The license to practice under this Article shall be renewed every two years. When renewing a license, each licensee shall submit to the Board evidence of the successful completion of at least 25 hours of study, as approved by the Board, during the immediately preceding two years, in the practice of massage and bodywork therapy. (1998-230, s. 10.)

§ 90-633. Disciplinary action.

The Board may deny, suspend, revoke, or refuse to license a massage and bodywork therapist or applicant for any of the following:

(1) The employment of fraud, deceit, or misrepresentation in obtaining or attempting to obtain a license or the renewal of a license.
(2) The use of drugs or intoxicating liquors to an extent that affects professional competency.
(3) Conviction of an offense under any municipal, State, or federal narcotic or controlled substance law until proof of rehabilitation can be established.
(4) Conviction of a felony or other public offense involving moral turpitude until proof of rehabilitation can be established.
(5) An adjudication of insanity or incompetency until proof of recovery from the condition can be established.
(6) Engaging in any act or practice in violation of any of the provisions of this Article or of any of the rules adopted by the Board, or aiding, abetting, or assisting any other person in the violation of these provisions or rules.
(7) The commission of an act of malpractice, gross negligence, or incompetency.
(8) Practice as a licensee under this Article without a valid certificate or renewal.
(9) Engaging in conduct that could result in harm or injury to the public.
(10) The employment of fraud, deceit, or misrepresentation when communicating with the general public, health care professionals, or other business professionals.

(11) Falsely holding out himself or herself as licensed or certified in any discipline of massage and bodywork therapy without successfully completing training approved by the Board in that specialty. (1998-230, s. 10.)

§ 90-634. Enforcement; injunctive relief.

(a) It is unlawful for a person not licensed or exempted under this Article to engage in any of the following:

(1) Practice of massage and bodywork therapy.
(2) Advertise, represent, or hold out himself or herself to others to be a massage and bodywork therapist.
(3) Use any title descriptive of any branch of massage and bodywork therapy, as provided in G.S. 90-623, to describe his or her practice.

(b) A person who violates subsection (a) of this section shall be guilty of a Class 1 misdemeanor.

(c) The Board may make application to superior court for an order enjoining a violation of this Article. Upon a showing by the Board that a person has violated or is about to violate this Article, the court may grant an injunction, restraining order, or take other appropriate action. (1998-230, s. 10.)

§ 90-634.1. Civil penalties; disciplinary costs.

(a) Authority to Assess Civil Penalties. — The Board may assess a civil penalty not in excess of one thousand dollars ($1,000) for the violation of any section of this Article or the violation of any rules adopted by the Board. The clear proceeds of any civil penalty assessed under this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(b) Consideration Factors. — Before imposing and assessing a civil penalty, the Board shall consider the following factors:

(1) The nature, gravity, and persistence of the particular violation.
(2) The appropriateness of the imposition of a civil penalty when considered alone or in combination with other punishment.
(3) Whether the violation was willful and malicious.
(4) Any other factors that would tend to mitigate or aggravate the violations found to exist.

(c) Schedule of Civil Penalties. — The Board shall establish a schedule of civil penalties for violations of this Article and rules adopted by the Board.

(d) Costs. — The Board may assess the costs of disciplinary actions against a person found to be in violation of this Article or rules adopted by the Board. (2003-348, s. 4.)

§ 90-635. Third-party reimbursement.

Nothing in this Article shall be construed to require direct third-party reimbursement to persons licensed under this Article. (1998-230, s. 10.)

§ 90-636. Regulation by county or municipality.

Nothing in this Article shall be construed to prohibit a county or municipality from regulating persons covered by this Article, however, a county or municipality may not impose regulations that are inconsistent with this Article. (1998-230, s. 10.)

§§ 90-637 through 90-639: Reserved for future codification purposes.

Article 37.

Health Care Practitioner Identification.

§ 90-640. Identification badges required.

(a) For purposes of this section, "health care practitioner" means an individual who is licensed, certified, or registered to engage in the practice of medicine, nursing, dentistry, pharmacy, or any related occupation involving the direct provision of health care to patients.

(b) When providing health care to a patient, a health care practitioner shall wear a badge or other form of identification displaying in readily visible type the individual's name and the license, certification, or registration held by the practitioner. If the identity of the individual's license, certification, or registration is commonly expressed by an abbreviation rather than by full title, that abbreviation may be used on the badge or other identification.

(c) The badge or other form of identification is not required to be worn if the patient is being seen in the health care practitioner's office and, the name and license of the practitioner can be readily determined by the patient from a posted license, a sign in the office, a brochure provided to patients, or otherwise.

(d) Each licensing board or other regulatory authority for health care practitioners may adopt rules for exemptions from wearing a badge or other form of identification, or for allowing use of the practitioner's first name only, when necessary for the health care practitioner's safety or for therapeutic concerns.

(e) Violation of this section is a ground for disciplinary action against the health care practitioner by the practitioner's licensing board or other regulatory authority. (1999-320, s. 1.)

§§ 90-641 through 90-645: Reserved for future codification purposes.

Article 38.

Respiratory Care Practice Act.

§ 90-646. Short title.

This Article may be cited as the "Respiratory Care Practice Act". (2000-162, s. 1.)

Editor's Note. — Session Laws 2000-110, s. 1, and Session Laws 2000-162, s. 1, both enacted new Articles in Chapter 90. Session Laws 2000-110, s. 1, enacted G.S. 90-646 through 90-649 as Article 37. Session Laws 2000-162, s. 1, enacted G.S. 90-646 through 90-665 as Article 38. Session Laws 2000-140, s. 98, renumbered the Article enacted by Session Laws 2000-110 as Article 39, G.S. 90-671 through 90-674.

§ 90-647. Purpose.

The General Assembly finds that the practice of respiratory care in the State of North Carolina affects the public health, safety, and welfare and that the mandatory licensure of persons who engage in respiratory care is necessary to ensure a minimum standard of competency. It is the purpose and intent of this

Article to protect the public from the unqualified practice of respiratory care and from unprofessional conduct by persons licensed pursuant to this Article. (2000-162, s. 1.)

§ 90-648. Definitions.

The following definitions apply in this Article:

(1) Board. — The North Carolina Respiratory Care Board.

(2) Diagnostic testing. — Cardiopulmonary procedures and tests performed on the written order of a physician licensed under Article 1 of this Chapter that provide information to the physician to formulate a diagnosis of the patient's condition. The tests and procedures may include pulmonary function testing, electrocardiograph testing, cardiac stress testing, and sleep related testing.

(3) Direct supervision. — The authority and responsibility to direct the performance of activities as established by policies and procedures for safe and appropriate completion of services.

(4) Individual. — A human being.

(5) License. — A certificate issued by the Board recognizing the person named therein as having met the requirements to practice respiratory care as defined in this Article.

(6) Licensee. — A person who has been issued a license under this Article.

(7) Medical director. — An appointed physician who is licensed under Article 1 of this Chapter and a member of the entity's medical staff, and who is granted the authority and responsibility for assuring and establishing policies and procedures and that the provision of such is provided to the quality, safety, and appropriateness standards as recognized within the defined scope of practice for the entity.

(8) Person. — An individual, corporation, partnership, association, unit of government, or other legal entity.

(9) Physician. — A doctor of medicine licensed by the State of North Carolina in accordance with Article 1 of this Chapter.

(10) Practice of respiratory care. — As defined by the written order of a physician licensed under Article 1 of this Chapter, the observing and monitoring of signs and symptoms, general behavior, and general physical response to respiratory care treatment and diagnostic testing, including the determination of whether such signs, symptoms, reactions, behavior, or general response exhibit abnormal characteristics, and the performance of diagnostic testing and therapeutic application of:

a. Medical gases, humidity, and aerosols including the maintenance of associated apparatus, except for the purpose of anesthesia.

b. Pharmacologic agents related to respiratory care procedures, including those agents necessary to perform hemodynamic monitoring.

c. Mechanical or physiological ventilatory support.

d. Cardiopulmonary resuscitation and maintenance of natural airways, the insertion and maintenance of artificial airways under the direct supervision of a recognized medical director in a health care environment which identifies these services within the scope of practice by the facility's governing board.

e. Hyperbaric oxygen therapy.

f. New and innovative respiratory care and related support activities in appropriately identified environments and under the training and practice guidelines established by the American Association of Respiratory Care.

The term also means the interpretation and implementation of a physician's written or verbal order pertaining to the acts described in this subdivision.

(11) Respiratory care. — As defined by the written order of a physician licensed under Article 1 of Chapter 90, the treatment, management, diagnostic testing, and care of patients with deficiencies and abnormalities associated with the cardiopulmonary system.

(12) Respiratory care practitioner. — A person who has been licensed by the Board to engage in the practice of respiratory care.

(13) Support activities. — Procedures that do not require formal academic training, including the delivery, setup, and maintenance of apparatus. The term also includes giving instructions on the use, fitting, and application of apparatus, but does not include therapeutic evaluation and assessment. (2000-162, s. 1.)

§ 90-649. North Carolina Respiratory Care Board; creation.

(a) The North Carolina Respiratory Care Board is created. The Board shall consist of 10 members as follows:

(1) Two members shall be respiratory care practitioners.

(2) Four members shall be physicians licensed to practice in North Carolina, and whose primary practice is Pulmonology, Anesthesiology, Critical Care Medicine, or whose specialty is Cardiothoracic Disorders.

(3) One member shall represent the North Carolina Hospital Association.

(4) One member shall represent the North Carolina Association of Medical Equipment Services.

(5) Two members shall represent the public at large.

(b) Members of the Board shall be citizens of the United States and residents of this State. The respiratory care practitioner members shall have practiced respiratory care for at least five years and shall be licensed under this Article. The public members shall not be: (i) a respiratory care practitioner, (ii) an agent or employee of a person engaged in the profession of respiratory care, (iii) a health care professional licensed under this Chapter or a person enrolled in a program to become a licensed health care professional, (iv) an agent or employee of a health care institution, a health care insurer, or a health care professional school, (v) a member of an allied health profession or a person enrolled in a program to become a member of an allied health profession, or (vi) a spouse of an individual who may not serve as a public member of the Board. (2000-162, s. 1; 2003-384, s. 1.)

§ 90-650. Appointments and removal of Board members; terms and compensation.

(a) The members of the Board shall be appointed as follows:

(1) The Governor shall appoint the public members described in G.S. 90-649(a)(5).

(2) The General Assembly, upon the recommendation of the Speaker of the House of Representatives, shall appoint one of the respiratory care practitioner members described in G.S. 90-649(a)(1) and one of the physician members described in G.S. 90-649(a)(2) in accordance with G.S. 120-121.

(3) The General Assembly, upon the recommendation of the President Pro Tempore of the Senate, shall appoint one of the respiratory care practitioner members described in G.S. 90-649(a)(1) and one of the

physician members described in G.S. 90-649(a)(2) in accordance with G.S. 120-121.

(4) The North Carolina Medical Society shall appoint one of the physician members described in G.S. 90-649(a)(2).

(5) The Old North State Medical Society shall appoint one of the physician members described in G.S. 96-649(a)(2).

(6) The North Carolina Hospital Association shall appoint the member described in G.S. 90-649(a)(3).

(7) The North Carolina Association of Medical Equipment Services shall appoint the member described in G.S. 90-649(a)(4).

(b) Members of the Board shall take office on the first day of November immediately following the expired term of that office and shall serve for a term of three years and until their successors are appointed and qualified. No member shall serve on the Board for more than two consecutive terms.

(c) The Governor may remove members of the Board, after notice and an opportunity for hearing, for incompetence, neglect of duty, unprofessional conduct, conviction of any felony, failure to meet the qualifications of this Article, or committing any act prohibited by this Article.

(d) Any vacancy shall be filled by the authority originally filling that position, except that any vacancy in appointments by the General Assembly shall be filled in accordance with G.S. 120-122. Appointees to fill vacancies shall serve the remainder of the unexpired term and until their successors have been duly appointed and qualified.

(e) Members of the Board shall receive no compensation for their services but shall be entitled to travel, per diem, and other expenses authorized by G.S. 93B-5.

(f) Individual members shall be immune from civil liability arising from activities performed within the scope of their official duties. (2000-162, s. 1.)

§ 90-651. Election of officers; meetings of the Board.

(a) The Board shall elect a chair and a vice-chair who shall hold office according to rules adopted pursuant to this Article, except that all officers shall be elected annually by the Board for one-year terms and shall serve until their successors are elected and qualified.

(b) The Board shall hold at least two regular meetings each year as provided by rules adopted pursuant to this Article. The Board may hold additional meetings upon the call of the chair or any two Board members. A majority of the Board membership shall constitute a quorum. (2000-162, s. 1.)

§ 90-652. Powers and duties of the Board.

The Board shall have the power and duty to:

(1) Determine the qualifications and fitness of applicants for licensure, renewal of licensure, and reciprocal licensure. The Board shall, in its discretion, investigate the background of an applicant to determine the applicant's qualifications with due regard given to the applicant's competency, honesty, truthfulness, and integrity. The Department of Justice may provide a criminal record check to the Board for a person who has applied for a license through the Board. The Board shall provide to the Department of Justice, along with the request, the fingerprints of the applicant, any additional information required by the Department of Justice, and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be for-

warded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The Board shall keep all information pursuant to this subdivision privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes. The Board shall collect any fees required by the Department of Justice and shall remit the fees to the Department of Justice for expenses associated with conducting the criminal history record check.

(2) Establish and adopt rules necessary to conduct its business, carry out its duties, and administer this Article.

(3) Adopt and publish a code of ethics.

(4) Deny, issue, suspend, revoke, and renew licenses in accordance with this Article.

(5) Conduct investigations, subpoena individuals and records, and do all other things necessary and proper to discipline persons licensed under this Article and to enforce this Article.

(6) Employ professional, clerical, investigative, or special personnel necessary to carry out the provisions of this Article and purchase or rent office space, equipment, and supplies.

(7) Adopt a seal by which it shall authenticate its proceedings, official records, and licenses.

(8) Conduct administrative hearings in accordance with Article 3A of Chapter 150B of the General Statutes.

(9) Establish certain reasonable fees as authorized by this Article for applications for examination, licensure, provisional licensure, renewal of licensure, and other services provided by the Board.

(10) Submit an annual report to the North Carolina Medical Board, the North Carolina Hospital Association, the North Carolina Society of Respiratory Care, the Governor, and the General Assembly of all the Board's official actions during the preceding year, together with any recommendations and findings regarding improvements of the practice of respiratory care.

(11) Publish and make available upon request the licensure standards prescribed under this Article and all rules adopted pursuant to this Article.

(12) Request and receive the assistance of State educational institutions or other State agencies.

(13) Establish and approve continuing education requirements for persons seeking licensure under this Article. (2000-162, s. 1; 2003-384, s. 2; 2004-89, s. 1.)

§ 90-653. Licensure requirements; examination.

(a) Each applicant for licensure under this Article shall meet the following requirements:

(1) Submit a completed application as required by the Board.

(2) Submit any fees required by the Board.

(3) Submit to the Board written evidence, verified by oath, that the applicant has successfully completed the minimal requirements of a respiratory care education program as approved by the Commission for Accreditation of Allied Health Educational Programs, or the Canadian Council on Accreditation for Respiratory Therapy Education.

(4) Submit to the Board written evidence, verified by oath, that the applicant has successfully completed the minimal requirements for Basic Cardiac Life Support as recognized by the American Heart Association, the American Red Cross, or the American Safety and Health Institute.

(5) Pass the entry-level examination given by the National Board for Respiratory Care, Inc.

(b) At least three times each year, the Board shall cause the examination required in subdivision (5) of subsection (a) of this section to be given to applicants at a time and place to be announced by the Board. Any applicant who fails to pass the first examination may take additional examinations in accordance with rules adopted pursuant to this Article. (2000-162, s. 1; 2003-384, s. 3.)

§ 90-654. Temporary license.

Upon application and payment of the required fees, the Board may grant a temporary license to a person who, at the time of application, submits notarized copies of the items required in G.S. 90-653(a)(3) through (a)(5) while awaiting official copies of the items from the issuing agency. The temporary license shall be valid for a period not to exceed 90 days from the date of application. (2000-162, s. 1; 2003-384, s. 4.)

§ 90-655. Licensure by reciprocity.

The Board may grant, upon application and the payment of proper fees, a license to a person who, at the time of application holds a valid license, certificate, or registration as a respiratory care practitioner issued by another state or a political territory or jurisdiction acceptable to the Board if, in the Board's determination, the requirements for that license, certificate, or registration are substantially the same as the requirements for licensure under this Article. (2000-162, s. 1.)

§ 90-656. Provisional license.

The Board may grant a provisional license for a period not exceeding 12 months to any applicant who has successfully completed the education requirements under G.S. 90-653(a)(3) and has made application to take the examination required under G.S. 90-653(a)(5). A provisional license allows the individual to practice respiratory care under the direct supervision of a respiratory care practitioner and in accordance with rules adopted pursuant to this Article. A license granted under this section shall contain an endorsement indicating that the license is provisional and stating the terms and conditions of its use by the licensee and shall state the date the license was granted and the date it expires. (2000-162, s. 1; 2003-384, s. 5.)

§ 90-657. Notification of applicant following evaluation of application.

After evaluation of the application and of any other evidence required from the applicant by the Board, the Board shall notify each applicant that the application and evidence submitted are satisfactory and accepted or unsatisfactory and rejected. If the application and evidence is rejected, the notice shall state the reasons for the rejection. (2000-162, s. 1.)

§ 90-658. License as property of the Board; display requirement; renewal; inactive status.

(a) A license issued by the Board is the property of the Board and shall be surrendered by the licensee to the Board on demand.

(b) The licensee shall display the license in the manner prescribed by the Board.

(c) The licensee shall inform the Board of any change of the licensee's address.

(d) The license shall be renewed by the Board annually upon the payment of a renewal fee if, at the time of application for renewal, the applicant is not in violation of this Article and has fulfilled the current requirements regarding continuing education as established by rules adopted pursuant to this Article.

(e) The Board shall notify a licensee at least 30 days in advance of the expiration of his or her license. Each licensee is responsible for renewing his or her license before the expiration date. Licenses that are not renewed automatically lapse.

(f) The Board may provide for the late renewal of an automatically lapsed license upon the payment of a late fee. No late fee renewal may be granted more than five years after a license expires.

(g) In accordance with rules adopted pursuant to this Article, a licensee may request that his or her license be declared inactive and may thereafter apply for active status. (2000-162, s. 1.)

§ 90-659. Suspension, revocation, and refusal to renew a license.

(a) The Board shall take the necessary actions to deny or refuse to renew a license, suspend or revoke a license, or to impose probationary conditions on a licensee or applicant if the licensee or applicant:

(1) Has engaged in any of the following conduct:
  a. Employed fraud, deceit, or misrepresentation in obtaining or attempting to obtain a license or the renewal of a license.
  b. Committed an act of malpractice, gross negligence, or incompetence in the practice of respiratory care.
  c. Practiced respiratory care without a license.
  d. Engaged in health care practices that are determined to be hazardous to public health, safety, or welfare.

(2) Was convicted of or entered a plea of guilty or nolo contendere to any crime involving moral turpitude.

(3) Was adjudicated insane or incompetent, until proof of recovery from the condition can be established.

(4) Engaged in any act or practice that violates any of the provisions of this Article or any rule adopted pursuant to this Article, or aided, abetted, or assisted any person in such a violation.

(b) Denial, refusal to renew, suspension, or revocation of a license, or imposition of probationary conditions upon a licensee may be ordered by the Board after a hearing held in accordance with Article 3A of Chapter 150B of the General Statutes and rules adopted pursuant to this Article. An application may be made to the Board for reinstatement of a revoked license if the revocation has been in effect for at least one year. (2000-162, s. 1.)

§ 90-660. Expenses; fees.

(a) All salaries, compensation, and expenses incurred or allowed for carrying out the purposes of this Article shall be paid by the Board exclusively out of the fees received by the Board as authorized by this Article or funds received from other sources. In no case shall any salary, expense, or other obligations of the Board be charged against the State.

(b) All monies received by the Board pursuant to this Article shall be deposited in an account for the Board and shall be used for the administration and implementation of this Article. The Board shall establish fees in amounts to cover the cost of services rendered for the following purposes:

(1) For an initial application, a fee not to exceed fifty dollars ($50.00).
(2) For examination or reexamination, a fee not to exceed two hundred dollars ($200.00).
(3) For issuance of any license, a fee not to exceed one hundred fifty dollars ($150.00).
(4) For the renewal of any license, a fee not to exceed seventy-five dollars ($75.00).
(5) For the late renewal of any license, an additional late fee not to exceed seventy-five dollars ($75.00).
(6) For a license with a provisional or temporary endorsement, a fee not to exceed fifty dollars ($50.00).
(7) For copies of rules adopted pursuant to this Article and licensure standards, charges not exceeding the actual cost of printing and mailing.
(8) For official verification of licensure status, a fee not to exceed twenty dollars ($20.00).
(9) For approval of continuing education programs, a fee not to exceed one hundred fifty dollars ($150.00). (2000-162, s. 1; 2001-455, s. 7; 2003-384, s. 6; 2007-418, s. 1.)

Effect of Amendments. — Session Laws 2007-418, s. 1, effective August 21, 2007, substituted “fifty dollars ($50.00)” for “twenty-five dollars ($25.00)” in subdivision (b)(1); substituted “one hundred fifty dollars ($150.00)” for “one hundred dollars ($100.00)” in subdivision (b)(3); substituted “‘seventy-five dollars ($75.00)” for “fifty dollars ($50.00)” in subdivisions (b)(4) and (b)(5); substituted “fifty dollars ($50.00)” for “thirty-five dollars ($35.00)” in subdivision (b)(6).

§ 90-661. Requirement of license.

It shall be unlawful for any person who is not currently licensed under this Article to:

(1) Engage in the practice of respiratory care.
(2) Use the title “respiratory care practitioner”.
(3) Use the letters “RCP”, “RTT”, “RT”, or any facsimile or combination in any words, letters, abbreviations, or insignia.
(4) Imply orally or in writing or indicate in any way that the person is a respiratory care practitioner or is otherwise licensed under this Article.
(5) Employ or solicit for employment unlicensed persons to practice respiratory care. (2000-162, s. 1; 2003-384, s. 7.)

§ 90-662. Violation a misdemeanor.

Any person who violates any provision of this Article shall be guilty of a Class 1 misdemeanor. (2000-162, s. 1.)

§ 90-663. Injunctions.

The Board may apply to the superior court for an order enjoining violations of this Article, and upon a showing by the Board that any person has violated or is about to violate this Article, the court may grant an injunction or restraining order or take other appropriate action. (2000-162, s. 1.)

§ 90-664. Persons and practices not affected.

The requirements of this Article shall not apply to:

(1) Any person registered, certified, credentialed, or licensed to engage in another profession or occupation or any person working under the supervision of a person registered, certified, credentialed, or licensed to engage in another profession or occupation in this State who is performing work incidental to or within the practice of that profession or occupation and does not represent himself or herself as a respiratory care practitioner.

(2) A student or trainee working under the direct supervision of a respiratory care practitioner while fulfilling an experience requirement or pursuing a course of study to meet requirements for licensure in accordance with rules adopted pursuant to this Article.

(3) A respiratory care practitioner serving in the armed forces or the Public Health Service of the United States or employed by the Veterans Administration when performing duties associated with that service or employment.

(4) A person who performs only support activities as defined in G.S. 90-648(13). (2000-162, s. 1.)

§ 90-665. Third-party reimbursement.

Nothing in this Article shall be construed to require direct third-party reimbursements to persons licensed under this Article. (2000-162, s. 1.)

§ 90-666. Civil penalties.

(a) Authority to Assess Civil Penalties. — In addition to taking any of the actions permitted under G.S. 90-659, the Board may assess a civil penalty not to exceed one thousand dollars ($1,000) for the violation of any section of this Article or any rules adopted by the Board. The clear proceeds of any civil penalty assessed under this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(b) Consideration Factors. — Before imposing and assessing a civil penalty and fixing the amount of the penalty, the Board shall, as a part of its deliberations, consider the following factors:

(1) The nature, gravity, and persistence of the particular violation.

(2) The appropriateness of the imposition of a civil penalty when considered alone or in combination with other punishment.

(3) Whether the violation was willful and malicious.

(4) Any other factors that would tend to mitigate or aggravate the violations found to exist.

(c) Schedule of Civil Penalties. — The Board shall establish a schedule of civil penalties for violations of this Article. The schedule shall indicate for each type of violation whether the violation can be corrected. Penalties shall be assessed for the first, second, and third violations of specified sections of this Article and for specified rules.

(d) Costs. — The Board may assess the costs of disciplinary actions against a person found to be in violation of this Article or rules adopted by the Board. (2003-384, s. 8.)

§§ 90-667 through 90-670: Reserved for future codification purposes.

Article 39.

Safety Profession.

§ 90-671. Definitions.

The following definitions apply in this Article:

(1) Associate Safety Professional (ASP). A person who has met the education, experience, and examination requirements established by the Board of Certified Safety Professionals for an Associate Safety Professional.

(2) Board of Certified Safety Professionals (BCSP). A nonprofit corporation, incorporated in Illinois in 1969, established to improve the practice and educational standards of the profession of safety by certifying individuals who meet its education, experience, examination, and maintenance requirements.

(3) Certified Safety Professional (CSP). A person who has met the education, experience, and examination requirements established by the Board of Certified Safety Professionals for a Certified Safety Professional. (2000-110, s. 1; 2000-140, s. 98.)

Editor's Note. — This article was originally enacted as Article 37 of Chapter 90 by Session Laws 2000-110, s. 1, and the section enacted as G.S. 90-646. The Article was renumbered as Article 39 of Chapter 90, and the section renumbered as G.S. 90-671, by Session Laws 2000-140, s. 98.

§ 90-672. Unlawful acts; injunctive relief; exclusion.

(a) No person shall represent himself or herself as a Certified Safety Professional or Associate Safety Professional unless that person is certified by the Board of Certified Safety Professionals and has duly authorized the Board to file with the office of the Secretary of State all information required by G.S. 90-674.

(b) A violation of this section constitutes an unfair trade practice under G.S. 75-1.1, and a court may impose a civil penalty against the defendant and shall be empowered to issue a restraining order to prevent further use of the title. (2000-110, s. 1; 2000-140, s. 98.)

Editor's Note. — This section was originally enacted as G.S. 90-647 by Session Laws 2000-110, s. 1, and was renumbered as G.S. 90-672, by Session Laws 2000-140, s. 98, which also provided for the correction of the internal reference in subsection (a).

§ 90-673. Exemptions and limitations.

(a) This Article does not apply to:

(1) A person who holds a license issued by a State board, commission, or other agency, is engaged in activities authorized by his or her license, and does not represent himself or herself as an Associate Safety Professional or Certified Safety Professional.

(2) A person who practices within the scope of safety, injury, or illness prevention and does not use the title "Associate Safety Professional" or "Certified Safety Professional", the initials "ASP" or "CSP", or otherwise represents himself or herself to the public as an Associate Safety Professional or Certified Safety Professional.

(3) A person who is licensed as an architect under Chapter 83A of the General Statutes or any person working under the supervision of a licensed architect.

(4) A person who is licensed as a professional engineer under Chapter 89C of the General Statutes or any person working under the supervision of a licensed professional engineer.

(b) Nothing in this Article shall permit the practice of engineering by persons who are not licensed under Chapter 89C of the General Statutes.

(c) Nothing in this Article shall permit the practice of architecture by persons not licensed under Chapter 83A of the General Statutes. (2000-110, s. 1; 2000-140, s. 98.)

Editor's Note. — This section was originally enacted as G.S. 90-648 by Session Laws 2000-110, s. 1, and was renumbered as G.S. 90-673, by Session Laws 2000-140, s. 98.

§ 90-674. Certification registry.

The Board shall file with the Secretary of State the name, address, telephone number, and date of certification for all Associate Safety Professionals and Certified Safety Professionals. The Board shall remit a filing fee of thirty-five dollars ($35.00) to the Secretary of State with each certification filed. All fees paid to the Department shall be used to pay the costs incurred in administering and enforcing this Article. The Board may require this filing fee to be paid by the person whose certification is being filed. The Board shall promptly notify the Secretary of State when a person's certification is revoked or no longer in effect.

The Secretary of State shall maintain a registry of all current Associate Safety Professionals and Certified Safety Professionals as furnished by the Board. (2000-110, s. 1; 2000-140, s. 98.)

Editor's Note. — This section was originally enacted as G.S. 90-649 by Session Laws 2000-110, s. 1, and was renumbered as G.S. 90-674, by Session Laws 2000-140, s. 98.

§§ 90-675 through 90-680: Reserved for future codification purposes.

Article 40.

Perfusionist Licensure Act.

§ 90-681. Legislative findings.

The General Assembly finds that the practice of perfusion is an area of health care that is continually evolving to include more sophisticated and demanding patient care activities. The General Assembly further finds that the practice of perfusion by unauthorized, unqualified, unprofessional, and incompetent persons is a threat to public health, safety, and welfare, and therefore it is necessary to establish minimum standards of education, training, and competency for persons engaged in the practice of perfusion. (2005-267, s. 1.)

Editor's Note. — Session Laws 2005-267, s. 2, expiring December 31, 2007, provides: "Notwithstanding the requirements of this act, the North Carolina Perfusion Advisory Committee shall issue a license to practice perfusion to any person who has, as his or her primary job function, been operating cardiopulmonary bypass systems during cardiac surgery cases in a licensed health care facility in the five years immediately preceding application to the Committee or within five of the last eight years preceding application to the Committee."

§ 90-682. Definitions.

The following definitions apply in this Article:

(1) Certified clinical perfusionist. — A person who has successfully completed the examination process and has been issued a certificate by the American Board of Cardiovascular Perfusion or its successor organization.

(2) Committee. — The Perfusionist Advisory Committee of the North Carolina Medical Board.

(3) Extracorporeal circulation. — The diversion of a patient's blood through a heart-lung machine or a similar device that assumes the functions of the patient's heart, lungs, kidneys, liver, or other organs.

(4) Licensee. — A person who has been issued a license to practice perfusion under this Article.

(5) Medical Board. — The North Carolina Medical Board, as established under Article 1 of this Chapter.

(6) Perfusion protocols. — Perfusion-related policies and protocols developed or approved by a licensed health care facility or a physician through collaboration with administrators, licensed perfusionists, and other health care professionals.

(7) Practice of perfusion. — The performing of functions, under the supervision of a licensed physician, necessary for the support, treatment, measurement, or supplementation of the cardiovascular, circulatory, and respiratory systems or other organs, or a combination of those functions, and the ensuring of safe management of physiological function by monitoring and analyzing the parameters of the systems during any medical situation where it is necessary to support or replace the patient's cardiopulmonary or circulatory function. The term also includes the use of extracorporeal circulation, long-term cardiopulmonary support techniques, including extracorporeal carbon-dioxide removal and extracorporeal membrane oxygenation, and associated therapeutic and diagnostic technologies; counterpulsation, ventricular assistance, autotransfusion, blood conservation techniques, myocardial and organ preservation, extracorporeal life support, and isolated limb perfusion; the use of techniques involving blood management, advanced life support, and other related functions; and, in the performance of the acts described in this subdivision, (i) the administration of pharmacological and therapeutic agents, blood products, or anesthetic agents through the extracorporeal circuit or through an intravenous line as ordered by a physician; (ii) the performance and use of anticoagulation monitoring and analysis, physiologic monitoring and analysis, blood gas and chemistry monitoring and analysis, hematological monitoring and analysis, hypothermia, hyperthermia, hemoconcentration and hemodilution, and hemodialysis in conjunction with perfusion service; and (iii) the observation of signs and symptoms related to perfusion services, the determination of whether the signs and symptoms exhibit abnormal characteristics, and the implementation of appropriate reporting, perfusion protocols, or changes in or the initiation of emergency procedures. (2005-267, s. 1; 2007-525, s. 5.)

Effect of Amendments. — Session Laws 2007-525, s. 5, effective October 1, 2007, substituted "Perfusionist Advisory Committee of the North Carolina Medical Board" for "North Carolina Perfusion Advisory Committee" in subdivision (2).

§ 90-682.1. Medical Board approval required.

(a) The Committee shall report to the Medical Board all actions taken by the Committee pursuant to this Article, except for actions taken by the Committee pursuant to G.S. 90-684. No action by the Committee is effective unless the action is approved by the Medical Board. The Medical Board may also rescind or supersede, in whole or in part, any action taken by the Committee in carrying out the provisions of this Article, except for actions taken by the Committee pursuant to G.S. 90-684. In rescinding or superseding an action by the Committee, the Board may remand the matter back to the Committee with instructions to perform some act consistent with this Article or Article 1 of Chapter 90. Members of the Medical Board may be selected by the President of the Board to participate in the matter that is the subject of the Order remanding the matter back to the Committee.

(b) The Board may waive any requirements of this Article consistent with G.S. 90-12.5. (2005-267, s. 1; 2007-346, s. 7; 2007-525, s. 6.)

Editor's Note. — The reference to "G.S. 90-12.5" in subsection (b) above, was substituted for "G.S. 90-12.2" at the direction of the Revisor of Statutes. G.S. 90-12.2 was recodified as G.S. 90-12.5 by Session Laws 2007-346, s. 7, effective October 1, 2007.

Effect of Amendments. — Session Laws 2007-525, s. 6, effective October 1, 2007, redesignated former first paragraph as present subsection (a); in subsection (a), made a stylistic change, inserted last two sentences; and added subsection (b).

§ 90-683. License required; exemptions.

(a) On or after July 1, 2006, no person shall practice or offer to practice perfusion as defined in this Article, use the title "licensed perfusionist" or "provisional licensed perfusionist", use the letters "LP" or "PLP", or otherwise indicate or imply that the person is a licensed perfusionist or a provisionally licensed perfusionist unless that person is currently licensed as provided in this Article.

(b) The provisions of this Article shall not apply to:

(1) Any person registered, certified, credentialed, or licensed to engage in another profession or occupation or any person working under the supervision of a person registered, certified, credentialed, or licensed to engage in another profession or occupation in this State if the person is performing work incidental to the practice of that profession or occupation and the person does not represent himself or herself as a licensed perfusionist or a provisionally licensed perfusionist.

(2) A student enrolled in an accredited perfusion education program if perfusion services performed by the student are an integral part of the student's course of study and are performed under the direct supervision of a licensed perfusionist.

(3) A perfusionist employed by the United States government when performing duties associated with that employment.

(4) A person performing autotransfusion or blood conservation techniques under the direct supervision of a licensed physician. (2005-267, s. 1.)

§ 90-684. Perfusion Advisory Committee.

(a) Composition and Terms. — The North Carolina Perfusion Advisory Committee is created. The Committee shall consist of seven members who shall serve staggered terms. The initial Committee members shall be selected on or before October 1, 2005, as follows:

(1) The North Carolina Medical Board shall appoint three licensed perfusionists, two of whom shall serve a term of three years and one of whom shall serve a term of two years.

(2) The North Carolina Medical Board shall appoint one physician who is licensed under Article 1 of Chapter 90 of the General Statutes and is a cardiothoracic surgeon or a cardiovascular anesthesiologist, who shall serve a term of two years.

(3) The North Carolina Hospital Association shall appoint two hospital administrators, one of whom shall serve a term of two years and one of whom shall serve a one-year term.

(4) The Governor shall appoint one public member who shall serve a one-year term.

Upon the expiration of the terms of the initial Committee members, members shall be appointed by the appointing authorities designated in subdivisions (1) through (4) of this subsection for a term of three years and shall serve until a successor is appointed. No member may serve more than two consecutive full terms.

(b) Qualifications. — Members of the Committee shall be citizens of the United States and residents of this State. The perfusionist members shall hold current licenses from the Committee and shall remain in good standing with the Committee during their terms. Public members of the Committee shall not be: (i) trained or experienced in the practice of perfusion, (ii) an agent or employee of a person engaged in the practice of perfusion, (iii) a health care professional licensed under this Chapter or a person enrolled in a program to become a licensed health care professional, (iv) an agent or employee of a health care institution, a health care insurer, or a health care professional school, (v) a member of an allied health profession or a person enrolled in a program to become a member of an allied health profession, or (vi) a spouse of an individual who may not serve as a public member of the Committee.

(c) Vacancies. — Any vacancy shall be filled by the authority originally filling that position. Appointees to fill vacancies shall serve the remainder of the unexpired term and until their successors have been duly appointed and qualified.

(d) Removal. — The Committee may remove any of its members for neglect of duty, incompetence, or unprofessional conduct. A member subject to disciplinary proceedings in his or her capacity as a licensed perfusionist shall be disqualified from participating in the official business of the Committee until the charges have been resolved.

(e) Compensation. — Each member of the Committee shall receive per diem and reimbursement for travel and subsistence as provided in G.S. 93B-5.

(f) Officers. — The officers of the Committee shall be a chair, a vice-chair, and other officers deemed necessary by the Committee to carry out the purposes of this Article. All officers shall be elected annually by the Committee for two-year terms and shall serve until their successors are elected and qualified. The chair of the Committee shall be a licensed perfusionist.

(g) Meetings. — The Committee shall hold its first meeting within 30 days after the appointment of its members and shall hold at least two meetings each year to conduct business and to review the standards and rules previously adopted by the Committee. The Committee shall establish the procedures for calling, holding, and conducting regular and special meetings. A majority of Committee members constitutes a quorum.

(h) Qualified Immunity. — The Committee and its members and staff shall not be held liable in any civil or criminal proceeding for exercising, in good faith, the powers and duties authorized by law. A person, partnership, firm, corporation, association, authority, or other entity acting in good faith without fraud or malice shall be immune from civil liability for (i) reporting, investigating, or providing an expert medical opinion to the Committee regarding the acts and omissions of a licensee or applicant that violates the provisions of G.S. 90-691(a) or any other provision of law relating to the fitness of a licensee or applicant to practice perfusion and (ii) initiating or conducting proceedings against a licensee or applicant if a complaint is made or action is taken in good faith without fraud or malice. A person shall not be held liable in any civil proceeding for testifying before the Committee in good faith and without fraud or malice in any proceeding involving a violation of G.S. 90-961(a) or any other law relating to the fitness of an applicant or licensee to practice perfusion, or for making a recommendation to the Committee in the nature of peer review, in good faith and without fraud and malice. (2005-267, s. 1; 2007-525, s. 7.)

Editor's Note. — Session Laws 2005-267, s. 3, provides: "Notwithstanding G.S. 90-684(a)(1), as enacted by Section 1 of this act, the initial perfusionists appointed to the North Carolina Perfusion Advisory Committee by the North Carolina Medical Board do not have to meet the licensure requirements established under G.S. 90-686, as enacted by Section 1 of this act. The appointees must be certified clinical perfusionists and must apply for and obtain a license from the Committee within 90 days after the Committee begins issuing licenses."

Effect of Amendments. — Session Laws 2007-525, s. 7, effective October 1, 2007, added subsection (h).

§ 90-685. Powers of the Committee.

The Committee shall have the power and duty to:

(1) Administer this Article.

(2) Issue interpretations of this Article.

(3) Adopt, amend, or repeal rules as may be necessary to carry out the provisions of this Article.

(4) Employ and fix the compensation of personnel that the Committee determines is necessary to carry into effect the provisions of this Article and incur other expenses necessary to effectuate this Article.

(4a) Establish the standards for qualifications and fitness of applicants for licensure, provisional licensure, licensure renewal, and reciprocal licensure.

(5) Determine the qualifications and fitness of applicants for licensure, provisional licensure, licensure renewal, and reciprocal licensure.

(6) Issue, renew, deny, suspend, or revoke licenses, order probation, issue reprimands, and carry out any other disciplinary actions authorized by this Article.

(7) Set fees for licensure, provisional licensure, reciprocal licensure, licensure renewal, and other services deemed necessary to carry out the purposes of this Article.

(8) Establish continuing education requirements for licensees.

(9) Establish a code of ethics for licensees.

(10) Maintain a current list of all persons who have been licensed under this Article.

(11) Conduct investigations for the purpose of determining whether violations of this Article or grounds for disciplining licensees exist.

(12) Maintain a record of all proceedings and make available to all licensees and other concerned parties an annual report of all Committee action.

(13) Adopt a seal containing the name of the Committee for use on all official documents and reports issued by the Committee.

(14) Summon and issue subpoenas for the appearance of any witnesses deemed necessary to testify concerning any matter to be heard before or inquired into by the Committee.

(15) Order that any patient records, documents, or other material concerning any matter to be heard before or inquired into by the Committee shall be produced before the Committee or made available for inspection, notwithstanding any other provisions of law providing

for the application of any physician-patient privilege with respect to such records, documents, or other material. The Committee shall withhold from public disclosure the identity of a patient, including information relating to dates and places of treatment, or any other information that would tend to identify the patient, unless the patient or the representative of the patient expressly consents to the disclosure.

(16) Order a licensee whose health and effectiveness have been significantly impaired by alcohol, drug addiction, or mental illness to attend and successfully complete a treatment program as deemed necessary and appropriate. (2005-267, s. 1; 2007-525, s. 8.)

Effect of Amendments. — Session Laws 2007-525, s. 8, effective October 1, 2007, added subdivisions (4a) and (14) through (16).

§ 90-685.1. Confidentiality of Committee investigative information.

(a) All records, papers, investigative files, investigative reports, other investigative information, and other documents containing information in the possession of or received or gathered by the Committee or its members or employees as a result of investigations, inquiries, or interviews conducted in connection with a licensing, complaint, or disciplinary matter shall not be considered public records within the meaning of Chapter 132 of the General Statutes and are privileged, confidential, and not subject to discovery, subpoena, or other means of legal compulsion for release to any person other than the Committee, its employees, or agents involved in the application for license or discipline of a license holder, except as provided in subsection (b) of this section. For purposes of this subsection, investigative information includes information relating to the identity of, and a report made by, a perfusionist, or other person performing an expert review for the Committee.

(b) The Committee shall provide the licensee or applicant with access to all information in its possession that the Committee intends to offer into evidence in presenting its case in chief at the contested hearing on the matter, subject to any privilege or restriction set forth by rule, statute, or legal precedent, upon written request from a licensee or applicant who is the subject of a complaint or investigation, or from the licensee's or applicant's counsel, unless good cause is shown for delay. The Committee is not required to provide any of the following:

(1) A Committee investigative report.
(2) The identity of a nontestifying complainant.
(3) Attorney-client communications, attorney work product, or other materials covered by a privilege recognized by the Rules of Civil Procedure or the Rules of Evidence. (2007-525, s. 9.)

Editor's Note. — Session Laws 2007-525, s. 15, made this section effective October 1, 2007.

§ 90-686. Qualifications for licensure.

(a) An applicant shall be licensed to practice perfusion if the applicant meets all of the following qualifications:

(1) Is at least 18 years old.
(2) Completes an application on a form provided by the Committee.

(3) Successfully completes a perfusion education program approved by the Committee.
(4) Pays the required fee under G.S. 90-689.
(5) Is a certified clinical perfusionist.

(b) All persons licensed under this section shall practice perfusion under the supervision of a physician licensed under Article 1 of Chapter 90 of the General Statutes. (2005-267, s. 1.)

§ 90-687. Reciprocity.

The Committee may grant, upon application and payment of proper fees, a license to a person who has been licensed to practice perfusion in another state or territory of the United States whose standards of competency are substantially equivalent to those provided in this Article or holds a current certificate as a certified clinical perfusionist. (2005-267, s. 1.)

§ 90-688. Provisional license.

The Committee may grant a provisional license for a period not exceeding 12 months to any applicant who has successfully completed an approved perfusion education program and pays the required fee under G.S. 90-689. A provisional license shall allow the individual to practice perfusion under the supervision and direction of a licensed perfusionist and in accordance with rules adopted pursuant to this Article. A license granted under this section shall contain an endorsement indicating that the license is provisional and stating the terms and conditions of its use by the licensee and shall state the date the license was granted and the date it expires. Provisional licenses shall be renewed in accordance with the provisions of G.S. 90-690. (2005-267, s. 1.)

§ 90-689. Expenses; fees.

(a) All fees shall be payable to the Medical Board and deposited in the name of the Medical Board in financial institutions designated by the Medical Board as official depositories. These fees shall be used to carry out the purposes of this Article.

(b) All salaries, compensation, and expenses incurred or allowed to carry out the purposes of this Article shall be paid by the Medical Board exclusively out of the fees received by the Medical Board as authorized by this Article or funds received from other sources. In no case shall any salary, expense, or other obligation authorized by this Article be charged against the State treasury.

(c) The Committee, upon the approval of the Medical Board, shall establish fees not exceeding the following amounts:

(1) License application	$350.00
(2) Biennial renewal of license	$350.00
(3) Late renewal of license	$100.00
(4) Provisional license	$175.00
(5) Copies of rules	Cost.

(2005-267, s. 1.)

§ 90-690. Renewal of licenses.

(a) All licenses to practice perfusion shall expire two years after the date they were issued. The Committee shall send a notice of expiration to each licensee at his or her last known address at least 30 days prior to the expiration of his or her license. All applications for renewal of unexpired licenses shall be filed with the Committee and accompanied by proof satisfactory to the

Committee that the applicant has completed the continuing education requirements established by the Committee and the renewal fee as required by G.S. 90-689.

(b) An application for renewal of a license that has been expired for less than three years shall be accompanied by proof satisfactory to the Committee that the applicant has current certification as defined by G.S. 90-682(1), has satisfied the continuing education requirements established by the Committee and has paid the renewal and late fees required by G.S. 90-689. A license that has been expired for more than three years shall not be renewed, but the applicant may apply for a new license by complying with the current requirements for licensure under this Article. (2005-267, s. 1; 2007-525, s. 10.)

Effect of Amendments. — Session Laws 2007-525, s. 10, effective October 1, 2007, in subsection (b) inserted "current certification as defined by G.S. 90-682(1), has" and "has paid."

§ 90-690.1. Maintenance of certification to maintain licensure.

(a) After December 31, 2007, all licensed perfusionists who are licensed under this Article shall maintain certification as defined in G.S. 90-682(1) in order to maintain licensure. If certification shall lapse at any time, the Committee may initiate disciplinary action under G.S. 90-691, or upon a finding consistent with G.S. 150B-3(c), may order the summary suspension of the perfusionist's license.

(b) The provisions of this section shall not apply to perfusionists who were licensed under Section 2 of S. L. 2005-267. (2007-525, s. 11.)

Editor's Note. — Session Laws 2007-525, s. 15, made this section effective October 1, 2007.

§ 90-691. Disciplinary authority.

(a) The Committee may place on probation with or without conditions, impose limitations and conditions on, publicly reprimand, assess monetary redress, issue public letters of concern, require satisfactory completion of treatment programs or remedial or educational training, deny, refuse to renew, suspend, or revoke an application or license if the applicant or licensee:

(1) Gives false information or withholds material information from the Committee in procuring or attempting to procure a license.

(2) Gives false information or withholds material information from the Committee during the course of an investigation conducted by the Committee.

(3) Has been convicted of or pled guilty or no contest to a crime that indicates the person is unfit or incompetent to practice perfusion as defined in this Article or that indicates the person has deceived, defrauded, or endangered the public.

(4) Has a habitual substance abuse or mental impairment that interferes with his or her ability to provide appropriate care as established by this Article or rules adopted by the Committee. The Committee is empowered and authorized to require a licensee to submit to a mental or physical examination by persons designated by the Committee before or after charges may be presented against the licensee, and the results of the examination shall be admissible in evidence in a hearing before the Committee.

(5) Has demonstrated gross negligence, incompetency, or misconduct in the practice of perfusion as defined in this Article. The Committee

may, upon reasonable grounds, require a licensee to submit to inquiries or examinations, written or oral, as the Committee deems necessary to determine the professional qualifications of the licensee.

(6) Has had an application for licensure or a license to practice perfusion in another jurisdiction denied, suspended, or revoked for reasons that would be grounds for similar action in this State.

(7) Has willfully violated any provision of this Article or rules adopted by the Committee.

(8) Has allowed his or her certification to lapse.

(b) The taking of any action authorized under subsection (a) of this section may be ordered by the Committee after a hearing is held in accordance with Article 3A of Chapter 150B of the General Statutes. The Committee may reinstate a revoked license if it finds that the reasons for revocation no longer exist and that the person can reasonably be expected to perform the services authorized under this Article in a safe manner. (2005-267, s. 1; 2007-525, s. 12.)

Effect of Amendments. — Session Laws 2007-525, s. 12, effective October 1, 2007, in the section heading, substituted "Disciplinary authority" for "Suspension, revocation, and refusal to renew"; rewrote the introductory language in subsection (a); added the last sentence in subdivisions (a)(4) and (5); and added subdivision (a)(8).

§ 90-692. Enjoining illegal practices.

The Committee may apply to the superior court for an order enjoining violations of this Article. Upon a showing by the Committee that any person has violated this Article, the court may grant injunctive relief. (2005-267, s. 1.)

§ 90-693. Civil penalties; disciplinary costs.

(a) Authority to Assess Civil Penalties. — The Committee may assess a civil penalty not in excess of one thousand dollars ($1,000) for the violation of any section of this Article or the violation of any rules adopted by the Committee. The clear proceeds of any civil penalty assessed under this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(b) Consideration Factors. — Before imposing and assessing a civil penalty, the Committee shall consider the following factors:

(1) The nature, gravity, and persistence of the particular violation.

(2) The appropriateness of the imposition of a civil penalty when considered alone or in combination with other punishment.

(3) Whether the violation was willful and malicious.

(4) Any other factors that would tend to mitigate or aggravate the violations found to exist.

(c) Schedule of Civil Penalties. — The Committee shall establish a schedule of civil penalties for violations of this Article and rules adopted by the Committee.

(d) Costs. — The Committee may assess the costs of disciplinary actions against a person found to be in violation of this Article or rules adopted by the Committee. (2005-267, s. 1.)

§ 90-694. Third-party reimbursement.

Nothing in this Article shall be construed to require direct third-party reimbursements to persons licensed under this Article. (2005-267, s. 1.)

§§ 90-695 through 90-700: Reserved for future codification purposes.

Article 41.

Pathology Services Billing.

§ 90-701. Billing of anatomic pathology services.

(a) It shall be unlawful for any person licensed to practice medicine, podiatry, or dentistry in this State to bill a patient, entity, or person for anatomic pathology services in an amount in excess of the amount charged by the clinical laboratory for performing the service unless the licensed practitioner discloses conspicuously on the itemized bill or statement, or in writing by a separate itemized disclosure statement:

(1) The amounts charged by the laboratory for the anatomic pathology service;
(2) Any other charge that has been included in the bill; and
(3) The name of the licensed practitioner performing or supervising the anatomic pathology service.

The disclosure required under this subsection shall be printed in a 10-point or higher font size.

(b) It shall be unlawful for any hospital licensed in this State to bill a patient, entity, or person for anatomic pathology services in an amount in excess of the amount charged by the clinical laboratory for performing the service unless the hospital discloses conspicuously on the itemized bill or statement, or in writing by a separate itemized disclosure statement:

(1) The amounts charged by the laboratory for the professional anatomic pathology services;
(2) Any other charge that has been included in the bill; and
(3) The name of the licensed practitioner performing or supervising the anatomic pathology service.

The disclosure required under this subsection shall be printed in a 10-point or higher font size.

(c) A bill for anatomic pathology services submitted to a patient, entity, or person for payment shall disclose the name and address of the laboratory performing the professional component of the service.

(d) The requirements of subsections (a) and (b) of this section shall not apply to:

(1) A licensed practitioner performing or supervising anatomic pathology services, or
(2) A hospital or physician group practice where a physician employee or physician under contract to a hospital or a physician group practice is providing or supervising anatomic pathology services and is compensated by the hospital or physician group practice for the services.

(e) As used in this section, the term "anatomic pathology services" means:

(1) Histopathology or surgical pathology meaning the gross and microscopic examination and histologic processing of organ tissue performed by a physician or under the supervision of a physician;
(2) Cytopathology meaning the examination of cells from fluids, aspirates, washings, brushings, or smears, including the Pap test examination performed by a physician or under the supervision of a physician;
(3) Hematology meaning the microscopic evaluation of bone marrow aspirates and biopsies performed by a physician or under the supervision of a physician, and peripheral blood smears when the attending or treating physician or technologist requests that a blood smear be reviewed by a pathologist;

(4) Subcellular pathology and molecular pathology; and
(5) Blood-banking services performed by pathologists.

(f) Nothing in this section shall be construed to require the disclosure of the terms or conditions of a contract for the provision of anatomic pathology services between a managed care organization and a hospital or between a managed care organization and a physician's practice.

(g) The requirements of subsections (a) and (b) of this section shall not apply to a referring laboratory providing anatomic pathology services for services performed by that laboratory in instances where one or more samples must be sent for a second medical opinion on a specimen.

(h) Nothing in this section shall be construed as a prohibition on a physician requesting the anatomic pathology services of more than one clinical laboratory for a second medical opinion on a specimen.

(i) Each intentional failure to disclose in violation of subsections (a), (b), or (c) of this section is a separate Class 3 misdemeanor offense punishable by a fine of two hundred fifty dollars ($250.00).

(j) The respective State licensing boards having jurisdiction over practitioners subject to this section may revoke, suspend, or deny renewal of the license of a practitioner who violates this section. Each State licensing board having jurisdiction may take disciplinary action on a finding by the board of intentional violation or an ongoing pattern of violations in the absence of a misdemeanor conviction.

(k) Not later than six months from the effective date of this section, the respective State licensing boards having jurisdiction, and the Division of Health Service Regulation, shall communicate the requirements of this section to all licensed practitioners and licensed facilities subject to this section. (2005-415, ss. 1, 1.1; 2007-182, s. 1.)

Editor's Note. — This section was originally enacted by Session Laws 2005-415, s. 1 as G.S. 90-681 in Article 40. It was then recodified by s. 1.1 of that act as G.S. 90-701 in Article 41, since Senate Bill 1059, 2005 Regular Session, became law.

Session Laws 2005-415, s. 3, provides: "The State licensing boards subject to G.S. 90-681 [renumbered as G.S. 90-701], as enacted by this act, and the Division of Facility Services [now the Division of Health Service Regulation] of the Department of Health and Human Services shall report to the 2006 Regular Session of the 2005 General Assembly upon its convening. The report shall indicate efforts made to apprise licensed practitioners and to evaluate licensed practitioners' and licensed health care facilities' compliance with the requirements of G.S. 90-681 [renumbered as G.S. 90-701], as enacted by this act."

Effect of Amendments. — Session Laws 2007-182, s. 1, effective July 5, 2007, substituted "Division of Health Service Regulation" for "Division of Facility Services" in subsection (k).

Chapter 90A.

Sanitarians and Water and Wastewater Treatment Facility Operators.

Article 1.

Sanitarians.

Sec.
90A-1 through 90A-19. [Repealed.]

Article 2.

Certification of Water Treatment Facility Operators.

90A-20. Purpose.
90A-20.1. Definitions.
90A-21. Water Treatment Facility Operators Board of Certification.
90A-22. Classification of water treatment facilities; notification of users.
90A-23. Grades of certificates.
90A-24. Operator qualifications and examination.
90A-25. Issuance of certificates.
90A-25.1. Renewal of certificate.
90A-26. Revocation or suspension of certificate.
90A-27. Application fee.
90A-28. Promotion of training and other powers.
90A-29. Certified operators required.
90A-30. Penalties; remedies; contested cases.
90A-31. Commercial water treatment operation firms.
90A-32. Certification of distribution operators.
90A-33, 90A-34. [Reserved.]

Article 3.

Certification of Water Pollution Control System Operators and Animal Waste Management System Operators.

Part 1. Certification of Water Pollution Control System Operators.

90A-35. Purpose.
90A-36. [Repealed.]
90A-37. Classification of water pollution control systems.
90A-38. Grades of certificates.
90A-39. Operator qualifications and examination.
90A-40. Issuance of certificates.
90A-41. Revocation of certificate.
90A-42. Fees.
90A-43. Promotion of training and other powers.
90A-44. Certified operators required.
90A-45. Commercial water pollution control system operating firms.
90A-46. Definitions.
Sec.
90A-46.1. Expiration and renewal of certificates; continuing education requirements.

Part 2. Certification of Animal Waste Management System Operators.

90A-47. Purpose.
90A-47.1. Definitions.
90A-47.2. Certified operator in charge required; qualifications for certification.
90A-47.3. Qualifications for certification; training; examination.
90A-47.4. Fees; certificate renewals.
90A-47.5. Suspension; revocation of certificate.
90A-47.6. Rules.
90A-48, 90A-49. [Reserved.]

Article 4.

Registrations of Sanitarians.

90A-50. State Board of Sanitarian Examiners.
90A-51. Definitions.
90A-52. Practice without certificate unlawful.
90A-53. Qualifications and examination for registration as a sanitarian.
90A-54. Qualification for registration as a sanitarian intern.
90A-55. State Board of Sanitarian Examiners; appointment and term of office.
90A-56. Compensation of Board members; expenses; employees.
90A-57. Election of officers; meetings; regulations.
90A-58. Applicability of Chapter 93B.
90A-59. Record of proceedings; register of applications; register of registered sanitarians and sanitarian interns.
90A-60. Rating of educational institutions.
90A-61. Certification and registration of persons practicing as sanitarians on October 1, 1982; temporary provisions.
90A-62. Certification and registration of sanitarians certified in other states.
90A-63. Renewal of certificates.
90A-64. Suspensions and revocations of certificates.
90A-65. Representing oneself as a registered sanitarian.
90A-66. Violations; penalty; injunction.
90A-67 through 90A-69. [Reserved.]

Article 5.

Certification of On-Site Wastewater Contractors and Inspectors.

Sec.
90A-70. Purpose.
90A-71. Definitions.
90A-72. Certification required; applicability.
90A-73. Creation and membership of the Board.
90A-74. Powers and duties of the Board.
90A-75. Expenses and fees.
90A-76. On-Site Wastewater Certification Fund.
90A-77. Certification requirements.
90A-78. Certification renewal.
90A-79. Continuing education.
90A-80. Investigation of complaints.
90A-81. Remedies.

ARTICLE 1.

Sanitarians.

§§ 90A-1 through 90A-19: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1274, s. 1.

Cross References. — For present provisions as to registration of sanitarians, see G.S. 90A-50 et seq.

ARTICLE 2.

Certification of Water Treatment Facility Operators.

§ 90A-20. Purpose.

It is the purpose of this Article to protect the public health and to conserve and protect the water resources of the State; to protect the public investment in water treatment facilities; to provide for the classifying of public water treatment facilities; to require the examination of water treatment facility operators and the certification of their competency to supervise the operation of water treatment facilities; and to establish the procedures for such classification and certification. Further, it is the purpose of this Article to provide for the certification of personnel operating the distribution portion of a water treatment facility. (1969, c. 1059, s. 2; 1989, c. 227, s. 1.)

§ 90A-20.1. Definitions.

In this Article, unless the context clearly requires otherwise, the following definitions apply:

(1) "Board" or "Board of Certification" means the Water Treatment Facility Operators Board of Certification.
(2) "Operator" means a person who operates, maintains or inspects water treatment facilities.
(3) "Operator in responsible charge" means a person designated by the owner of the water treatment facility to be responsible for the total operation and maintenance of the facility.
(4) "Public water system" means a system for the provision of piped water for human consumption as defined in G.S. 130A-313(10).
(5) "Unit of local government" means a county, city, consolidated city-county, sanitary district or other local political subdivision, authority or agency of local government.
(6) "Water treatment facility" means any facility or facilities used or available for use in the collection, treatment, testing, storage, pump-

ing, or distribution of water for a public water system. (1989, c. 227, s. 2.)

§ 90A-21. Water Treatment Facility Operators Board of Certification.

(a) Board Membership. — There is hereby established within the Department of Environment and Natural Resources a Water Treatment Facility Operators Board of Certification (hereinafter termed the "Board of Certification") composed of eight members to be appointed by the Governor as follows:

(1) One member who is currently employed as a water treatment facility operator;
(2) One member who is manager of a North Carolina municipality using a surface water supply;
(3) One member who is manager of a North Carolina municipality using a treated groundwater supply;
(4) One member who is employed as a director of utilities, water superintendent, or equivalent position with a North Carolina municipality;
(5) One member employed by a private water utility or private industry and who is responsible for the operation or supervision of a water supply and treatment facility;
(6) One member who is a faculty member of a four-year college or university whose major field is related to water supply;
(7) One member employed by the Department of Environment and Natural Resources and working in the field of water supply;
(8) One member not certified or regulated under this Article, who shall represent the interest of the public at large.

(b) Terms of Office. — All members serving on the Board on June 30, 1981, shall complete their respective terms. No member appointed to the Board on or after July 1, 1981, shall serve more than two complete consecutive three-year terms, except that the member employed by the Department of Environment and Natural Resources may serve more than two consecutive terms, and except that each member shall serve until his successor is appointed and qualifies. The Governor may remove any member for good cause shown and shall appoint members to fill unexpired terms. The Governor shall appoint the public member not later than July 1, 1981.

(c) Powers and Responsibilities. — The Board of Certification shall establish all rules, regulations and procedures with respect to the certification program and advise and assist the Secretary of Environment and Natural Resources in its administration.

(d) Compensation. — Members of the Board of Certification who are officers or employees of State agencies or institutions shall receive subsistence and travel allowances at the rates authorized by G.S. 138-5.

(e) Officers. — The Board shall elect a chairman and all other necessary officers to serve one-year terms. A majority of the members of the Board shall constitute a quorum for the transaction of business.

(f) Annual Report. — The Board shall report annually to the Governor a full statement of its disciplinary and enforcement programs and activities during the year, together with such recommendations as it may deem expedient. (1969, c. 1059, s. 2; 1973, c. 476, s. 128; 1981, c. 616, ss. 1-5; 1989, c. 727, s. 219(7); 1997-443, s. 11A.24.)

§ 90A-22. Classification of water treatment facilities; notification of users.

(a) On or before July 1, 1982, the Board of Certification, with the advice and assistance of the Secretary of Environment and Natural Resources, shall classify all surface water treatment facilities and all facilities for treating groundwater supplies that are used, or intended for use, as part of a public water supply system with due regard for the size of the facility, its type, character of water to be treated, other physical conditions affecting the treatment of the water, and with respect to the degree of skill, knowledge, and experience that the operator responsible for the water treatment facility must have to supervise successfully the operation of the facilities so as to adequately protect the public health.

(b) The Board shall notify users of such facilities when any classification of a facility by the Board would result in a certified operator's not being required to supervise the operation of that facility. Any user so notified may demand a hearing on the Board's decision, and that hearing and any appeal therefrom shall be conducted in accordance with Articles 3 and 4 of Chapter 150B of the General Statutes. (1969, c. 1059, s. 2; 1973, c. 476, s. 128; 1981, c. 616, s. 6; 1987, c. 827, ss. 1, 230; 1989, c. 727, s. 219(8); 1997-443, s. 11A.25.)

§ 90A-23. Grades of certificates.

The Board of Certification, with the advice and assistance of the Secretary of Environment and Natural Resources, shall establish grades of certification for water treatment facility operators corresponding to the classification of water treatment facilities. (1969, c. 1059, s. 2; 1973, c. 476, s. 128; 1989, c. 227, s. 3; c. 727, s. 219(9); 1997-443, s. 11A.26.)

§ 90A-24. Operator qualifications and examination.

The Board of Certification, with the advice and assistance of the Secretary of Environment and Natural Resources shall establish minimum requirements of education, experience and knowledge for each grade of certification for water treatment facility operators, and shall establish procedures for receiving applications for certification, conducting examinations and making investigations of applicants as may be necessary and appropriate to the end that prompt and fair consideration be given every application and the water treatment facilities of the State may be adequately supervised by certified operators. (1969, c. 1059, s. 2; 1973, c. 476, s. 128; 1989, c. 727, s. 219(10); 1997-443, s. 11A.27.)

§ 90A-25. Issuance of certificates.

(a) The Board shall issue a certificate to an applicant who meets the requirements for certification and pays the required fee. The certificate shall state the grade of certification appropriate for the classification of water treatment facilities the applicant is qualified to operate.

(b) Certificates may be issued, without examination, in a comparable grade to any person who holds a certificate in any state, territory or possession of the United States, if in the judgment of the Board of Certification the requirements for operators under which the person's certificate was issued do not conflict with the provisions of this Article, and are of a standard not lower than that specified under rules and regulations adopted under this Article.

(c) Certificates in an appropriate grade will be issued to operators who, on July 1, 1969, hold certificates of competency issued under the voluntary certification program now being administered through the Department of Environment and Natural Resources with the cooperation of the North Carolina Water Works Operators Association, the North Carolina Section of the American Water Works Association, and the North Carolina League of Municipalities.

(d) Certificates in an appropriate grade will be issued without examination to any person or persons certified by the governing board in the case of a city, town, county, sanitary district, or other political subdivision, or by the owner in the case of a private utility or industry, to have been in responsible charge of its water treatment facilities on the date the Board of Certification notifies the governing board, or owner, of the classification of its water treatment facility, provided the facility was classified before July 1, 1981, and provided the application for such certification is made within one year of the date of notification. A certificate so issued will be valid for use by the holder only in the water treatment facility in which he was employed at the time of his certification. No certificate shall be issued under this subsection to any operator of any water treatment facility classified by the board on or after July 1, 1981.

(e) Temporary certificates in any grade may be issued without examination to any person employed as a water treatment facility operator when the Board of Certification finds that the supply of certified operators, or persons with training necessary to certification, is inadequate. Temporary certificates shall be valid for only one year. Temporary certificates may be issued with such special conditions or requirements relating to the place of employment of the person holding the certificate, his supervision on a consulting or advisory basis, or other matters as the Board of Certification may deem necessary to protect the public health. No temporary certificate may be renewed more than one time either by any operator at the same grade level or by any operator for employment at the same water treatment facility. (1969, c. 1059, s. 2; 1973, c. 476, s. 128; 1981, c. 616, ss. 7, 8; 1989, c. 727, s. 18; 1991, c. 321, s. 1; 1997-443, s. 11A.28.)

§ 90A-25.1. Renewal of certificate.

A certificate expires on December 31 of the year in which it is issued or renewed. The Board, with the advice and assistance of the Secretary of Environment and Natural Resources, may establish minimum continuing education requirements that an applicant must meet to renew a certificate. The Board shall renew a certificate if the applicant meets the continuing education requirements imposed as a condition for renewal, pays the required renewal fee plus any renewal fees in arrears, and, if the application is late, pays the late penalty. (1991, c. 321, s. 2; 1997-443, s. 11A.29.)

§ 90A-26. Revocation or suspension of certificate.

The Board of Certification, in accordance with the procedure set forth in Chapter 150B of the General Statutes of North Carolina, may issue a reprimand to an operator, or suspend or revoke the certificate of an operator, when it finds any of the following:

(1) The operator has practiced fraud or deception.
(2) The operator failed to use reasonable care, judgment, knowledge, or ability in the performance of an operator's duties.
(3) The operator is incompetent or unable to properly perform the duties of an operator.
(4) The operator has failed to comply with the requirements for certification or renewal of certification. (1969, c. 1059, s. 2; 1973, c. 1331, s. 3; 1981, c. 616, s. 9; 1987, c. 827, s. 1; 1991, c. 321, s. 3.)

§ 90A-27. Application fee.

The Board may establish a schedule of fees for the issuance or renewal of a certificate to cover the costs of administering the certification programs. The fee for issuing or renewing a certificate may not exceed fifty dollars ($50.00). The Board may impose a penalty not to exceed thirty dollars ($30.00) for the late renewal of a certificate. (1969, c. 1059, s. 2; 1981, c. 562, s. 1; 1991, c. 321, s. 4.)

§ 90A-28. Promotion of training and other powers.

The Board of Certification and the Secretary of Environment and Natural Resources may take all necessary and appropriate steps in order to effectively and fairly achieve the purposes of this Article, including, but not limited to, the providing of training for operators and cooperating with educational institutions and private and public associations, persons, or corporations in the promotion of training for water treatment facility personnel. (1969, c. 1059, s. 2; 1973, c. 476, s. 128; 1989, c. 727, s. 219(11); 1997-443, s. 11A.30.)

§ 90A-29. Certified operators required.

(a) On and after July 1, 1971, every person, corporation, company, association, partnership, unit of local government, State agency, federal agency, or other legal entity owning or having control of a water treatment facility shall have the obligation of assuring that the operator in responsible charge of such facility is duly certified by the Board of Certification under the provisions of this Article.

(b) No person, after July 1, 1971, shall perform the duties of an operator, in responsible charge of a water treatment facility, without being duly certified under the provisions of this Article. (1969, c. 1059, s. 2; 1981, c. 616, s. 10; 1989, c. 227, s. 4.)

§ 90A-30. Penalties; remedies; contested cases.

(a) Upon the recommendation of the Board of Certification, the Secretary of Environment and Natural Resources or a delegated representative may impose an administrative, civil penalty on any person, corporation, company, association, partnership, unit of local government, State agency, federal agency, or other legal entity who violates G.S. 90A-29(a). Each day of a continued violation shall constitute a separate violation. The penalty shall not exceed one hundred dollars ($100.00) for each day such violation continues. No penalty shall be assessed until the person alleged to be in violation has been notified of the violation.

The clear proceeds of penalties imposed pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(b) Any person wishing to contest a penalty issued under this section shall be entitled to an administrative hearing and judicial review conducted according to the procedures outlined in Articles 3 and 4 of Chapter 150B of the General Statutes.

(c) The Secretary may bring a civil action in the superior court of the county in which the violation is alleged to have occurred to recover the amount of the administrative penalty whenever an owner or person in control of a water treatment facility

(1) Who has not requested an administrative hearing fails to pay the penalty within 60 days after being notified of such penalty, or

(2) Who has requested an administrative hearing fails to pay the penalty within 60 days after service of a written copy of the decision as provided in G.S. 150B-36.

(d) Notwithstanding any other provision of law, this section imposes the only penalty or sanction, civil or criminal, for violations of G.S. 90A-29(a) or for the failure to meet any other legal requirement for a water system to have a certified operator in responsible charge. (1981, c. 616, s. 11; 1987, c. 827, s. 231; 1989, c. 227, s. 5; c. 727, s. 219(12); 1989 (Reg. Sess., 1990), c. 1024, s. 18; 1997-443, s. 11A.31; 1998-215, s. 45.)

§ 90A-31. Commercial water treatment operation firms.

(a) Every person, corporation, company, association, partnership, unit of local government, State agency, federal agency, or other legal entity owning or having control of a water treatment facility may contract with a responsible commercial water treatment facility operation firm for operational and other services of that firm. The owner with the firm's consent may designate an employee of that contracting firm as the operator in responsible charge. This designee and other licensed employees of the firm shall be responsible for the total operation and maintenance of the water treatment facility, and shall be limited as to the number of facilities, distance between facilities, and frequency of visits as can reasonably be handled during the ordinary course of business as well as during emergencies. Contractual firms shall not be limited as to the number of facilities, distance between facilities, location of office or other internal management procedures.

(b) Any operator in responsible charge shall obtain certification from the Water Treatment Facility Operators Board of Certification and shall comply with all of the requirements specified in Chapter 90A and the rules and reasonable standards of the Board, applicable to all operators in responsible charge, designed to assure satisfactory operation of water treatment facilities. (1985, c. 550, s. 1; 1989, c. 227, s. 6.)

§ 90A-32. Certification of distribution operators.

The Board of Certification shall have the authority to establish certification programs for personnel who operate the distribution portion of a water treatment facility. The Board may provide for voluntary or mandatory certification and may provide requirements for training, education, and experience of personnel to be certified. The owner of a water treatment facility shall have three years to obtain certification or the services of appropriately certified distribution personnel after the effective date of mandatory certification. (1989, c. 227, s. 7.)

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1989, c. 227, s. 7 having been G.S. 90A-33.

§§ 90A-33, 90A-34: Reserved for future codification purposes.

Article 3.

Certification of Water Pollution Control System Operators and Animal Waste Management System Operators.

Part 1. Certification of Water Pollution Control System Operators.

§ 90A-35. Purpose.

It is the purpose of this Article to protect the public health and to conserve and protect the quality of the water resources of the State and maintain the quality of receiving waters as assigned by the North Carolina Environmental Management Commission; to protect the public investment in water pollution control systems; to provide for the classification of water pollution control systems; to require the examination of water pollution control system operators and the certification of their competency to supervise the operation of such systems; and to establish procedures for such classification and certification. (1969, c. 1059, s. 3; 1973, c. 1262, s. 23; 1989, c. 372, s. 1; 1989 (Reg. Sess., 1990), c. 850, s. 1; 1991, c. 623, ss. 1, 3; 1995 (Reg. Sess., 1996), c. 626, s. 6(a).)

Cross References. — As to the Wastewater Treatment Plant Operators Certification Commission, see G.S. 143B-300, 143B-301.

§ **90A-36:** Repealed by Session Laws 1973, c. 1262, s. 44.

§ 90A-37. Classification of water pollution control systems.

The Commission, with the advice and assistance of the Secretary of Environment and Natural Resources, shall classify all water pollution control systems. In making the classification, the Commission shall give due regard, among other factors, to the size of the system, the nature of the wastes to be treated or removed from the wastewater, the treatment process to be employed, and the degrees of skill, knowledge and experience that the operator of the water pollution control system must have to supervise the operation of the system so as to adequately protect the public health and maintain the water quality standards of the receiving waters as assigned by the North Carolina Environmental Management Commission. (1969, c. 1059, s. 3; 1973, c. 1262, s. 23; 1977, c. 771, s. 4; 1979, c. 554, ss. 1, 2; 1989, c. 372, s. 2; c. 727, ss. 19, 218(23); 1989 (Reg. Sess., 1990), c. 850, s. 1; 1991, c. 623, ss. 1, 4; 1997-443, s. 11A.119(a).)

§ 90A-38. Grades of certificates.

(a) The Commission, with the advice and assistance of the Secretary of Environment and Natural Resources, shall establish grades and types of certification for water pollution control system operators corresponding to the classification of water pollution control systems. The grades of certification shall be ranked so that a person holding a certification in the highest grade is thereby affirmed competent to operate water pollution control systems of that type in the highest classification and any water pollution control system of that type in a lower classification; a person holding a certification in the next highest grade is affirmed as competent to operate water pollution control systems in the next-to-the-highest classification of that type and any lower classification of that type; and in a like manner through the range of grades of certification and classification of water pollution control systems.

(b) No certificate shall be required under this Article to operate a conventional septic tank system. For purposes of this section, "conventional septic tank system" means a subsurface sanitary sewage system consisting of a settling tank and a subsurface disposal field without a pump or other appurtenances. (1969, c. 1059, s. 3; 1973, c. 1262, s. 23; 1977, c. 771, s. 4; 1979, c. 554, s. 2; 1989, c. 372, s. 3; c. 727, ss. 20, 218(24); 1989 (Reg. Sess., 1990), c. 850, s. 1; 1991, c. 623, ss. 1, 5; 1997-443, s. 11A.119(a).)

§ 90A-39. Operator qualifications and examination.

The Commission, with the advice and assistance of the Secretary of Environment and Natural Resources, shall establish minimum requirements of education, experience, and knowledge for each grade of certification for water pollution control facility operators and shall establish procedures for receiving applications for certification, conducting examinations, and making investigations of applicants as may be necessary and appropriate to the end that prompt and fair consideration be given every applicant and that the water pollution control systems within the State may be adequately supervised by certified operators. (1969, c. 1059, s. 3; 1973, c. 1262, s. 23; 1977, c. 771, s. 4; 1979, c. 554, s. 2; 1989, c. 372, s. 4; c. 727, ss. 21, 218(25); 1989 (Reg. Sess., 1990), c. 850, s. 1; 1991, c. 623, ss. 1, 6; 1997-443, s. 11A.119(a).)

§ 90A-40. Issuance of certificates.

(a) An applicant, upon meeting satisfactorily the appropriate requirements, shall be issued a suitable certificate by the Commission designating the level of his competency. Once issued, a certificate shall be valid unless:

(1) The certificate holder voluntarily surrenders the certificate to the Commission;
(2) The certificate is replaced by one of a higher grade;
(3) The certificate is revoked by the Commission for cause; or
(4) The certificate holder fails to pay the annual renewal fee when due.

(b) A certificate may be issued in an appropriate grade without examination to any person who is properly registered on the "National Association of Boards of Certification" reciprocal registry and who meets all other requirements of rules adopted under this Article.

(c) Repealed by Session Laws 1987, c. 582, s. 2.

(d) Repealed by Session Laws 1991, c. 623, s. 7.

(e) Temporary certificates in an appropriate grade may be issued without examination to any person employed as a water pollution control system operator when the Commission finds that the supply of certified operators or persons with training and experience necessary for certification is inadequate. Temporary certificates shall be valid for only one year, but may be renewed. Temporary certificates may be issued with such special conditions or requirements relating to the place of employment of the person holding the certificate, his supervision on a consulting or advisory basis, or other matters as the Commission may deem necessary to protect the public health and maintain the water quality standards of the receiving waters as assigned by the North Carolina Environmental Management Commission.

(f) Certificates in an appropriate grade and type may be issued without examination to water pollution control system operators who on 1 January 1992 hold certificates of competency issued under the voluntary certification program administered by the North Carolina Water Pollution Control Association. (1969, c. 1059, s. 3; 1973, c. 476, s. 128; c. 1262, s. 23; 1979, c. 554, ss. 2-4; 1987, c. 582, ss. 1, 2; 1989, c. 372, s. 5; 1989 (Reg. Sess., 1990), s. 1; 1991, c. 623, ss. 1, 7.)

§ 90A-41. Revocation of certificate.

The Commission, in accordance with the procedure set forth in Chapter 150B of the General Statutes, may suspend or revoke a certificate or may issue a written reprimand to an operator if it finds that the operator has practiced fraud or deception; that reasonable care, judgment, or the application of his knowledge or ability was not used in the performance of his duties; or that the operator is incompetent or unable to properly perform his duties. (1969, c. 1059, s. 3; 1973, c. 1331, s. 3; 1979, c. 554, s. 2; 1987, c. 827, s. 1; 1989, c. 372, s. 6; 1989 (Reg. Sess., 1990), c. 850, s. 1; 1991, c. 623, ss. 1, 8.)

§ 90A-42. Fees.

(a) The Commission, in establishing procedures for implementing the requirements of this Article, shall impose the following schedule of fees:

(1) Examination including Certificate, $85.00;
(2) Temporary Certificate, $200.00;
(3) Temporary Certification Renewal, $300.00;
(4) Conditional Certificate, $75.00;
(5) Repealed by Session Laws 1987, c. 582, s. 3.
(6) Reciprocity Certificate, $100.00;
(6a) Voluntary Conversion Certificate, $50.00;
(7) Annual Renewal, $50.00;
(8) Replacement of Certificate, $20.00;
(9) Late Payment of Annual Renewal, $50.00 penalty in addition to all current and past due annual renewal fees plus one hundred dollars ($100.00) penalty per year for each year for which annual renewal fees were not paid prior to the current year; and
(10) Mailing List Charges — The Commission may provide mailing lists of certified water pollution control system operators and of water pollution control system operators to persons who request such lists. The charge for such lists shall be twenty-five dollars ($25.00) for each such list provided.

(b) The Water Pollution Control System Account is established as a nonreverting account within the Department. Fees collected under this section shall be credited to the Account and applied to the costs of administering this Article. (1969, c. 1059, s. 3; 1979, c. 554, s. 5; 1981, c. 361, ss. 1-4; 1987, c. 582, s. 3; 1989, c. 372, s. 7; 1989 (Reg. Sess., 1990), c. 850, s. 1; 1991, c. 623, ss. 1, 9; 1991 (Reg. Sess., 1992), c. 1039, s. 1; 1998-212, s. 29A.11(e); 2007-323, s. 30.3(c).)

Editor's Note. — Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 30.3.(c), effective August 1, 2007, substituted "$50.00" for "$35.00" at the end of subdivision (a)(7).

§ 90A-43. Promotion of training and other powers.

The Commission and the Secretary of Environment and Natural Resources are authorized to take all necessary and appropriate steps in order to effectively and fairly achieve the purposes of this Article, including, but not limited to, the providing of training for water pollution control system operators and cooperating with educational institutions and private and public associations, persons, or corporations in the promotion of training for water pollution control system personnel. (1969, c. 1059, s. 3; 1973, c. 1262, s. 23; 1977, c. 771, s. 4; 1979, c. 554, s. 2; 1989, c. 372, s. 8; c. 727, s. 218(26); 1989 (Reg. Sess., 1990), c. 850, s. 1; 1991, c. 623, ss. 1, 10; 1997-443, s. 11A.119(a).)

§ 90A-44. Certified operators required.

No person, firm, or corporation, municipal or private, owning or having control of a water pollution control system for which a certified operator is required under rules adopted by the Commission shall allow such system to be operated by any person who does not hold a currently valid certificate in an appropriate grade and type issued by the Commission. No person shall perform the duties of a water pollution control system operator in responsible charge without being duly certified under the provisions of this Article. No person shall perform the duties of a water pollution control system operator who has not paid all fees required under this Article. (1969, c. 1059, s. 3; 1979, c. 554, s. 2; 1991, c. 623, s. 11.)

§ 90A-45. Commercial water pollution control system operating firms.

(a) Any person, firm, or corporation, municipal or private, owning or having control of a water pollution control system may contract with a responsible commercial water pollution control system operating firm for operational and other services of that firm. Such firm shall designate an employee as the operator in responsible charge of the water pollution control system. Such employee and any other employees who have been duly certified under this Article shall be responsible for the total operation and maintenance of the water pollution control system. Commercial water pollution control system operating firms shall not be limited as to the number of systems, distance between systems, location of office or residence, or other internal management procedures.

(b) Any employee designated by the firm as operator in responsible charge must hold an appropriate certificate issued by the Commission and must comply with all of the requirements of this Article and rules adopted by the Commission.

(c) The Commission may adopt rules requiring that any commercial water pollution control system operating firm file an annual report with the Commission as to the operation of such system. (1983, c. 489, s. 1; 1989, c. 372, s. 9; 1989 (Reg. Sess., 1990), c. 850, s. 1; 1991, c. 623, ss. 1, 12.)

§ 90A-46. Definitions.

The following definitions shall apply throughout this Article:

(1) "Commercial water pollution control system operating firm" means a person who contracts to operate a water pollution control system for any person who holds a permit for a water pollution control system, other than an employee of the permittee.

(2) "Commission" means the Water Pollution Control System Operators Certification Commission.

(3) "Waste" has the same meaning as in G.S. 143-213.

(4) "Operator" means a person who holds a currently valid certificate as a water pollution control system operator issued by the Commission under rules adopted pursuant to this Article.

(5) "Operator in responsible charge" means the person designated by a person owning or having control of a water pollution control system as the operator of record of the water pollution control system and who has primary responsibility for the operation of such system.

(6) "Water pollution control system" means a system for the collection, treatment, or disposal of waste for which a permit is required under rules adopted by either the North Carolina Environmental Management Commission or the Commission for Public Health. (1991, c. 623, s. 13; 2007-182, s. 2.)

Effect of Amendments. — Session Laws 2007-182, s. 2, effective July 5, 2007, substituted "Commission for Public Health" for "Commission for Health Services" in subdivision (6).

§ 90A-46.1. Expiration and renewal of certificates; continuing education requirements.

A certificate issued under this Part expires on 31 December of the year in which it is issued or renewed. The Commission may establish minimum continuing education requirements that an applicant must meet to renew a certificate. The Commission shall renew a certificate if the applicant meets the continuing education requirement and pays the required renewal fee, any renewal fee in arrears, and any late application penalty. (1997-496, s. 1.)

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 450.

Part 2. Certification of Animal Waste Management System Operators.

§ 90A-47. Purpose.

The purpose of this Part is to reduce nonpoint source pollution in order to protect the public health and to conserve and protect the quality of the State's water resources, to encourage the development and improvement of the State's agricultural land for the production of food and other agricultural products, and to require the examination of animal waste management system operators and certification of their competency to operate or supervise the operation of those systems. (1995 (Reg. Sess., 1996), c. 626, s. 6(b).)

§ 90A-47.1. Definitions.

(a) As used in this Part:

(1) "Animal waste" means liquid residuals resulting from an animal operation that are collected, treated, stored, or applied to the land through an animal waste management system.

(2) "Application" means laying, spreading on, irrigating, or injecting animal waste onto land.

(3) "Commission" means the Water Pollution Control System Operators Certification Commission.

(4) "Operator in charge" means a person who holds a currently valid certificate to operate an animal waste management system and who has primary responsibility for the operation of the system.

(5) "Owner" means the person who owns or controls the land used for agricultural purposes or the person's lessee or designee.

(b) The definitions set out in G.S. 143-215.10B, other than the definition of "animal waste", apply to this Part. (1995 (Reg. Sess., 1996), c. 626, s. 6(b).)

§ 90A-47.2. Certified operator in charge required; qualifications for certification.

(a) No owner or other person in control of an animal operation having an animal waste management system shall allow the system to be operated by a person who does not hold a valid certificate as an operator in charge of an animal waste management system issued by the Commission. No person shall perform the duties of an operator in charge of an animal waste management system without being certified under the provisions of this Part. Other persons may assist in the operation of an animal waste management system so long as they are directly supervised by an operator in charge who is certified under this Part.

(b) The owner or other person in control of an animal operation may contract with a certified animal waste management system operator in charge to provide for the operation of the animal waste management system at that animal operation. The Commission may adopt rules requiring that any certified animal waste management system operator in charge who contracts with one or more owners or other persons in control of an animal operation file an annual report with the Commission as to the operation of each system at which the services of the operator in charge are provided. (1995 (Reg. Sess., 1996), c. 626, s. 6(b).)

§ 90A-47.3. Qualifications for certification; training; examination.

(a) The Commission shall develop and administer a certification program for animal waste management system operators in charge that provides for receipt of applications, training and examination of applicants, and investigation of the qualifications of applicants.

(b) The Commission, in cooperation with the Division of Water Quality of the Department of Environment and Natural Resources, and the Cooperative Extension Service, shall develop and administer a training program for animal waste management system operators in charge. An applicant for initial certification shall complete 10 hours of classroom instruction prior to taking the examination. In order to remain certified, an animal waste management system operator in charge shall complete six hours of approved additional training during each three-year period following initial certification. A certified animal waste management system operator in charge who fails to complete approved additional training within 30 days of the end of the three-year period shall take and pass the examination for certification in order to renew the certificate. (1995 (Reg. Sess., 1996), c. 626, s. 6(b); 1996, 2nd Ex. Sess., c. 18, s. 27.34(c); 1997-443, s. 11A.119(a).)

§ 90A-47.4. Fees; certificate renewals.

(a) An applicant for certification under this Part shall pay a fee of twenty-five dollars ($25.00) for the examination and the certificate.

(b) The certificate shall be renewed annually upon payment of a renewal fee of ten dollars ($10.00). A certificate holder who fails to renew the certificate and pay the renewal fee within 30 days of its expiration shall be required to take and pass the examination for certification in order to renew the certificate. (1995 (Reg. Sess., 1996), c. 626, s. 6(b); 1998-212, s. 29A.11(f).)

§ 90A-47.5. Suspension; revocation of certificate.

(a) The Commission, in accordance with the provisions of Chapter 150B of the General Statutes, may suspend or revoke the certificate of any operator in charge who:

(1) Engages in fraud or deceit in obtaining certification.

(2) Fails to exercise reasonable care, judgment, or use of the operator's knowledge and ability in the performance of the duties of an operator in charge.

(3) Is incompetent or otherwise unable to properly perform the duties of an operator in charge.

(b) In addition to revocation of a certificate, the Commission may levy a civil penalty, not to exceed one thousand dollars ($1,000) per violation, for willful violation of the requirements of this Part.

The clear proceeds of civil penalties levied pursuant to this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1995 (Reg. Sess., 1996), c. 626, s. 6(b); 1998-215, s. 46.)

§ 90A-47.6. Rules.

The Commission shall adopt rules to implement the provisions of this Part. (1995 (Reg. Sess., 1996), c. 626, s. 6(b).)

§§ 90A-48, 90A-49: Reserved for future codification purposes.

ARTICLE 4.

Registrations of Sanitarians.

§ 90A-50. State Board of Sanitarian Examiners.

There is hereby created a State Board of Sanitarian Examiners to register qualified sanitarians to practice within the State. (1959, c. 1271, s. 2; 1973, c. 476, s. 128; 1981 (Reg. Sess., 1982), c. 1274, s. 2.)

CASE NOTES

Applied in Gray v. Laws, 51 F.3d 426 (4th Cir. 1995).

Cited in King v. North Carolina State Bd. of Sanitarian Exmrs., 82 N.C. App. 409, 346 S.E.2d 300 (1986).

§ 90A-51. Definitions.

The words and phrases defined below shall when used in this Article have the following meaning unless the context clearly indicates otherwise:

(1) "Board" means the Board of Sanitarian Examiners.

(2) "Certificate of registration" is a document issued as evidence of registration and qualification to practice as a sanitarian or a sanitarian intern under this Article. The certificate shall bear the designation "registered sanitarian" or "sanitarian intern" and show the name of the person, date of issue, serial number, seal, and signatures of the members of the Board.

(3) "Registered sanitarian" is a sanitarian registered in accordance with the provisions of this Article.

(4) "Sanitarian" is a public health professional qualified by education in the arts and sciences, specialized training, and acceptable environmental health field experience to effectively plan, organize, manage, execute and evaluate one or more of the many diverse elements comprising the field of environmental health. Practice in the field of environmental health within the meaning of this Article includes, but is not limited to, organization, management, education, enforcement, and consultation for the purpose of prevention of environmental health hazards and the promotion and protection of the public health and the environment in the following areas: food, lodging and institutional sanitation, on-site sewage treatment and disposal, and milk and dairy sanitation.

For purposes of this Article the following are not included within the definition of "sanitarian":

a. A person teaching, lecturing, or engaging in research.

b. A person who is a sanitary engineer, public health engineer, public health engineering assistant, registered professional engineer, industrial hygienist, health physicist, chemist, epidemiologist, toxicologist, geologist, hydrogeologist, waste management specialist, or soil scientist, except when the person is working as a sanitarian.

c. A public health officer or public health department director.

d. A person who holds a North Carolina license to practice medicine, veterinary medicine, or nursing.

e. Laboratory personnel when performing or supervising the performance of sanitation related laboratory functions.

It is the sole purpose of this Article to safeguard the health, safety, and general welfare of the public from adverse environmental factors and to register those environmental health professionals practicing as sanitarians who are qualified by education, training, and experience to work, or are working, in the public sector in the field of environmental health within the scope of practice as defined in this Article.

(5) "Sanitarian intern" is a person who possesses the necessary educational qualifications as prescribed in G.S. 90A-53(3), but who has not completed the experience and specialized training requirements in the field of public health sanitation as required for registration. (1959, c. 1271, s. 1; 1981 (Reg. Sess., 1982), c. 1274, s. 2; 1989, c. 545, s. 1.)

CASE NOTES

"Sanitarian." — Subdivision (4) of this section does not require that a person be engaged in a "broad range of environmental health functions." Rather, the statute plainly requires that in order to be certified as a registered sanitarian one must be "a public health professional qualified . . . to effectively plan, organize, manage, execute and evaluate one or more of the many diverse elements comprising the field of environmental health." King v. North Carolina State Bd. of Sanitarian Exmrs., 82 N.C. App. 409, 346 S.E.2d 300 (1986).

Board's denial of petitioners' request for certification pursuant to G.S. 90A-61(a) as registered sanitarians, based on its finding that they were not engaged in a broad range of environmental health functions on Oct. 1, 1982, was affected by an error of law, and was reversed and remanded. King v. North Carolina State Bd. of Sanitarian Exmrs., 82 N.C. App. 409, 346 S.E.2d 300 (1986).

Applied in Gray v. Laws, 51 F.3d 426 (4th Cir. 1995).

§ 90A-52. Practice without certificate unlawful.

(a) In order to safeguard life, health and the environment, it shall be unlawful for any person to practice as a sanitarian in the State of North Carolina or use the title "registered sanitarian" unless such person shall have obtained a certificate of registration from the Board. No person shall offer his services as a registered sanitarian or use, assume or advertise in any way any title or description tending to convey the impression that he is a registered sanitarian unless he is the holder of a current certificate of registration issued by the Board.

(b) Notwithstanding the provisions of subsection (a), a person may practice as a sanitarian intern for a period not to exceed three years provided he has obtained a temporary certificate of registration from the Board. (1959, c. 1271, s. 12; 1981 (Reg. Sess., 1982), c. 1274, s. 2.)

§ 90A-53. Qualifications and examination for registration as a sanitarian.

The Board shall issue certificates to qualified persons as registered sanitarians. A certificate as a registered sanitarian shall be issued to any person upon the Board's determination that such person:

(1) Has made application to the Board on a form prescribed by the Board;

(2) Is of good moral character;

(3) Has received a baccalaureate degree from a post-secondary educational institution rated as acceptable by the Board with a minimum of 30 semester hours or its equivalent in the physical and/or biological sciences;

(4) Has satisfactorily completed a course in specialized instruction and training approved by the Board which course shall be designed as to content and so administered as to present sufficient knowledge of the needs properly to be served by public health sanitation, the elements of good environmental health sanitation, the laws and regulations governing sanitation in environmental health and the protection of the public health;

(5) Has had at least two years' experience in the field of environmental health as defined in this Article. Provided, however, that only one year of experience in the field of environmental health as defined in this Article is required of a sanitarian intern who is a graduate of a bachelor's or master's degree program that is accredited by the National Accreditation Council for Environmental Health Curricula of the National Environmental Health Association.

(6) Has passed an examination administered by the Board designed to test for competence in the subject matters of environmental health sanitation. The examination shall be in a form prescribed by the Board and may be oral, written, or both. The examination for applicants shall be held annually or more frequently as the Board may by rule prescribe, at a time and place to be determined by the Board. A person shall not be registered if such person fails to meet the minimum grade requirements for examination specified by the Board. Failure to pass an examination shall not prohibit such person from being examined at subsequent times and places as specified by the Board; and

(7) Has paid a fee set by the Board not to exceed the cost of the examination. (1959, c. 1271, s. 6; 1981 (Reg. Sess., 1982), c. 1274, s. 2; 1989, c. 545, s. 2; 1993, c. 233, ss. 1-3.)

§ 90A-54. Qualification for registration as a sanitarian intern.

(a) A temporary certificate may be issued under requirements and conditions prescribed by the Board to any person to act or serve as a sanitarian intern without meeting the full requirements of a registered sanitarian for a period not to exceed three years provided such person meets the educational requirements in G.S. 90A-53.

(b) Any person meeting the educational requirements of G.S. 90A-53(3) may make application to the Board on a form prescribed by the Board for temporary registration as a sanitarian intern. The Board shall accept such application when submitted upon the payment of a fee set by the Board not to exceed thirty-five dollars ($35.00). (1981 (Reg. Sess., 1982), c. 1274, s. 2.)

§ 90A-55. State Board of Sanitarian Examiners; appointment and term of office.

(a) Board Membership. — The Board shall consist of nine members: the Secretary of Environment and Natural Resources, or the Secretary's duly authorized representative, one public-spirited citizen, one environmental sanitation educator from an accredited college or university, one local health director, a representative of the Division of Environmental Health of the Department of Environment and Natural Resources, and four practicing sanitarians who qualify by education and experience for registration under this Article, three of whom will represent the Western, Piedmont, and Eastern Regions of the State as described more specifically in the rules adopted by the Board.

(b) Term of Office. — Each member of the State Board of Sanitarian Examiners shall be appointed by the Governor for a term of four years. As the term of each current member expires, the Governor shall appoint a successor in accordance with the provisions of this section. If a vacancy occurs on the Board for any other reason than the expiration of a member's term, the Governor shall appoint a successor for the remainder of the unexpired term. No person shall serve as a member of the Board for more than two consecutive four-year terms.

(c) The Environmental Health Section of the North Carolina Public Health Association, Inc., shall submit a recommended list of Board member candidates to the Governor for his consideration in appointments.

(d) The Governor may remove an appointee member for misconduct in office, incompetency, neglect of duty, or other sufficient cause. (1959, c. 1271, s. 2; 1973, c. 476, s. 128; 1981 (Reg. Sess., 1982), c. 1274, s. 2; 1989, c. 727, s. 23; 1997-443, s. 11A.32; 2005-386, s. 1.1.)

§ 90A-56. Compensation of Board members; expenses; employees.

Members of the Board shall receive compensation and be reimbursed for travel expenses in accordance with G.S. 93B-5. The Board may employ necessary personnel for the performance of its functions and fix the compensation therefor, within the limits of funds available to the Board. The total expenses of the administration of this Article shall not exceed the total income therefrom and none of the expenses of said Board or the compensation or expenses of any officer thereof or any employee shall ever be paid or payable out of the treasury of the State of North Carolina; and neither the Board nor any officer or employee thereof shall have any power or authority to make or incur any expense, debt, or other financial obligation binding upon the State of North Carolina. (1981 (Reg. Sess., 1982), c. 1274, s. 2; 1991 (Reg. Sess., 1992), c. 1011, s. 5.)

§ 90A-57. Election of officers; meetings; regulations.

(a) The Board shall annually elect a chairman, vice-chairman and a secretary from among its membership. The officers may serve more than one term. The Board shall meet annually in the City of Raleigh, at a time set by the Board, and it may hold additional meetings and conduct business at any place in the State. Five members of the Board shall constitute a quorum to do business. The Board may designate any member to conduct any proceeding, hearing, or investigation necessary to its purpose, but any final action requires a quorum of the Board. The Board is authorized to adopt such rules and regulations as may be necessary for the efficient operation of the Board.

(b) The Board shall have an official seal and each member shall be empowered to administer oaths in taking of testimony upon any matters pertaining to the function of the Board. (1959, c. 1271, s. 3; 1981 (Reg. Sess., 1982), c. 1274, s. 2.)

CASE NOTES

Cited in Stephenson v. Bartlett, 358 N.C. 219, 595 S.E.2d 112 (2004).

§ 90A-58. Applicability of Chapter 93B.

The Board shall be subject to the provisions of Chapter 93B of the General Statutes of North Carolina. (1959, c. 1271, s. 5; 1981 (Reg. Sess., 1982), c. 1274, s. 2.)

§ 90A-59. Record of proceedings; register of applications; register of registered sanitarians and sanitarian interns.

(a) The Board shall keep a record of its proceedings.

(b) The Board shall maintain a register of all applications for registration, which shall show:

(1) The place of residence, name and age of each applicant;
(2) The name and address of the employer of each applicant;
(3) The date of application;
(4) Complete information of educational and experience qualifications;
(5) The action taken by the Board;
(6) The serial number of the certificate of registration issued to the applicant;
(7) The date on which the Board reviewed and acted upon the application; and
(8) Such other pertinent information as may be deemed necessary by the Board.

(c) The Board shall maintain a current registry of all sanitarians and sanitarian interns in the State of North Carolina that have been registered in accordance with the provisions of this Article.

(d) These records shall be public records as defined in Chapter 132 of the General Statutes of North Carolina. (1981 (Reg. Sess., 1982), c. 1274, s. 2; 1987, c. 282, s. 11.)

§ 90A-60. Rating of educational institutions.

For the purpose of determining the qualifications of applicants for certification and registration under this Article, the Board may accept the ratings of educational institutions as issued by accrediting bodies acceptable to the Board. (1959, c. 1271, s. 7; 1981 (Reg. Sess., 1982), c. 1274, s. 2.)

§ 90A-61. Certification and registration of persons practicing as sanitarians on October 1, 1982; temporary provisions.

(a) Any person who submits to the Board under oath evidence that such person was practicing as a sanitarian (as defined in G.S. 90A-51(4) of this Article) or registered sanitarian (as defined in G.S. 90A-51(3) of this Article) in the State of North Carolina on October 1, 1982, shall be certified as a registered sanitarian.

(b) If any person described under subsection (a) does not make application and pay the appropriate fee to the Board within six months from October 1, 1982, he must then satisfy all the requirements of G.S. 90A-53 in order to obtain a certificate of registration.

(c) Within three years from October 1, 1982, every person specified in subsection (a) who has not satisfied the requirements for a certificate of registration listed in subsection (a) shall thereafter satisfy all the requirements listed in G.S. 90A-53 in order to obtain a certificate of registration. (1981 (Reg. Sess., 1982), c. 1274, s. 2.)

CASE NOTES

G.S. 90A-51(4) does not require that a sanitarian be engaged in a "broad range of environmental health functions." Rather, the statute plainly requires that in order to be certified as a registered sanitarian one must be "a public health professional qualified . . . to effectively plan, organize, manage, execute and evaluate one or more of the many diverse elements comprising the field of environmental health." King v. North Carolina State Bd. of Sanitarian Exmrs., 82 N.C. App. 409, 346 S.E.2d 300 (1986).

Denial of Certification Held Error. — The Board's denial of petitioners' request for certification pursuant to subsection (a) of this section as registered sanitarians, based on its finding they were not engaged in a broad range of environmental health functions on Oct. 1, 1982, was affected by an error of law, and would be reversed and remanded. King v. North Carolina State Bd. of Sanitarian Exmrs., 82 N.C. App. 409, 346 S.E.2d 300 (1986).

§ 90A-62. Certification and registration of sanitarians certified in other states.

The Board may, without examination, grant a certificate as a registered sanitarian to any person who at the time of application, is certified as a registered sanitarian by a similar board of another state, district or territory whose standards are acceptable to the Board but not lower than those required by this Article. A fee to be determined by the Board and not to exceed thirty-five dollars ($35.00) shall be paid by the applicant to the Board for the issuance of a certificate under the provisions of this section. (1959, c. 1271, s. 9; 1981 (Reg. Sess., 1982), c. 1274, s. 2.)

§ 90A-63. Renewal of certificates.

(a) A certificate as a registered sanitarian or sanitarian intern issued pursuant to the provisions of this Article will expire on the thirty-first day of December of the current year and must be renewed annually on or before the first day of January. Each application for renewal must be accompanied by a renewal fee to be determined by the Board, but not to exceed thirty-five dollars ($35.00). The Board is authorized to charge an extra five dollar late renewal fee for renewals made after the first day of January of each year.

(b) Registrations expired for failure to pay renewal fees may be reinstated under the rules and regulations adopted by the Board.

(c) A registered sanitarian shall complete any continuing education requirements specified by the Board for renewal of a certificate. (1959, c. 1271, s. 10; 1981 (Reg. Sess., 1982), c. 1274, s. 2; 1989, c. 545, s. 3.)

§ 90A-64. Suspensions and revocations of certificates.

(a) The Board shall have the power to refuse to grant, or may suspend or revoke, any certificate issued under provisions of this Article for any of the causes hereafter enumerated:

(1) Fraud, deceit, or perjury in obtaining registration under the provisions of this Article;
(2) Addiction to narcotics;
(3) Drunkenness on duty;
(4) Defrauding the public or attempting to do so;
(5) Failing to renew certificate as required;
(6) Dishonesty;
(7) Incompetency;
(8) Inexcusable neglect of duty;
(9) Guilty of any unprofessional or dishonorable conduct unworthy of and affecting the practice of his profession.

(b) The procedure to be followed by the Board when refusing to allow an applicant to take an examination, or revoking or suspending a certificate issued under the provisions of this Article, shall be in accordance with the provisions of Chapter 150B of the General Statutes of North Carolina. (1959, c. 1271, s. 11; 1973, c. 1331, s. 3; 1981 (Reg. Sess., 1982), c. 1274, s. 2; 1987, c. 827, s. 1.)

§ 90A-65. Representing oneself as a registered sanitarian.

A holder of a current certificate of registration may append to his name the letters, "R.S." (1959, c. 1271, s. 12; 1981 (Reg. Sess., 1982), c. 1274, s. 2.)

§ 90A-66. Violations; penalty; injunction.

Any person violating any of the provisions of this Article or of the rules and regulations adopted by the Board shall be guilty of a Class 1 misdemeanor. The Board may appear in its own name in the superior courts in an action for injunctive relief to prevent violation of this Article and the superior courts shall have power to grant such injunctions regardless of whether criminal prosecution has been or may be instituted as a result of such violations. Actions under this section shall be commenced in the superior court district or set of districts as defined in G.S. 7A-41.1 in which the respondent resides or has his principal place of business or in which the alleged acts occurred. (1959, c. 1271, s. 13; 1981 (Reg. Sess., 1982), c. 1274, s. 2; 1987 (Reg. Sess., 1988), c. 1037, s. 104; 1993, c. 539, s. 653; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — §§ 90A-67 through 90A-69: Reserved for future codification purposes.

§§ 90A-67 through 90A-69: Reserved for future codification purposes.

Article 5.

Certification of On-Site Wastewater Contractors and Inspectors.

§ 90A-70. Purpose.

It is the purpose of this Article to protect the environment and public health, safety, and welfare by ensuring the integrity and competence of on-site wastewater contractors and inspectors; to require the examination of on-site wastewater contractors and inspectors and the certification of their competency to supervise or conduct the construction, installation, repair, or inspection of on-site wastewater systems; to establish minimum standards for ethical conduct, responsibility, training, experience, and continuing education for on-site wastewater system contractors and inspectors; and to provide appropriate enforcement procedures for rules adopted by the North Carolina On-Site Wastewater Contractors and Inspectors Certification Board. (2006-82, s. 1.)

Editor's Note. — Session Laws 2006-82, s. 3, made this Article effective July 10, 2006, except that G.S. 90A-72, 90A-79, and 90A-81 become effective January 1, 2008.

§ 90A-71. Definitions.

The following definitions apply in this Article:

(1) "Board" means the North Carolina On-Site Wastewater Contractors and Inspectors Certification Board.

(2) "Contractor" means a person who constructs, installs, or repairs, or offers to construct, install, or repair an on-site wastewater system in the State.

(3) "Conventional wastewater system" has the same meaning as in G.S. 130A-343(a)(3).

(4) "Department" means the Department of Environment and Natural Resources.

(5) "Inspector" means a person who conducts an inspection of an on-site wastewater system at any time after the local health department has issued an operation permit pursuant to G.S. 130A-337.

(6) "On-site wastewater system" means any wastewater system permitted under the provisions of Article 11 of Chapter 130A of the General Statutes that does not discharge to a treatment facility or the surface waters of the State.

(7) "Person" means all persons, including individuals, firms, partnerships, associations, public or private institutions, municipalities, or political subdivisions, governmental agencies, or private or public corporations organized and existing under the laws of this State or any other state or country. (2006-82, s. 1.)

§ 90A-72. Certification required; applicability.

(a) Certification Required. — No person shall construct, install, or repair or offer to construct, install, or repair an on-site wastewater system in the State without being certified as a contractor at the required level of certification for the specified system. No person shall conduct an inspection or offer to conduct an inspection of an on-site wastewater system without being certified as an inspector at the required level of certification for the specified system.

(b) Applicability. — This Article does not apply to the following:

(1) A person who is employed by, or performs labor and services for, a certified contractor or inspector in connection with the construction, installation, repair, or inspection of an on-site wastewater system performed under the direct and personal supervision of the certified contractor or inspector.

(2) A person who constructs, installs, or repairs an on-site wastewater system described as a single septic tank with a gravity-fed distribution system when located on land owned by that person and that is intended solely for use by that person and members of that person's immediate family.

(3) A person licensed under Article 1 of Chapter 87 of the General Statutes who constructs or installs an on-site wastewater system ancillary to the building being constructed.

(4) A person who is certified by the Water Pollution Control System Operators Certification Commission and contracted to provide necessary operation and maintenance on the permitted on-site wastewater system.

(5) A person permitted under Article 21 of Chapter 143 of the General Statutes who is constructing a water pollution control facility necessary to comply with the terms and conditions of a National Pollutant Discharge Elimination System (NPDES) permit.

(6) A person licensed under Article 1 of Chapter 87 of the General Statutes as a licensed public utilities contractor who is installing or expanding a wastewater treatment facility, including a collection system, designed by a registered professional engineer.

(7) A plumbing contractor licensed under Article 2 of Chapter 87 of the General Statutes, so long as the plumber is not performing plumbing work that includes the installation or repair of a septic tank or similar depository, or lines or appurtenances downstream from the point where the house or building sewer lines from the plumbing system meet the septic tank or similar depository. (2006-82, s. 1.)

Editor's Note. — Session Laws 2006-82, s. 3, made this Article effective July 10, 2006, except that G.S. 90A-72, 90A-79, and 90A-81 become effective January 1, 2008.

§ 90A-73. Creation and membership of the Board.

(a) Creation and Appointments. — There is created the North Carolina On-Site Wastewater Contractors and Inspectors Certification Board. The Board shall consist of nine members appointed to three-year terms as follows:

(1) One member appointed by the Governor who, at the time of appointment, is engaged in the construction, installation, repair, or inspection of on-site wastewater systems, to a term that expires on 1 July of years that precede by one year those years that are evenly divisible by three.

(2) One member appointed by the Governor who, at the time of appointment, is a certified water treatment facility operator pursuant to Article 2 of Chapter 90A of the General Statutes, to a term that expires on 1 July of years evenly divisible by three.

(3) One member appointed by the Governor who is an employee of the Division of Environmental Health of the Department to a term that expires on 1 July of years that follow by one year those years that are evenly divisible by three.

(4) One member appointed by the General Assembly upon recommendation of the President Pro Tempore of the Senate who, at the time of appointment, is engaged in the construction, installation, repair, or inspection of on-site wastewater systems, to a term that expires on 1 July of years that follow by one year those years that are evenly divisible by three.

(5) One member appointed by the General Assembly upon recommendation of the President Pro Tempore of the Senate who, at the time of appointment, is engaged in the business of inspecting on-site wastewater systems, to a term that expires on 1 July of years that precede by one year those years that are evenly divisible by three.

(6) One member appointed by the General Assembly upon recommendation of the President Pro Tempore of the Senate upon the recommendation of the North Carolina Home Builders Association, to a term that expires on 1 July of years evenly divisible by three.

(7) One member appointed by the General Assembly upon recommendation of the Speaker of the House of Representatives who, at the time of appointment, is engaged in the construction, installation, repair, or inspection of on-site wastewater systems, to a term that expires on 1 July of years evenly divisible by three.

(8) One member appointed by the General Assembly upon recommendation of the Speaker of the House of Representatives who, at the time of appointment, is (i) employed as an environmental health specialist, and (ii) engaged primarily in the inspection and permitting of on-site wastewater systems, to a term that expires on 1 July of years that follow by one year those years that are evenly divisible by three.

(9) One member appointed by the General Assembly upon recommendation of the Speaker of the House of Representatives who, at the time

of appointment, is (i) employed by the North Carolina Cooperative Extension Service, and (ii) is knowledgeable in the area of on-site wastewater systems, to a term that expires on 1 July of years that precede by one year those years that are evenly divisible by three.

(b) Vacancies. — An appointment to fill a vacancy on the Commission created by the resignation, dismissal, disability, or death of a member shall be for the balance of the unexpired term. Vacancies in appointments made by the General Assembly shall be filled as provided in G.S. 120-122.

(c) Oath. — Each member of the Board, before entering upon the discharge of the duties of the Board, shall take and file with the Secretary of State an oath in writing to perform properly the duties as a member of the Board and to uphold the Constitution of North Carolina and the Constitution of the United States.

(d) Dual Office Holding. — Service on the Board may be in addition to any other office a person is entitled to hold.

(e) Officers. — The Board shall elect a Chair from among its members. The Chair shall serve from the time of election until 30 June of the following year, or until a successor is elected.

(f) Compensation. — Board members who are State employees shall receive no per diem compensation for serving on the Board but shall be reimbursed for their expenses in accordance with G.S. 138-6. All other Board members shall receive per diem compensation and reimbursement in accordance with the compensation rate established in G.S. 93B-5.

(g) Quorum. — A majority of the members of the Board constitutes a quorum for the transaction of business.

(h) Meetings. — The Board shall meet at least twice each year and may hold special meetings at the call of the Chair or a majority of the members of the Board.

(i) Staff. — The Board may employ staff to carry out the duties of the Board and the provisions of this Article. The Board shall determine the compensation, duties, and other terms and conditions of employment of the staff. (2006-82, s. 1.)

Editor's Note. — Session Laws 2006-82, s. 2(a), (b), provides: 'In order to provide for a system of staggered three-year terms for the members of the On-Site Wastewater Contractors and Inspectors Certification Board established by G.S. 90A-73(a), as enacted by Section 1 of this act, the following provisions shall apply:

"(1) The term of the member initially appointed to serve in the position established by G.S. 90A-73(a)(1) shall be three years and shall expire on 1 July 2009.

"(2) The term of the member initially appointed to serve in the position established by G.S. 90A-73(a)(2) shall be four years and shall expire on 1 July 2010.

"(3) The term of the member initially appointed to serve in the position established by G.S. 90A-73(a)(3) shall be five years and shall expire on 1 July 2011.

"(4) The term of the member initially appointed to serve in the position established by G.S. 90A-73(a)(4) shall be five years and shall expire on 1 July 2011.

"(5) The term of the member initially appointed to serve in the position established by G.S. 90A-73(a)(5) shall be three years and shall expire on 1 July 2009.

"(6) The term of the member initially appointed to serve in the position established by G.S. 90A-73(a)(6) shall be four years and shall expire on 1 July 2010.

"(7) The term of the member initially appointed to serve in the position established by G.S. 90A-73(a)(7) shall be four years and shall expire on 1 July 2010.

"(8) The term of the member initially appointed to serve in the position established by G.S. 90A-73(a)(8) shall be five years and shall expire on 1 July 2011.

"(9) The term of the member initially appointed to serve in the position established by G.S. 90A-73(a)(9) shall be three years and shall expire on 1 July 2009.

"In the event that the General Assembly fails to appoint one or more initial members to the On-Site Wastewater Contractors and Inspectors Certification Board during the 2006 Regular Session, the failure to make an initial appointment shall be treated as though a vacancy had occurred, and the vacancy may be filled by appointment as provided in G.S. 120-122."

§ 90A-74. Powers and duties of the Board.

The Board shall have the following general powers and duties:

(1) To adopt rules in the manner prescribed by Chapter 150B of the General Statutes to govern its actions and to implement the provisions of this Article.

(2) To determine the eligibility requirements for persons seeking certification pursuant to this Article.

(3) To establish grade levels of certifications based on design capacity, complexity, projected costs, and other features of approved on-site wastewater systems.

(4) To develop and administer examinations for each grade level of certification. The Board may approve applications by recognized associations for certification of its members after a review of the requirements of the association to ensure that they are equivalent to the requirements of the Board.

(5) To issue, renew, deny, restrict, suspend, or revoke certifications and to carry out any of the other actions authorized by this Article.

(6) To establish, publish, and enforce rules of professional conduct of persons who are certified pursuant to this Article.

(7) To maintain a record of all proceedings and make available to persons certified under this Article, and to other concerned parties, an annual report of all Board action.

(8) To establish reasonable fees for application, certification, and renewal, and other services provided by the Board.

(9) To conduct investigations to determine whether violations of this Article or grounds for disciplining persons certified under this Article exist.

(10) To adopt a common seal containing the name of the Board for use on all certificates and official reports issued by the Board.

(11) To conduct other services necessary to carry out the purposes of this Article. (2006-82, s. 1.)

§ 90A-75. Expenses and fees.

(a) Expenses. — All salaries, compensation, and expenses incurred or allowed for the purposes of carrying out this Article shall be paid by the Board exclusively out of the funds received by the Board as authorized by this Article. No salary, expense, or other obligations of the Board may be charged against the General Fund of the State. Neither the Board nor any of its members or employees may incur any expense, debt, or financial obligation binding upon the State.

(b) Contributions. — The Board may accept grants, contributions, bequests, and gifts that shall be kept in the same account as the funds deposited in accordance with this Article and other provisions of the law.

(c) Fees. — All fees shall be established in rules adopted by the Board. The Board shall establish fees sufficient to pay the costs of administering this Article, but in no event shall the Board charge a fee at an annual rate in excess of the following:

(1) Application for basic certification	$150.00
(2) Application for each grade level	$50.00
(3) Certification renewal	$100.00
(4) Reinstatement of revoked or suspended certification	$500.00
(5) Application for on-site wastewater system inspector	$200.00.

(d) Audit. — The Board is subject to the oversight of the State Auditor under Article 5A of Chapter 147 of the General Statutes. (2006-82, s. 1.)

§ 90A-76. On-Site Wastewater Certification Fund.

The On-Site Wastewater Certification Fund is created as a nonreverting account within the Department. All fees collected pursuant to this Article shall be credited to the Fund. The Fund shall be used solely for the costs of administering this Article. (2006-82, s. 1.)

§ 90A-77. Certification requirements.

(a) Certification. — The Board shall issue a certificate of the appropriate grade level to an applicant who satisfies all of the following conditions:

(1) Is at least 18 years of age.
(2) Submits a properly completed application to the Board.
(3) If the applicant has prior experience providing on-site wastewater system services, submits affidavits of three persons not related to the applicant for whom the applicant provided on-site wastewater services.
(4) If the applicant has no prior experience, completes the basic on-site wastewater education program approved by the Board.
(5) Completes any additional training program designed by the Board specific to the grade level for which the applicant is applying.
(6) Pays the applicable fees set by the Board for the particular application and grade level.
(7) For grade levels greater than conventional systems, passes a written or oral examination that tests the applicant's proficiency in all of the following areas:
    a. Principles of public and environmental health associated with on-site wastewater systems.
    b. Principles of construction and safety.
    c. Technical and practical knowledge of on-site wastewater systems typical to the specified grade level.
    d. Laws and rules related to the installation, construction, repair, or inspection of the specified on-site wastewater system.

(b) Location of Examinations. — The Board shall provide a minimum of three examinations each year; one each in the eastern, central, and western regions of the State.

(c) Approval of Certification Programs. — The Board may issue a certificate at the appropriate grade level to an applicant who has completed an approved training or continuing education program.

(d) No Degree Required. — An applicant shall not be required to hold or obtain an educational diploma or degree to obtain a certificate. An applicant that meets all the conditions for certification except for passage of the Board examination may take the examination on three successive occasions without having to file for a new application, pay an additional application fee, or repeat any applicable training program. If the applicant fails to pass the Board examination on three successive occasions, the applicant must reapply to the Board, pay an additional application fee, and repeat the training program.

(e) Certificate. — The certification shall show the full name of the certificate holder. The certificate shall provide a unique identification number and shall be signed by the Chair. Issuance of the certificate by the Board shall be prima facie evidence that the person named therein is entitled to all the rights and privileges of a certified contractor or inspector, at the grade level specified on the certificate, while the certificate remains in effect.

(f) Replacement Certificate. — A new certificate to replace one lost, destroyed, or mutilated shall be issued subject to rules adopted by the Board and with the payment of a fee set by the Board. The fee for a duplicate or replacement certificate shall not exceed twenty-five dollars ($25.00). (2006-82, s. 1.)

§ 90A-78. Certification renewal.

(a) Renewal. — All certifications shall expire at intervals determined by the Board unless they are renewed. In no event may the interval determined by the Board be less than one year. To renew a certification, a contractor or inspector must meet all of the following conditions:

(1) Submit an application for renewal on the form prescribed by the Board.
(2) Meet the continuing education requirements prescribed by the Board.
(3) Pay the certification renewal fee.

(b) Late Fee. — A contractor or inspector with an expired certificate may renew the certification within 90 days of its expiration upon payment of a late fee set by the Board. The late fee shall not exceed twenty-five dollars ($25.00). If a certification is not renewed within 90 days of its expiration, the certification shall not be renewed, and the holder must apply for a new certificate. (2006-82, s. 1.)

§ 90A-79. Continuing education.

(a) Requirements. — The Board shall require continuing education as a condition of certification and renewal. The Board shall determine the number of hours, based on grade levels applied for, up to a maximum of 12 hours per year, and the subject material for the specified grade level. The Board shall maintain records of continuing education coursework successfully completed by each certified contractor or inspector.

(b) Approval of Continuing Education Programs. — The Board may approve a continuing education program or course if the Board finds that the program or course provides useful educational information or experience that will enhance the construction, installation, repair, or inspection of on-site wastewater systems. The Board may develop and offer continuing education programs. (2006-82, s. 1.)

Editor's Note. — Session Laws 2006-82, s. 3, made this Article effective July 10, 2006, except that G.S. 90A-72, 90A-79, and 90A-81 become effective January 1, 2008.

§ 90A-80. Investigation of complaints.

(a) Misconduct. — A person may refer to the Board charges of fraud, deceit, negligence, incompetence, or misconduct against any certified contractor or inspector. The charges shall be in writing and sworn to by the complainant and submitted to the Board. These charges, unless dismissed without a hearing by the Board as unfounded or trivial, shall be heard and determined by the Board in accordance with the provisions of Chapter 150B of the General Statutes. An association that receives professional recognition of its own certification process by the Board shall be responsible for the conduct and competency of its members.

(b) Records. — The Board shall establish and maintain detailed records regarding complaints concerning each certified contractor or inspector. The records shall include those certified by recognized associations. The records shall also detail the levels of certification held by each contractor or inspector.

(c) Notification. — The Board shall provide local health departments with notification of changes in certifications, complaints, suspensions, or reinstatements under this Article. (2006-82, s. 1.)

§ 90A-81. Remedies.

(a) Denial, Suspension, and Revocation of Certification. — The Board may deny, suspend, or revoke a certificate under this Article for:

(1) A violation of this Article or a rule of the Board.
(2) The use of fraud or deceit in obtaining or renewing a certificate.
(3) Any act of gross negligence, incompetence, or misconduct in the construction, installation, repair, or inspection of an on-site wastewater system.
(4) Failure to satisfactorily complete continuing education requirements prescribed by the Board.

(b) Arbitration. — The Board may establish a voluntary arbitration procedure to resolve complaints concerning a certified contractor or inspector or any work performed by a certified contractor or inspector, or conflicts involving any certified contractor or inspector and the Division of Environmental Health of the Department or a local health department.

(c) Injunction. — The Board may ask the Attorney General to seek an injunction to restrain any person, firm, partnership, or corporation from violating the provisions of this Article or rules adopted by the Board. The Attorney General may bring an action for an injunction in the name of the State in the superior court of any county in which the violator resides or the violator's principal place of business is located. In any proceedings for an injunction, it shall not be necessary to allege or prove either that an adequate remedy at law does not exist, or that substantial or irreparable damage would result from the continued violation. Members of the Board shall not be personally or professionally liable for any act or omission pursuant to this subsection. The Board shall not be required to post a bond in connection with any action to obtain an injunction.

(d) Offenses. — A person who commits any one or more of the following offenses is guilty of a Class 2 misdemeanor:

(1) Engages in or offers to engage in the construction, installation, repair, or inspection of an on-site wastewater system without the appropriate certificate for the grade level of on-site wastewater system.
(2) Gives false or forged evidence of any kind in obtaining a certificate.
(3) Falsely impersonates a certified contractor or inspector. (2006-82, s. 1.)

Editor's Note. — Session Laws 2006-82, s. 3, made this Article effective July 10, 2006, except that G.S. 90A-72, 90A-79, and 90A-81 become effective January 1, 2008.

Chapter 90B.

Social Worker Certification and Licensure Act.

Sec.
90B-1. Short title.
90B-2. Purpose.
90B-3. Definitions.
90B-4. Prohibitions.
90B-5. North Carolina Social Work Certification and Licensure Board; appointments; terms; composition.
90B-6. Functions and duties of the Board.
90B-6.1. Board general provisions.
90B-6.2. Fees.
Sec.
90B-7. Titles and qualifications for certificates and licenses.
90B-8. Persons from other jurisdictions.
90B-9. Renewal of certificates and licenses.
90B-10. Exemption from certain requirements.
90B-11. Disciplinary procedures.
90B-12. Violation a misdemeanor.
90B-13. Injunction.
90B-14. Third-party reimbursements.
90B-15. License or certificate to be displayed.

§ 90B-1. Short title.

This Chapter shall be known as the "Social Worker Certification and Licensure Act." (1983, c. 495, s. 1; 1999-313, s. 1.)

Cross References. — As to a civil action remedy for persons who are sexually exploited by their psychotherapist, see the Psychotherapy Patient/Client Sexual Exploitation Act, see G.S. 90-21.41 et seq.

Legal Periodicals. — For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

§ 90B-2. Purpose.

Since the profession of social work significantly affects the lives of the people of this State, it is the purpose of this Chapter to protect the public by setting standards for qualification, training, and experience for those who seek to represent themselves to the public as certified social workers or licensed clinical social workers and by promoting high standards of professional performance for those engaged in the practice of social work. (1983, c. 495, s. 1; 1999-313, s. 1.)

§ 90B-3. Definitions.

The following definitions apply in this Chapter:

(1) Board. — The North Carolina Social Work Certification and Licensure Board.

(2) Licensed Clinical Social Worker. — A person who is competent to function independently, who holds himself or herself out to the public as a social worker, and who offers or provides clinical social work services or supervises others engaging in clinical social work practice.

(3) Certified Master Social Worker. — A person who is certified under this Chapter to practice social work as a master social worker and is engaged in the practice of social work.

(4) Certified Social Work Manager. — A person who is certified under this Chapter to practice social work as a social work manager and is engaged in the practice of social work.

(5) Certified Social Worker. — A person who is certified under this Chapter to practice social work as a social worker and is engaged in the practice of social work.

(6) Clinical Social Work Practice. — The professional application of social work theory and methods to the biopsychosocial diagnosis, treatment, or prevention, of emotional and mental disorders. Practice includes,

by whatever means of communications, the treatment of individuals, couples, families, and groups, including the use of psychotherapy and referrals to and collaboration with other health professionals when appropriate. Clinical social work practice shall not include the provision of supportive daily living services to persons with severe and persistent mental illness as defined in G.S. 122C-3(33a).

(7) Practice of Social Work. — To perform or offer to perform services, by whatever means of communications, for other people that involve the application of social work values, principles, and techniques in areas such as social work services, consultation and administration, and social work planning and research.

(7a) Provisional Licensed Clinical Social Worker. — A person issued a provisional license to provide clinical social work services pursuant to G.S. 90B-7(f).

(8) Social Worker. — A person engaging in the practice of social work who is not certified or licensed under this Chapter as a Certified Social Worker, Certified Master Social Worker, Licensed Clinical Social Worker, or Certified Social Work Manager. (1983, c. 495, s. 1; 1991, c. 732, s. 1; 1999-313, s. 1; 2007-379, s. 1.)

Editor's Note. — Session Laws 1991, c. 732, s. 7 provides: "Any proposed substantive changes to G.S. 90B-3, 90B-4, 90B-5, 90B-7, or 90B-10 shall be reviewed by the Legislative Committee on New Licensing Boards pursuant to G.S. 120-149.3(e)."

Effect of Amendments. — Session Laws 2007-379, s. 1, effective August 19, 2007, added subdivision (7a).

§ 90B-4. Prohibitions.

(a) Except as otherwise provided in this Chapter, it is unlawful for any person who is not certified as a social worker, master social worker, or social work manager under this Chapter to represent himself or herself to be certified under this Chapter or hold himself or herself out to the public by any title or description denoting that he or she is certified under this Chapter.

(b) After January 1, 1992, except as otherwise provided in this Chapter, it is unlawful to engage in or offer to engage in the practice of clinical social work without first being licensed under this Chapter as a clinical social worker.

(c) Nothing herein shall prohibit school social workers who are certified by the State Board of Education from practicing school social work under the title "Certified School Social Worker." Except as provided for licensed clinical social workers, nothing herein shall be construed as prohibiting social workers who are not certified by the Board from practicing social work. Except as provided herein for licensed clinical social workers, no agency, institution, board, commission, bureau, department, division, council, member of the Council of State, or officer of the legislative, executive or judicial branches of State government or counties, cities, towns, villages, other municipal corporations, political subdivisions of the State, public authorities, private corporations created by act of the General Assembly or any firm or corporation receiving State funds shall require the obtaining or holding of any certificate issued under this Chapter or the taking of an examination held pursuant to this Chapter as a requirement for obtaining or continuing in employment.

(d) Nothing herein shall authorize the practice of medicine as defined in Article 1 of this Chapter or the practice of psychology as defined in Article 18A of this Chapter. (1983, c. 495, s. 1; 1991, c. 732, s. 2; 1999-313, s. 1.)

Editor's Note. — Session Laws 1991, c. 732, s. 7 provides: "Any proposed substantive changes to G.S. 90B-3, 90B-4, 90B-5, 90B-7, or 90B-10 shall be reviewed by the Legislative

Committee on New Licensing Boards pursuant to G.S. 120-149.3(e)."

§ 90B-5. North Carolina Social Work Certification and Licensure Board; appointments; terms; composition.

(a) For the purpose of carrying out the provisions of this Chapter, there is hereby created the North Carolina Social Work Certification and Licensure Board which shall consist of seven members appointed by the Governor as follows:

(1) At least two members of the Board shall be Certified Social Workers or Certified Master Social Workers, three members shall be Licensed Clinical Social Workers, and two members shall be appointed from the public at large. Composition of the Board as to the race and sex of its members shall reflect the composition of the population of the State of North Carolina.

(2) At all times the Board shall include at least one member primarily engaged in social work education, at least one member primarily engaged in social work in the public sector, and at least one member primarily engaged in social work in the private sector.

(3) All members of the Board shall be residents of the State of North Carolina, and with the exception of the public members, shall be certified or licensed by the Board under the provisions of this Chapter. Professional members of the Board must be actively engaged in the practice of social work or in the education and training of students in social work, and have been for at least three years prior to their appointment to the Board. Such activity during the two years preceding the appointment shall have occurred primarily in this State.

(b) The Governor may only remove a member of the Board for neglect of duty, malfeasance, or conviction of a felony or other crime of moral turpitude.

(c) The term of office of each member of the Board shall be three years. No member shall serve more than two consecutive three-year terms. Each term of service on the Board shall expire on the 30th day of June of the year in which the term expires. As the term of a member expires, the Governor shall make the appointment for a full term, or, if a vacancy occurs for any other reason, for the remainder of the unexpired term.

(d) Members of the Board shall receive compensation for their services and reimbursement for expenses incurred in the performance of duties required by this Chapter, at the rates prescribed in G.S. 93B-5.

(e) The Board may employ, subject to the provisions of Chapter 126 of the General Statutes, the necessary personnel for the performance of its functions, and fix their compensation within the limits of funds available to the Board. (1983, c. 495, s. 1; 1991, c. 732, s. 3; 1999-313, s. 1.)

Editor's Note. — Session Laws 1991, c. 732, s. 7 provides: "Any proposed substantive changes to G.S. 90B-3, 90B-4, 90B-5, 90B-7, or 90B-10 shall be reviewed by the Legislative Committee on New Licensing Boards pursuant to G.S. 120-149.3(e)."

§ 90B-6. Functions and duties of the Board.

(a) The Board shall administer and enforce the provisions of this Chapter.

(b) The Board shall elect from its membership, a chairperson, a vice-chairperson, and secretary-treasurer, and adopt rules to govern its proceedings. A majority of the membership shall constitute a quorum for all Board meetings.

(c) The Board shall examine and pass on the qualifications of all applicants for certificates and licenses under this Chapter, and shall issue a certificate or license to each successful applicant therefor.

(d) The Board may adopt a seal which may be affixed to all certificates and licenses issued by the Board.

(e) The Board may authorize expenditures deemed necessary to carry out the provisions of this Chapter from the fees which it collects, but in no event shall expenditures exceed the revenues of the Board during any fiscal year. No State appropriations shall be subject to the administration of the Board.

(f) Repealed by Session Laws 1999-313, s. 1, effective July 1, 1999.

(g) The Board shall have the power to establish or approve study or training courses and to establish reasonable standards for certification, licensure, and renewal of certification and licensure, including the power to adopt or use examination materials and accreditation standards of the Council on Social Work Education or other recognized accrediting agency and the power to establish reasonable standards for continuing social work education; provided that for certificate and license renewal no examination shall be required; provided further, that the Board shall not have the power to withhold approval of study or training courses offered by a college or university having a social work program approved by the Council on Social Work Education.

(h) Subject to the provisions of Chapter 150B of the General Statutes, the Board shall have the power to adopt rules to carry out the purposes of this Chapter, including but not limited to the power to adopt ethical and disciplinary standards.

(i) The Board may order that any records concerning the practice of social work and relevant to a complaint received by the Board or an inquiry or investigation conducted by or on behalf of the Board shall be produced by the custodian of the records to the Board or for inspection and copying by representatives of or counsel to the Board. A social worker licensed by the Board or an agency employing a social worker licensed by the Board shall maintain records for a minimum of three years from the date the social worker terminates services to the client and the client services record is closed. A social worker certified or licensed by the Board shall cooperate fully and in a timely manner with the Board and its designated representatives in an inquiry or investigation of the records conducted by or on behalf of the Board.

(j) The Board shall have the power to employ or retain professional personnel, including legal counsel, subject to G.S. 114-2.3, or clerical or other special personnel deemed necessary to carry out the provisions of this Chapter. (1983, c. 495, s. 1; 1987, c. 827, s. 1; 1995, c. 344, s. 1; 1999-313, s. 1; 2005-129, s. 1; 2007-379, s. 2.)

Effect of Amendments. — Session Laws 2007-379, s. 2, effective August 19, 2007, added the last two sentences to subsection (i).

§ 90B-6.1. Board general provisions.

The Board shall be subject to the administrative provisions of Chapter 93B of the General Statutes. (1983, c. 495, s. 1.)

§ 90B-6.2. Fees.

(a) The Board shall establish fees not exceeding the following amounts:

(1) All initial applications	$200.00
(2) Examination	Cost plus an amount not to exceed $40.00

(3) Repeated examination or any additional examination	Cost plus an amount not to exceed $40.00
(4) Renewal applications	200.00
(5) Late fees for renewal	50.00
(6) Reinstatement	200.00
(7) Duplicate license	25.00
(8) Temporary certificate or license	25.00.

(b) Notwithstanding subdivision (a)(4) of this section, the Board may establish a graduated fee schedule for renewals that is based upon the applicant's level of certification or licensure. The Board may establish fees for the actual cost of duplication services, materials, and returned bank items. All fees derived from services provided by the Board under the provisions of this Chapter shall be nonrefundable. The Board shall maintain accounts of all receipts to the Board. (1999-313, s. 1.)

§ 90B-7. Titles and qualifications for certificates and licenses.

(a) Each person desiring to obtain a certificate or license from the Board shall make application to the Board upon such forms and in such manner as the Board shall prescribe, together with the required application fee established by the Board.

(b) The Board shall issue a certificate as "Certified Social Worker" to an applicant who meets the following qualifications:

(1) Has a bachelors degree in a social work program from a college or university having a social work program accredited or admitted to candidacy for accreditation by the Council on Social Work Education for undergraduate curricula.

(2) Has passed the Board examination for the certification of persons in this classification.

(c) The Board shall issue a certificate as "Certified Master Social Worker" to an applicant who meets the following qualifications:

(1) Has a masters or doctoral degree in a social work program from a college or university having a social work program approved by the Council on Social Work Education.

(2) Has passed the Board examination for the certification of persons in this classification.

(d) The Board shall issue a license as a "Licensed Clinical Social Worker" to an applicant who meets the following qualifications:

(1) Holds or qualifies for a current certificate as a Certified Master Social Worker.

(2) Shows to the satisfaction of the Board that he or she has had two years of clinical social work experience with appropriate supervision in the field of specialization in which the applicant will practice.

(3) Has passed the Board examination for the certification of persons in this licensure.

(e) The Board shall issue a certificate as a "Certified Social Work Manager" to an applicant who meets the following qualifications:

(1) Holds or qualifies for a current certificate as a Certified Social Worker.

(2) Shows to the satisfaction of the Board that he or she has had two years of experience in an administrative setting with appropriate supervision and training.

(3) Has passed the Board examination for the certification of persons in this classification.

(f) The Board may issue a provisional license in clinical social work to a person who has a masters or doctoral degree in a social work program from a college or university having a social work program approved by the Council on Social Work Education and desires to be licensed as a clinical social worker. The provisional license may not be issued for a period exceeding two years and the person issued the provisional license must practice under the supervision of a licensed clinical social worker or a Board-approved alternate. Notwithstanding G.S. 90B-6(g), a provisional licensee shall pass the qualifying clinical examination prescribed by the Board within two years to be eligible for renewal of the provisional license. The provisional licensee shall complete all requirements for full licensure within three renewal cycles, or a total of six years, unless otherwise directed by the Board. (1983, c. 495, s. 1; 1991, c. 732, s. 4; 1999-313, s. 1; 2007-379, s. 3.)

Editor's Note. — Session Laws 1991, c. 732, s. 7 provides: "Any proposed substantive changes to G.S. 90B-3, 90B-4, 90B-5, 90B-7, or 90B-10 shall be reviewed by the Legislative Committee on New Licensing Boards pursuant to G.S. 120-149.3(e)."

Effect of Amendments. — Session Laws 2007-379, s. 3, effective August 19, 2007, added the last two sentences in subsection (f).

§ 90B-8. Persons from other jurisdictions.

(a) The Board may grant a certificate or license without examination or by special examination to any person who, at the time of application, is certified, registered or licensed as a social worker by a similar board of another country, state, or territory whose certification, registration or licensing standards are substantially equivalent to those required by this Chapter. The applicant shall have passed an examination in the country, state, or territory in which he or she is certified, registered, or licensed that is equivalent to the examination required for the level of certification or licensure sought in this State.

(b) The Board may issue a temporary license to a nonresident clinical social worker who is either certified, registered, or licensed in another jurisdiction whose standards, in the opinion of the Board, at the time of the person's certification, registration, or licensure were substantially equivalent to or higher than the requirements of this Chapter. Nothing in this Chapter shall be construed as prohibiting a nonresident clinical social worker certified, registered, or licensed in another state from rendering professional clinical social work services in this State for a period of not more than five days in any calendar year. All persons granted a temporary clinical social worker license shall comply with the supervision requirements established by the Board. (1983, c. 495, s. 1; 1999-313, s. 1.)

§ 90B-9. Renewal of certificates and licenses.

(a) All certificates and licenses shall be effective upon date of issuance by the Board, and shall be renewed on or before the second June 30 thereafter.

(b) All certificates and licenses issued hereunder shall be renewed at the times and in the manner provided by this section. At least 45 days prior to expiration of each certificate or license, the Board shall mail a notice and application for renewal to the certificate holder or licensee. Prior to the expiration date, the application shall be returned properly completed, together with a renewal fee established by the Board pursuant to G.S. 90B-6.2(a)(4) and evidence of completion of the continuing education requirements established by the Board pursuant to G.S. 90B-6(g), upon receipt of which the Board shall renew the certificate or license. If a certificate or license is not renewed on or before the expiration date, an additional fee shall be charged for late renewal as provided in G.S. 90B-6.2(a)(5).

(c) A certificate or license issued under this Chapter shall be automatically suspended for failure to renew for a period of more than 60 days after the renewal date. The Board may reinstate a certificate or license suspended under this subsection upon payment of a reinstatement fee as provided in G.S. 90B-6.2(a)(6) and may require that the applicant file a new application, furnish new supervisory reports or references or otherwise update his or her credentials, or submit to examination for reinstatement. The Board shall have exclusive jurisdiction to investigate alleged violations of this Chapter by any person whose certificate or license has been suspended under this subsection and, upon proof of any violation of this Chapter, the Board may take disciplinary action as provided in G.S. 90B-11.

(d) Any person certified or licensed and desiring to retire temporarily from the practice of social work shall send written notice thereof to the Board. Upon receipt of such notice, his or her name shall be placed upon the nonpracticing list and he or she shall not be subject to payment of renewal fees while temporarily retired. In order to reinstate certification or licensure, the person shall apply to the Board by making a request for reinstatement and paying the appropriate fee as provided in G.S. 90B-6.2. (1983, c. 495, s. 1; 1999-313, s. 1; 2006-226, s. 19.)

Effect of Amendments. — Session Laws 2006-226, s. 19, effective August 10, 2006, in subsection (b), substituted "G.S. 90B-6.2(a)(4)" for "G.S. 90B-6.2(a)(5)" in the third sentence, and "G.S. 90B-6.2(a)(5)" for "G.S. 90B-6.2(a)(6)" in the last sentence; and in subsection (c), substituted "G.S. 90B-6.2(a)(6)" for "G.S. 90B-6.2(a)(7)" in the second sentence.

§ 90B-10. Exemption from certain requirements.

(a) Applicants who were engaged in the practice of social work before January 1, 1984, shall be exempt from the academic qualifications required by this act for Certified Social Workers and Certified Social Work Managers and shall be certified upon passing the Board examination and meeting the experience requirements, if any, for certification of persons in that classification.

(b) The following may engage in clinical social work practice without meeting the requirements of G.S. 90B-7(d):

(1) Repealed by Session Laws 2007-379, s. 4, effective August 19, 2007.

(2) A student completing a clinical requirement for graduation while pursuing a course of study in social work in an institution accredited by or in candidacy status with the Council on Social Work Education.

(3) Repealed by Session Laws 2007-379, s. 4, effective August 19, 2007. (1983, c. 495, s. 1; 1991, c. 732, s. 5; 1993 (Reg. Sess., 1994), c. 745, s. 38.1; 1996, 2nd Ex. Sess., c. 18, s. 24.11; 1997-443, s. 11.31; 2007-379, s. 4.)

Editor's Note. — Session Laws 1991, c. 732, s. 7 provides: "Any proposed substantive changes to G.S. 90B-3, 90B-4, 90B-5, 90B-7, or 90B-10 shall be reviewed by the Legislative Committee on New Licensing Boards pursuant to G.S. 120-149.3(e)."

Effect of Amendments. — Session Laws 2007-379, s. 4, effective August 19, 2007, repealed former subdivisions (b)(1) and (b)(3), exempting clinical social workers in practice prior to 1993 and clinical social workers practicing exclusively at certain hospitals and health care facilities.

§ 90B-11. Disciplinary procedures.

(a) The Board may, in accordance with the provisions of Chapter 150B of the General Statutes, deny, suspend, or revoke an application, certificate, or license on any of the following grounds:

(1) Conviction of a misdemeanor or the entering of a plea of guilty or nolo contendere to a misdemeanor under this Chapter.
(2) Conviction of a felony or the entering of a plea of guilty or nolo contendere to a felony under the laws of the United States or of any state of the United States.
(3) Gross unprofessional conduct, dishonest practice or incompetence in the practice of social work.
(4) Procuring or attempting to procure a certificate or license by fraud, deceit, or misrepresentation.
(5) Any fraudulent or dishonest conduct in social work.
(6) Inability of the person to perform the functions for which he or she is certified or licensed, or substantial impairment of abilities by reason of physical or mental disability.
(7) Violations of any of the provisions of this Chapter or of rules of the Board.

(b) Upon proof that an applicant, certificate holder, or licensee under this Chapter has engaged in any of the prohibited actions specified in subsection (a) of this section, the Board may, in lieu of denial, suspension, or revocation, take one or more of the following actions:
(1) Issue a reprimand or censure.
(2) Order probation with conditions deemed appropriate by the Board.
(3) Require examination, remediation, or rehabilitation, including care, counseling, or treatment by a professional designated or approved by the Board, the cost of which shall be borne by the applicant, certificate holder, or licensee.
(4) Require supervision for the services provided by the applicant, certificate holder, or licensee by a certified or licensed social worker designated and approved by the Board, the cost of which shall be borne by the applicant, certificate holder, or licensee.
(5) Limit or circumscribe the practice of social work provided by the applicant, certificate holder, or licensee with respect to the extent, nature, or location of the services provided.

(c) The Board may impose conditions of probation or restrictions upon continued practice at the conclusion of a period of suspension or as a requirement for the restoration of a revoked or suspended certificate or license. Instead of or in connection with any disciplinary proceeding or investigation, the Board may enter into a consent order with an applicant, certificate holder, or licensee relative to a discipline, supervision, probation, remediation, rehabilitation, or practice limitation.

(d) In considering whether an applicant, certificate holder, or licensee is mentally or physically capable of practicing social work with reasonable skill and safety, the Board may require an applicant, certificate holder, or licensee to submit to a mental examination by a licensed clinical social worker or other licensed mental health professional designated by the Board and to a physical examination by a physician or other licensed health professional designated by the Board. The examination may be ordered by the Board before or after charges are presented against the applicant, certificate holder, or licensee and the results of the examination shall be reported directly to the Board and shall be admissible in evidence in a hearing before the Board.

(e) The Board shall provide the opportunity for a hearing under Article 3A of Chapter 150B of the General Statutes to: (i) any person whose certification or licensure was denied or granted subject to restrictions, probation, disciplinary action, remediation, or other conditions or limitations; and (ii) any certificate holder or licensee before revoking or suspending his or her certificate or license or restricting his or her practice or imposing any other disciplinary action or remediation. If the applicant, certificate holder, or licensee waives the opportunity for a hearing, the Board's denial, revocation, suspension, or other action shall be final. No applicant, certificate holder, or licensee shall be entitled to a hearing for failure to pass a qualifying examination.

(f) In any proceeding before the Board, complaint or notice of charges against any applicant, certificate holder, or licensee, and any decision rendered by the Board, the Board may withhold from public disclosure the identity of any client who has not consented to the public disclosure of social work services provided to him or her by the applicant, certificate holder, or licensee. If necessary for the protection and rights of a client and the full presentation of relevant evidence, the Board may close a hearing to the public and receive evidence involving or concerning the delivery of social work services.

(g) Records, papers, and other documents containing information collected and compiled by or on behalf of the Board as a result of an investigation, inquiry, or interview conducted in connection with certification, licensure, or a disciplinary matter shall not be considered public records within the meaning of Chapter 132 of the General Statutes. Any notice or statement of charges, notice of hearing, or decision rendered in connection with a hearing, shall be a public record. Information that identifies a client who has not consented to the public disclosure of services rendered to him or her by a person certified or licensed under this Chapter shall be deleted from the public record. All other records, papers, and documents containing information collected and compiled by or on behalf of the Board shall be public records, but any information that identifies a client who has not consented to the public disclosure of services rendered to him or her shall be deleted. (1983, c. 495, s. 1; 1987, c. 827, s. 1; 1999-313, s. 1.)

§ 90B-12. Violation a misdemeanor.

Any person violating any provision of this Chapter is guilty of a Class 2 misdemeanor. (1983, c. 495, s. 1; 1993, c. 539, s. 654; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 90B-13. Injunction.

As an additional remedy, the Board may proceed in a superior court to enjoin and restrain any person from violating the prohibitions of this Chapter. The Board shall not be required to post bond in connection with such proceeding. (1983, c. 495, s. 1.)

§ 90B-14. Third-party reimbursements.

Nothing in this Chapter shall be construed to authorize or require direct third-party reimbursement to persons certified under this Chapter. (1991, c. 732, s. 6.)

§ 90B-15. License or certificate to be displayed.

A person licensed or certified under this Chapter shall conspicuously display the license or certificate issued by the Board at the licensee's or certificate holder's primary place of practice. (2007-379, s. 5.)

Editor's Note. — Session Laws 2007-379, s. 6, made this section effective August 19, 2007.

Chapter 90C.

North Carolina Recreational Therapy Licensure Act.

Sec.
90C-1 through 90C-19. [Repealed.]
90C-20. Short title.
90C-21. Purpose.
90C-22. Definitions.
90C-23. North Carolina Recreational Therapy Licensure Board is created.
90C-24. Powers of the Board.
90C-25. Executive Director.
90C-26. The Board may accept contributions, etc.
90C-27. Requirements for licensure.
Sec.
90C-28. Licensure fees.
90C-29. License renewal.
90C-30. Reinstatement.
90C-31. Inactive list.
90C-32. Revocation, suspension, or denial of licensure.
90C-33. Reciprocity.
90C-34. Persons and practices not affected.
90C-35. Reports; immunity from suit.
90C-36. Violations and penalties.
90C-37. Enjoining illegal practices.

§§ 90C-1 through 90C-19: Repealed by Session Laws 2005-378, s. 1, effective October 5, 2005.

§ 90C-20. Short title.

This Chapter shall be known as the "North Carolina Recreational Therapy Licensure Act". (2005-378, s. 2.)

Editor's Note. — Session Laws 2005-378, s. 3, provides: "Members serving on the North Carolina State Board of Therapeutic Recreation Certification on the effective date of this act [October 5, 2005] shall continue to serve and complete their current terms on the North Carolina Recreational Therapy Licensure Board established in G.S. 90C-23, as enacted in Section 2 of this act. The Governor shall appoint the physician member to serve a three-year term pursuant to G.S. 90C-23(b)(4), as enacted in Section 2 of this act. Members appointed thereafter shall serve three-year staggered terms."

Session Laws 2005-378, s. 4, provides: "Any current State-certified person working within the scope of recreational therapy, as defined in G.S. 90C-22(7), as enacted in Section 2 of this act, as a recreational therapist or a recreational therapy assistant before January 30, 2006, may be exempt from all educational, examination, and experience requirements for initial licensure pursuant to this Chapter, as enacted in Section 2 of this act. In order to qualify for this exemption, an applicant must apply to the Board for licensure before January 15, 2008, and the applicant must be working within the scope of recreational therapy and previously certified by the Board at the time of application. The Board shall attempt in good faith to notify all current State-certified persons of the availability of this exemption and the deadlines for qualifying and applying for licensure under this act."

§ 90C-21. Purpose.

It is the purpose and intent of the Recreational Therapy Licensure Act to safeguard the health and safety of the public and to protect the public from harm by unqualified persons by establishing a minimum level of education, experience, and competence to assure the highest degree of professional care and conduct on the part of licensed recreational therapists and licensed recreational therapy assistants. (2005-378, s. 2.)

§ 90C-22. Definitions.

In this Chapter, unless the context otherwise requires, the following definitions shall apply:

(1) Board. — The North Carolina Board of Recreational Therapy Licensure.

(2) Licensed recreational therapist. — A person who holds a license pursuant to this Chapter as a recreational therapist. A person licensed as a "Recreational Therapist" under this Chapter may practice in clinical, residential, educational, and community settings and may:
   a. Conduct an individualized patient or client assessment for the purpose of collecting systematic, comprehensive, and accurate data necessary to determine a course of action and subsequent individualized treatment plan.
   b. Plan and develop the individualized treatment plan that identifies a patient or client's goals, objectives, and treatment intervention strategies.
   c. Implement the individualized treatment plan that is consistent with the overall patient or client treatment program.
   d. Systematically evaluate and compare the patient or client's response to the individualized treatment plan and suggest modifications as appropriate.
   e. Develop a discharge plan in collaboration with the patient or client, his or her family, and other treatment team members.
   f. Serve as a resource for patient or client recreation opportunities to promote or improve his or her general health and well-being.
   g. Deliver services in accordance with the professional standards of practice and codes of ethics promulgated by national or State professional organizations.
   h. Manage delivery of services in accordance with a written plan of operation based upon standards advanced by appropriate membership, regulatory, and credentialing agencies.
   i. Provide professional and preprofessional education and training of recreational therapists or recreational therapy assistants.
   j. Conduct research in the field of recreational therapy or therapeutic recreation.

(3) Licensed recreational therapy assistant. — A person who holds a license pursuant to this Chapter as a recreational therapy assistant to act under the supervision of a licensed recreational therapist as defined by rule. A person licensed as a "Recreational Therapy Assistant" under this Chapter may assist in the practice of recreational therapy in clinical, residential, and community settings under the supervision of a licensed recreational therapist and in accordance with a recreational therapy assistant's training, education, and scope of practice, as defined by rule.

(4) Person. — Any individual, corporation, partnership, association, unit of government, or other legal entity.

(5) Recreational therapy. — A treatment service designed to restore, remediate, or rehabilitate a patient or client's level of functioning and independence in life activities, as well as reduce or eliminate the activity limitations and restrictions to participation in life situations caused by an illness or disabling condition.

(6) Recreational therapy aide. — Any nonlicensed person who aids in the provision of recreational therapy services under the provisions of this Chapter, and who acts under the direction and on-site supervision of a licensed recreational therapist or licensed recreational therapy assistant. A recreational therapy aide may perform recreational therapy related duties and functions which are assigned and are commensurate with an aide's training and competency. An aide's work shall not include responding to a physician's orders; designing, conducting, or interpreting individualized recreational therapy pa-

tient assessment; determining or modifying recreational therapy treatment plans or interventions; or any independent practice or performance of recreational therapy services.

(7) Scope of recreational therapy. — The practice of recreational therapy includes all direct patient or client services of assessment, planning, design, implementation, evaluation, and documentation of specific interventions, management, consultation, research, and education for either individuals or groups that require specific therapeutic recreation or recreational therapy intervention representing the process and knowledge base delineated in the most recent National Council for Therapeutic Recreation Certification (NCTRC) Job Analysis Study and professional standards of practice. Scope is inclusive of professional and preprofessional education and training in recreational therapy, therapeutic recreation, and related research.

(8) Therapeutic recreation. — The provision of treatment services and the provision of recreation services to persons with illnesses or disabling conditions. The primary purposes of treatment services, which are often referred to as recreational therapy, are to restore, remediate, or rehabilitate in order to improve functioning and independence as well as reduce or eliminate the effects of illness or disability. The primary purposes of recreation services are to provide recreation resources and opportunities in order to improve health and well-being. Therapeutic recreation is provided by professionals who are trained and certified, registered, or licensed to provided therapeutic recreation. (2005-378, s. 2.)

Editor's Note. — Subdivision (5), defining "recreational therapy," subdivision (6), defining "recreational therapy aide," and subdivision (7), defining "scope of recreational therapy," were designated as such at the direction of the Revisor of Statutes, the designations in Session Laws 2005-378, s. 2, having been (7), (5), and (6), respectively.

§ 90C-23. North Carolina Recreational Therapy Licensure Board is created.

(a) The North Carolina Recreational Therapy Licensure Board is created.

(b) Composition. — The Board shall consist of eight members appointed as follows:

(1) Three practicing recreational therapists, one of whom shall be appointed by the Governor, one of whom shall be appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, and one of whom shall be appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives.

(2) One licensed practicing recreational therapy assistant appointed by the Governor.

(3) One licensed practicing recreational therapist who is engaged primarily in providing education or training for recreational therapists or recreational therapy assistants appointed by the Governor.

(4) One physician licensed pursuant to Article 1 of Chapter 90 of the General Statutes appointed by the Governor.

(5) Two public members, one of whom shall be appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate and one of whom shall be appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives.

The Governor shall make appointments after consultation with the North Carolina Recreational Therapy Licensure Board and other interested persons.

(c) Qualifications. — The nonpublic recreational therapist or recreational therapy assistant members of the Board shall hold a current license. Each nonpublic recreational therapist or recreational therapy assistant member of the Board, at the time of his or her appointment and for at least two years before, shall have been actively engaged in North Carolina in the practice of recreational therapy or therapeutic recreation, in the education and training of graduate or undergraduate students of recreational therapy or therapeutic recreation, or in recreational therapy or therapeutic recreation research.

One public member shall not be a licensed health care professional or an agent or employee of any health care institution, health care insurer, health care professional school, or a member of any allied health profession. One public member shall have received recreational therapy or therapeutic recreation services. For purposes of this subsection, a person enrolled in a program to prepare him or her to be a licensed health care professional or an allied health professional shall not be eligible to serve as a public member of the Board. The spouse of any person who would be prohibited by this subsection from serving on the Board as a public member shall not serve as a public member of the Board. Public members shall reasonably reflect the population of this State.

(d) Term. — Members of the Board shall serve three-year staggered terms and shall serve until a successor is appointed and qualified. No member shall serve more than two consecutive full terms.

(e) Vacancies. — The Governor shall fill vacancies to the Board positions for which the Governor is the appointing authority within 30 days after a position is vacated. The General Assembly shall fill vacancies for which it is the appointing authority in accordance with G.S. 120-122. Appointees shall serve the remainder of the unexpired term and until their successors have been appointed and qualified.

(f) Removal. — The Board may remove any of its members for gross neglect of duty, incompetence, or unprofessional conduct. A member subject to disciplinary proceedings shall be disqualified from Board business until the charges are resolved. The Governor may also remove any member for gross neglect of duty, incompetence, or unprofessional conduct.

(g) Compensation. — Each member of the Board shall receive such per diem compensation and reimbursement for travel and subsistence as shall be set for licensing Board members generally, as provided in G.S. 93B-5.

(h) Officers. — The officers of the Board shall be a chairman, a vice-chairman, and other officers deemed necessary by the Board to carry out the purposes of this Chapter. All officers shall be elected annually by the Board for one-year terms and shall serve until their successors are elected and qualified.

(i) Meetings. — The Board shall hold at least two meetings each year to conduct business and shall adopt rules governing the calling, holding, and conducting of regular and special meetings. A majority of the Board members shall constitute a quorum.

(j) Employees. — The Board may employ necessary personnel for the performance of its functions and fix their compensation within the limits of the funds available to the Board.

(k) The total expense of the administration of this Chapter shall not exceed the total income from fees collected pursuant to this Chapter. None of the expenses of the Board, or the compensation or expenses of any officer or any employee of the Board, shall be paid or payable out of the General Fund. Neither the Board nor any of its officers or employees may incur any expense, debt, or other financial obligation binding upon the State. (2005-378, s. 2.)

Editor's Note. — Session Laws 2005-378, s. 3, provides: "Members serving on the North Carolina State Board of Therapeutic Recreation Certification on the effective date of this act [October 5, 2005] shall continue to serve and complete their current terms on the North Carolina Recreational Therapy Licensure Board established in G.S. 90C-23, as enacted in Section 2 of this act. The Governor shall appoint the physician member to serve a three-year term pursuant to G.S. 90C-23(b)(4), as enacted in Section 2 of this act. Members appointed thereafter shall serve three-year staggered terms."

§ 90C-24. Powers of the Board.

(a) The Board shall have the following general powers and duties:

(1) To administer this Chapter.

(2) To issue interpretations of this Chapter.

(3) To adopt, amend, or repeal rules and regulations in the manner prescribed by Chapter 150B of the General Statutes, as may be necessary to carry out the provisions of this Chapter.

(4) To establish qualifications of, employ, and set the compensation of the Executive Director who shall not be a member of the Board.

(5) To employ and fix the compensation of the personnel that the Board determines are necessary to carry out the provisions of this Chapter and to incur other expenses necessary to effectuate this Chapter.

(6) To determine the qualifications of persons who are licensed pursuant to this Chapter.

(7) To issue, renew, deny, suspend, or revoke licenses and carry out any of the other actions authorized by this Chapter.

(8) To conduct investigations for the purpose of determining whether violations of this Chapter are grounds for revoking, denying, suspending, or refusing to renew the licenses of persons licensed pursuant to this Chapter.

(9) To maintain a record of all proceedings and make available to persons who hold a license and other concerned parties an annual report of all Board action.

(10) To set fees for licensure, license renewal, and other services deemed necessary to carry out the purpose of this Chapter.

(11) To adopt a seal containing the name of the Board to be used on licenses and official reports it issues.

(12) To issue annually a list stating the names of persons currently licensed under the privilege of this Chapter.

(13) To establish or approve, as defined by rule, reasonable competency requirements for licensure, including the power to adopt or use examination materials, study or training courses, and standards of recognized accrediting and credentialing agencies and professional associations and the power to establish or approve, as defined by rule, reasonable standards for renewal of licensure, including requirements for continuing recreational therapy or therapeutic recreation education.

(b) The powers and duties enumerated above are granted for the purpose of enabling the Board to protect the public from misrepresentation of licensure status as provided in this Chapter and shall be liberally construed to accomplish this objective. (2005-378, s. 2.)

§ 90C-25. Executive Director.

The Executive Director shall deposit all fees payable to the Board in financial institutions designated by the Board as official depositories. The funds shall be deposited in the name of the Board and shall be used to pay all expenses incurred by the Board in carrying out the purposes of this Chapter. The State Auditor shall audit the Board annually. (2005-378, s. 2.)

§ 90C-26. The Board may accept contributions, etc.

The Board may accept grants, contributions, devises, bequests, and gifts that shall be kept in a separate fund and shall be used by it to publicize the licensure program and its protective benefits to the public. (2005-378, s. 2.)

§ 90C-27. Requirements for licensure.

(a) The Board shall license any person as a "Licensed Recreational Therapist" who meets the following education, credential, and experience requirements:

(1) Passage of an appropriate examination as a therapeutic recreation specialist or a recreational therapist by the North Carolina Recreational Therapy Licensure Board or current certification as a "Certified Therapeutic Recreation Specialist" by the National Council for Therapeutic Recreation Certification.

(2) A minimum level of education or experience, as defined by rules of the Board, inclusive of practice competency standards or guidelines promulgated by professional associations and credentialing and accrediting organizations.

(3) For purposes of this subsection, an academic major or specialization shall be defined by rules of the Board and shall be inclusive of information gathered through surveys of educational institutions in the State having a bachelors or masters degree with a specialization in recreational therapy or therapeutic recreation.

(b) The Board shall license any person as a "Licensed Recreational Therapy Assistant" who meets the following education and experience requirements:

(1) A minimum level of education or experience, as defined by rules of the Board, inclusive of practice competency standards or guidelines promulgated by professional associations and credentialing and accrediting organizations as deemed appropriate by the Board.

(2) For purposes of this section, an academic major or specialization shall be defined by rules of the Board and shall be inclusive of information gathered through surveys of educational institutions in the State having associate degree curricula in recreational therapy or therapeutic recreation. (2005-378, s. 2.)

Editor's Note. — Session Laws 2005-378, s. 4, provides: "Any current State-certified person working within the scope of recreational therapy, as defined in G.S. 90C-22(7), as enacted in Section 2 of this act, as a recreational therapist or a recreational therapy assistant before January 30, 2006, may be exempt from all educational, examination, and experience requirements for initial licensure pursuant to this Chapter, as enacted in Section 2 of this act. In order to qualify for this exemption, an applicant must apply to the Board for licensure before January 15, 2008, and the applicant must be working within the scope of recreational therapy and previously certified by the Board at the time of application. The Board shall attempt in good faith to notify all current State-certified persons of the availability of this exemption and the deadlines for qualifying and applying for licensure under this act."

§ 90C-28. Licensure fees.

Applications for licensure shall be made on forms prescribed and furnished by the Board. The Board may establish fees for the actual cost of duplication services, materials, and returned bank items. All fees derived from services provided by the Board under the provisions of this Chapter shall be nonrefundable. The Board shall establish the amount of fees as defined by rule not to exceed the following amounts:

(1) Initial application for licensure fee	$200.00

(2) Licensure renewal fee	$200.00
(3) Record maintenance fee	$100.00
(4) Inactive fee	$ 50.00.

(2005-378, s. 2.)

§ 90C-29. License renewal.

Every license issued pursuant to this Chapter shall be renewable every two years. Within 30 days before the expiration date, a person who desires to continue to be licensed in the field of therapeutic recreation or recreational therapy shall apply for license renewal on forms furnished by the Board. The applicant shall meet criteria for renewal, including continuing education, established by the Board as defined by rule and shall pay the required fee established by the Board pursuant to this Chapter. Failure to renew the license before the expiration date shall result in automatic forfeiture of any license issued pursuant to this Chapter.

The Executive Director shall notify, in writing, every person at his or her last known address of the expiration of his or her license and the amount that is required for its two-year renewal. (2005-378, s. 2.)

§ 90C-30. Reinstatement.

A person who has allowed his or her license to lapse by failure to renew it pursuant to this Chapter must apply for licensure on a reinstatement form provided by the Board. The Board shall require the applicant to return the completed reinstatement licensure form including renewal requirements established by the Board as defined by rule. If the license has lapsed for more than two years, the Board shall require the applicant to successfully demonstrate competency as defined by rules established by the Board. If the Board determines that the license should be reinstated, it shall issue a license renewal to the applicant. (2005-378, s. 2.)

§ 90C-31. Inactive list.

When a person licensed by the Board submits a request for inactive status and pays the inactive fee, the Board shall issue to the person a statement of inactive status and shall place the person's name on the "Inactive Status" list. While on that list, the person shall not hold himself or herself out as licensed pursuant to this Chapter. When that person desires to be removed from the inactive list and returned to an active list, an application shall be submitted to the Board on a form furnished by the Board, and the fee shall be paid for license renewal. The Board shall require evidence of competency as defined by rule to resume practice before returning the applicant to the active status. (2005-378, s. 2.)

§ 90C-32. Revocation, suspension, or denial of licensure.

The Board may require remedial education, issue of a letter of reprimand, restrict, revoke, or suspend any license issued pursuant to this Chapter or deny any application for licensure if the Board determines that the licensee or applicant has done any of the following:

(1) Given false information or withheld material information from the Board in procuring or attempting to procure a license pursuant to this Chapter.

(2) Been convicted of, or pleaded guilty or nolo contendere to, any crime that indicates that the person is unfit or incompetent to be licensed pursuant to this Chapter.

(3) Is unable to perform the functions for which a license has been issued due to impairment of mental or physical faculties.
(4) Engaged in conduct that endangers the public health.
(5) Is unfit or incompetent to be licensed pursuant to this Chapter by reason of deliberate or negligent acts or omissions regardless of whether active injury to the patient or client is established.
(6) Engages in conduct that deceives, defrauds, or harms the public in the course of claiming licensed status or practicing recreational therapy.
(7) Willfully violated any provision of this Chapter, rules, or code of ethics enacted by the Board.
(8) Aided, abetted, or assisted any person in violating the provisions of this Chapter.

The Board may reinstate a revoked license or remove licensure restrictions when it finds that the reasons for revocation or restriction no longer exist and that the person can reasonably be expected to safely and properly practice recreational therapy. (2005-378, s. 2.)

§ 90C-33. Reciprocity.

The Board may grant a license, without examination or by special examination, to any person who, at the time of application, is licensed as a recreational therapist or therapeutic recreation specialist by a similar Board of another country, state, or territory whose licensing standards are substantially equivalent to or higher than those required by this Chapter. The Board shall determine the substantial equivalence upon which reciprocity is based. (2005-378, s. 2.)

§ 90C-34. Persons and practices not affected.

Nothing in this Chapter shall be construed to prevent or restrict:

(1) Any person qualified, registered, certified, or licensed to engage in another profession or occupation or any person working under the supervision of a person registered, certified, or licensed to engage in another profession or occupation in this State from performing work incidental to the practice of that profession or occupation as long as that person does not represent himself or herself as a recreational therapy assistant or recreational therapist or the work to be recreational therapy or therapeutic recreation as defined by this Chapter.
(2) Any person employed as a therapeutic recreation specialist, therapeutic recreation assistant, or recreational therapist or a recreational therapy assistant by the government of the United States, if he or she provides therapeutic recreation or recreational therapy solely under the direction and control of the organization by which he or she is employed.
(3) Any person pursuing a course of study leading to a degree in recreational therapy or therapeutic recreation at an accredited college or university that meets the minimum academic requirements for a major or specialization in recreational therapy as defined by the rules and regulations of the Board.
(4) Any person fulfilling the supervised fieldwork experience required for a degree and for licensure, as defined by the rules of the Board, if the person is designated by a title that clearly indicates his or her status as a student.
(5) **(Expires June 30, 2010)** Any person employed as a therapeutic recreation specialist, therapeutic recreation assistant, recreational therapist, or recreational therapy assistant by the North Carolina

Department of Health and Human Services, if he or she provides therapeutic recreation or recreational therapy solely under the direction and control of the Department. (2005-378, s. 2; 2007-389, s. 1.)

Editor's Note. — Session Laws 2007-389, which expires June 30, 2010, in s. 2, provides: "The Department of Health and Human Services in collaboration with the North Carolina Board of Recreational Therapy Licensure shall develop a timetable and benchmarks for achieving full compliance with the requirements of Chapter 90C of the General Statutes."

Effect of Amendments. — Session Laws 2007-389, s. 1, effective August 19, 2007, and expiring June 30, 2010, added subdivision (5).

§ 90C-35. Reports; immunity from suit.

Any person who has reasonable cause to suspect malpractice, misconduct, or incapacity of a person who is licensed pursuant to this Chapter or who has reasonable cause to suspect that any person is in violation of this Chapter should report the relevant facts to the Board. Upon receipt of a charge or upon its own initiative, the Board may give notice of an administrative hearing pursuant to Chapter 150B of the General Statutes or may, after diligent investigation, dismiss unfounded charges. Any person making a report pursuant to this section shall be immune from criminal prosecution or civil liability based on that report unless the person knew the report was false or acted in reckless disregard of whether or not the report was false. (2005-378, s. 2.)

§ 90C-36. Violations and penalties.

Any person not licensed under this Chapter who holds himself or herself out to be licensed under this Chapter or who practices recreational therapy or therapeutic recreation shall be guilty of a Class 1 misdemeanor. Any fine imposed as a result of conviction shall not exceed five hundred dollars ($500.00). (2005-378, s. 2.)

§ 90C-37. Enjoining illegal practices.

(a) If the Board finds that a person is violating any of the provisions of this Chapter, it may apply in its own name to the superior court for a temporary or permanent restraining order or an injunction to prevent that person from continuing the illegal practices. The court is empowered to grant an injunction regardless of whether criminal prosecution or other action has been or may be instituted as a result of the violation. All actions by the Board shall be governed by the Rules of Civil Procedure.

(b) The venue for actions brought under this Chapter shall be in the county where the defendant resides or the county where the violation occurs. (2005-378, s. 2.)

Chapter 90D.

Interpreters and Transliterators.

Sec.
90D-1. Title.
90D-2. Declaration of purpose.
90D-3. Definitions.
90D-4. License required; exemptions.
90D-5. Creation of the Board.
90D-6. Powers of the Board.
90D-7. Requirements for licensure.

Sec.
90D-8. Provisional license.
90D-9. Reciprocity; licensure of nonresident.
90D-10. Expenses and fees.
90D-11. License renewal.
90D-12. Disciplinary action.
90D-13. Injunctive relief.
90D-14. Civil penalties.

§ 90D-1. Title.

This Chapter may be cited as the "Interpreter and Transliterator Licensure Act". (2002-182, s. 1; 2003-56, s. 3.)

Cross References. — As to interpreters for deaf persons, see § 8B-1 et seq.

Editor's Note. — Session Laws 2002-182, s. 8, provides: "The Department of Public Instruction must provide the Board with a copy of the State Board of Education's approved educational requirements and standards for interpreters and transliterators employed by the local educational agencies, who provide support services for hearing-impaired students."

§ 90D-2. Declaration of purpose.

The practice of manual or oral interpreting and transliterating services affects the public health, safety, and welfare, and therefore the licensure of these practices is necessary to ensure minimum standards of competency and to provide the public with safe and accurate manual or oral interpreting or transliterating services. It is the purpose of this Chapter to provide for the regulation of persons offering manual or oral interpreting or transliterating services to individuals who are deaf, hard-of-hearing, or dependent on the use of manual modes of communication in this State. (2002-182, s. 1; 2003-56, s. 3.)

§ 90D-3. Definitions.

The following definitions apply in this Chapter:

(1) Board. — The North Carolina Interpreter and Transliterator Licensing Board.

(2) Cued speech. — A tool that utilizes a phonetically based system to enable spoken language to appear visibly through the use of eight handshapes in four locations in combination with natural mouth movements to allow sounds of spoken language to appear differently.

(3) Educational interpreter or transliterator. — A person who provides accessible communication, using the most understandable language model, to individuals in prekindergarten through grade 12 or in any institution of higher education.

(4) Interpreter. — A person who practices the act of interpreting as defined in this section.

(5) Interpreting. — The process of providing accessible communication, between and among persons who are deaf or hard-of-hearing and those who are hearing. This process includes, but is not limited to, communication between American Sign Language and English. It may also involve various other modalities that involve visual, gestural, and tactile methods.

(6) License. — A certificate that evidences approval by the Board that a person has successfully completed the requirements set forth in G.S.

90D-7 entitling the person to perform the functions and duties of an interpreter or transliterator.

(7) Provisional license. — A certificate issued by the Board under G.S. 90D-8 enabling a person to perform the functions and duties of an interpreter or transliterator until the person has successfully completed all of the requirements set forth in G.S. 90D-7.

(8) Transliterating. — The process of providing accessible communication between one or more hearing persons and one or more deaf or hard-of-hearing persons using a form of manually coded English.

(9) Transliterator. — A person who practices the act of transliterating as defined in this section. (2002-182, s. 1; 2003-56, s. 3.)

§ 90D-4. License required; exemptions.

(a) Except as provided in Chapter 8B of the General Statutes, no person shall practice or offer to practice as an interpreter or transliterator for a fee or other consideration, represent himself or herself as a licensed interpreter or transliterator, or use the title "Licensed Interpreter for the Deaf", "Licensed Transliterator for the Deaf", or any other title or abbreviation to indicate that the person is a licensed interpreter or transliterator unless that person is currently licensed under this Chapter.

(b) The provisions of this Chapter do not apply to:

(1) Persons providing interpreting or transliterating services in religious proceedings.

(2) Persons providing interpreting or transliterating services in mentoring or training programs approved by the Board.

(3) An intern under the supervision of a person licensed under this Chapter to provide interpreting or transliterating services.

(4) Persons providing interpreting or transliterating services in an emergency situation until a licensed interpreter or transliterator can be obtained. An emergency situation is one where the deaf or hard-of-hearing person is in substantial danger of death or irreparable harm if interpreting or transliterating services are not provided immediately.

(5) Educational interpreters or transliterators.

(6) Nonresident persons who are nationally certified providing interpreting or transliterating services in this State no more than 20 days per year in accordance with rules adopted by the Board. (2002-182, s. 1; 2003-56, s. 3; 2005-299, s. 1.)

§ 90D-5. Creation of the Board.

(a) The North Carolina Interpreter and Transliterator Licensing Board is created.

(b) Composition and Terms. — The Board shall consist of nine members who shall serve staggered terms. The initial Board members shall be selected on or before July 1, 2003, as follows:

(1) A member of the North Carolina Association of the Deaf (NCAD) who is deaf and familiar with the interpreting process. This member shall be appointed by the Governor and serve for a term of two years.

(2) An interpreter who is a member of the North Carolina Registry of Interpreters for the Deaf, Inc., (NCRID) with five years experience in a community setting and who is licensed to practice as an interpreter or transliterator under this Chapter. This member shall be appointed by the Governor and serve for a term of three years.

(3) An employee of the North Carolina Department of Health and Human Services. This member shall be appointed by the Governor, upon

recommendation of the Secretary of the Department, and serve a term of three years.

(4) An interpreter or transliterator for deaf-blind individuals who is licensed to practice as an interpreter or transliterator under this Chapter or a deaf-blind individual who is a member of the North Carolina Deaf-Blind Association and who has knowledge of the interpreting process. This member shall be appointed by the General Assembly, upon recommendation of the President Pro Tempore of the Senate, and serve for a term of three years.

(5) A cued speech or oral transliterator licensed to practice as an interpreter or transliterator under this Chapter. This member shall be appointed by the General Assembly, upon recommendation of the President Pro Tempore of the Senate, and serve for a term of two years.

(6) A member of Self Help for Hard of Hearing (SHHH) with knowledge of the interpreting process and deafness. This member shall be appointed by the General Assembly, upon recommendation of the President Pro Tempore of the Senate, and serve for a term of three years.

(7) An interpreter who is a member of the North Carolina Registry of Interpreters for the Deaf, Inc., (NCRID) with five years experience in an educational setting in grades K-12 and who is licensed to practice as an interpreter or transliterator under this Chapter. This member shall be appointed by the General Assembly, upon recommendation of the Speaker of the House of Representatives, and serve for a term of two years.

(8) A faculty member of an Interpreter Training Program (ITP), an Interpreter Preparation Program (IPP), or a qualified or professional certified instructor of the American Sign Language Teachers Association (ASLTA). This member shall be appointed by the General Assembly, upon recommendation of the Speaker of the House of Representatives, and serve for a term of two years.

(9) A public member. This member shall be appointed by the General Assembly, upon recommendation of the Speaker of the House of Representatives, and serve a term of two years. For purposes of this section, a public member shall not be licensed under this Chapter or have an immediate family member who is deaf or hard-of-hearing.

Upon the expiration of the terms of the initial Board members, each member shall be appointed for a term of three years and shall serve until a successor is appointed and qualified. No member may serve more than two consecutive full terms.

(c) Qualifications. — All members of the Board who are required to be licensed under this Chapter shall reside or be employed in North Carolina and shall remain in active practice and in good standing with the Board as a licensee during their terms.

(d) Vacancies. — A vacancy shall be filled in the same manner as the original appointment. Appointees to fill vacancies shall serve the remainder of the unexpired term and until their successors have been duly appointed and qualified.

(e) Removal. — The Board may remove any of its members for neglect of duty, incompetence, or unprofessional conduct. A member subject to disciplinary proceedings as a licensee shall be disqualified from participating in the official business of the Board until the charges have been resolved.

(f) Compensation. — Each member of the Board shall receive per diem and reimbursement for travel and subsistence as provided in G.S. 93B-5.

(g) Officers. — The officers of the Board shall be a chair, a vice-chair, and other officers deemed necessary by the Board to carry out the purposes of this

Chapter. All officers shall be elected by the Board for two-year terms and shall serve until their successors are elected and qualified.

(h) Meetings. — The Board shall hold at least two meetings each year to conduct business. The Board shall establish procedures governing the calling, holding, and conducting of regular and special meetings. A majority of the Board shall constitute a quorum. (2002-182, s. 1; 2003-56, s. 1.)

Editor's Note. — Session Laws 2002-182, s. 9, provides: "Notwithstanding the language in G.S. 90D-5, as enacted in Section 1 of this act, the initial Board members who are required to be licensed under that section, must only have satisfied the requirements for licensure in G.S. 90D-7(a)(1) and (3) of this act."

§ 90D-6. Powers of the Board.

The Board shall have the power and duty to:

(1) Administer this Chapter.

(2) Adopt, amend, or repeal rules necessary to carry out the provisions of this Chapter, subject to the provisions of Chapter 150B of the General Statutes.

(3) Employ and fix the compensation of personnel that the Board determines is necessary to carry into effect the provisions of this Chapter and to incur other expenses necessary to effectuate this Chapter.

(4) Examine and determine the qualifications and fitness of applicants for licensure, renewal of licensure, and reciprocal licensure.

(5) Issue, renew, deny, suspend, or revoke licenses and carry out any disciplinary actions authorized by this Chapter.

(6) Set fees as authorized in G.S. 90D-10.

(7) Conduct investigations for the purpose of determining whether violations of this Chapter or grounds for disciplining licensees exist.

(8) Maintain a record of all proceedings and make available to licensees and other concerned parties an annual report of all Board action.

(9) Keep on file in its office at all times a complete record of the names, addresses, license numbers, and renewal license numbers of all persons entitled to practice under this Chapter.

(10) Adopt a seal containing the name of the Board for use on all licenses and official reports issued by the Board.

(11) Adopt rules for continuing education requirements.

(12) Conduct administrative hearings in accordance with Article 3A of Chapter 150B of the General Statutes. (2002-182, s. 1; 2005-299, s. 3.)

§ 90D-7. Requirements for licensure.

(a) Upon application to the Board and the payment of the required fees, an applicant may be licensed as an interpreter or transliterator if the applicant meets all of the following qualifications:

(1) Is 18 years of age or older.

(2) Is of good moral character as determined by the Board.

(3) Meets one of the following criteria:

  a. Holds a valid National Association of the Deaf (NAD), level 4 or 5 certification.

  b. Is nationally certified by the Registry of Interpreters for the Deaf, Inc., (RID).

  c. Has a national certification recognized by the National Cued Speech Association (NCSA).

  d. Holds a quality assurance North Carolina Interpreter Classification System (NCICS) level A or B classification in effect on January 1, 2000.

(b) Effective July 1, 2008, any person who applies for initial licensure as an interpreter or transliterator shall hold at least a two-year degree from a regionally accredited institution.

(c) The Department of Justice may provide a criminal record check to the Board for a person who has applied for a new, provisional, or renewal license through the Board. The Board shall provide to the Department of Justice, along with the request, the fingerprints of the applicant, any additional information required by the Department of Justice, and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The Board shall keep all information pursuant to this subdivision privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this subsection. (2002-182, s. 1; 2003-56, s. 3.)

Editor's Note. — Session Laws 2002-182, s. 7, as amended by Session Laws 2003-56, s. 2, provides: "A person practicing interpreter or transliterator services on the effective date of this act who submits the following evidence to the Board and pays the required fee on or before December 31, 2004, shall be licensed without having to satisfy the requirements of subdivision (a)(3) of G.S. 90D-7 as enacted in Section 1 of this act:

"(1) Evidence that the person meets the qualifications in subdivisions (a)(1) and (a)(2) of G.S. 90D-7.

"(2) Evidence that the person has been actively engaged as an interpreter or transliterator in this State for at least 200 hours for each of the two years immediately preceding the effective date of this act. The evidence must be verified in writing by sources approved by the Board.

"(3) Two letters of recommendation from sources approved by the Board.

"(4) A fee of seventy-five dollars ($75.00) for the registration. This fee shall be in lieu of the fee for a license authorized in G.S. 90D-10 of the act. A person who obtains a license by meeting the requirements of this section must comply with the continuing education requirements set by the Board. Any practicing person who does not register with the Board on or before December 31, 2004, shall be required to complete all requirements prescribed by the Board and to otherwise comply with the provisions of Chapter 90D, enacted by Section 1 of this act."

Session Laws 2002-182, s. 9, provides: "Notwithstanding the language in G.S. 90D-5, as enacted in Section 1 of this act, the initial Board members who are required to be licensed under that section, must only have satisfied the requirements for licensure in G.S. 90D-7(a)(1) and (3) of this act."

§ 90D-8. Provisional license.

(a) Upon application to the Board and the payment of the required fees, an applicant may be issued a one-time provisional license as an interpreter or transliterator if the applicant meets all of the following qualifications:

(1) Is at least 18 years of age.
(2) Is of good moral character as determined by the Board.
(3) Completes two continuing education units approved by the Board. These units must be completed for each renewable year.
(4) Satisfies one of the following:
  a. Holds a quality assurance North Carolina Interpreter Classification System (NCICS) level C classification.
  b. Holds a valid National Association of the Deaf (NAD) level 2 or 3 certification.

c. Holds a current Educational Interpreter Performance Assessment (EIPA) level 3 or above classification.
d. Repealed by Session Laws 2005-299, s. 2, effective August 22, 2005.
e. Holds at least a two-year interpreting degree from a regionally accredited institution.

(a1) Upon application to the Board, payment of the required fees, and meeting the requirements for a provisional license under subdivisions (1) and (2) of subsection (a) of this section, the Board may also issue a provisional license to any of the following categories of persons seeking a provisional license:

(1) A certified deaf interpreter (CDI) who completes 30 hours of training, including "Role and Function", "Code of Ethics", and interpreting professional studies coursework.
(2) An oral interpreter who completes a total of 40 hours of training in interpreting coursework or workshops related to oral interpreting.
(3) A person providing cued speech interpreting or transliterating services who completes a total of 40 hours of training in interpreting coursework or workshops related to cued speech.
(4) A person providing interpreting or transliterating services who has a recognized credential from another state in the field of interpreting or transliterating.
(5) An interpreter or transliterator who has accumulated 200 hours per year in the provision of interpreting or transliterating services, in this State or another state, totaling 400 hours for the two years immediately preceding the date of application.

(b) A provisional license issued under this section shall be valid for one year. Upon expiration, a provisional license may be renewed for an additional one-year period in the discretion of the Board. However, a provisional license shall not be renewed more than three times. The Board may, in its discretion, grant an extension after the third time the provisional license has been renewed under circumstances to be established in rules adopted by the Board.

(c) Effective July 1, 2008, any person who applies for initial licensure on a provisional basis as an interpreter or transliterator shall hold at least a two-year degree from a regionally accredited institution. (2002-182, s. 1; 2003-56, s. 3; 2005-299, s. 2.)

§ 90D-9. Reciprocity; licensure of nonresident.

(a) The Board may issue a license to a qualified applicant who resides in this State and holds an interpreter or transliterator license in another state if that state has standards of competency that are substantially equivalent to those provided in this Chapter.

(b) The Board may issue a license to a nonresident if the person meets the requirements of this Chapter or the person resides in a state that recognizes licenses issued by the Board. (2002-182, s. 1; 2003-56, s. 3.)

§ 90D-10. Expenses and fees.

(a) All salaries, compensation, and expenses incurred or allowed for the purposes of this Chapter shall be paid by the Board exclusively out of the fees received by the Board as authorized by this Chapter or from funds received from other sources. In no case shall any salary, expense, or other obligations of the Board be charged against the General Fund.

(b) The Board may impose the following fees not to exceed the amounts listed below:

(1) License	$225.00

(2) Provisional license	$225.00
(3) License renewal	$150.00
(4) Provisional license renewal	$150.00
(5) Duplicate license	$10.00.

(2002-182, s. 1; 2003-56, s. 3.)

§ 90D-11. License renewal.

Each license issued under this Chapter shall be renewed on or before October 1 of each year. All applications for renewal shall be filed with the Board and shall be accompanied by the renewal fee as required by G.S. 90D-10 and written proof of satisfactory completion of continuing education requirements adopted by the Board. Licenses that are not renewed shall automatically lapse, and the licensee shall be required to reapply for licensure in accordance with rules adopted by the Board. (2002-182, s. 1; 2003-56, s. 3.)

§ 90D-12. Disciplinary action.

The Board may deny, suspend, revoke, or refuse to license an interpreter or transliterator or applicant for any of the following:

(1) Giving false information to or withholding information from the Board in procuring or attempting to procure a license.
(2) Having been convicted of or pled guilty or no contest to a crime that indicates the person is unfit or incompetent to perform interpreter or transliterator services or that indicates the person has deceived or defrauded the public.
(3) Having been disciplined by the Registry of Interpreters for the Deaf, Inc., (RID).
(4) Demonstrating gross negligence, incompetency, or misconduct in performing interpreter or transliterator services.
(5) Failing to pay child support after having been ordered to do so by a court of competent jurisdiction.
(6) Willfully violating any provisions of this Chapter or rules adopted by the Board. (2002-182, s. 1; 2003-56, s. 3.)

§ 90D-13. Injunctive relief.

If the Board finds that a person who does not have a license issued under this Chapter claims to be a licensed interpreter or transliterator or is engaging in practice as an interpreter or transliterator in violation of this Chapter, the Board may apply in its own name to the superior court for a temporary restraining order or other injunctive relief to prevent the person from continuing illegal practices. The action may be brought in the county where the illegal or unlawful acts are alleged to have been committed, in the county where the defendant resides, or in the county where the Board maintains its offices and records. The court may grant injunctions regardless of whether criminal prosecution or other action has been or may be instituted as a result of a violation. (2002-182, s. 1; 2003-56, s. 3.)

§ 90D-14. Civil penalties.

(a) Authority to Assess Civil Penalties. — The Board may assess a civil penalty not to exceed one thousand dollars ($1,000) for the violation of any section of this Chapter or any rules adopted by the Board. The clear proceeds of any civil penalty assessed under this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(b) Consideration Factors. — Before imposing and assessing a civil penalty, the Board shall consider the following factors:

(1) The nature, gravity, and persistence of the particular violation.
(2) The appropriateness of the imposition of a civil penalty when considered alone or in combination with other punishment.
(3) Whether the violation was willful and malicious.
(4) Any other factors that would tend to mitigate or aggravate the violations found to exist.

(c) Schedule of Civil Penalties. — The Board shall establish a schedule of civil penalties for violations of this Chapter or rules adopted by the Board.

(d) Costs. — The Board may assess the costs of disciplinary actions against a person found to be in violation of this Chapter or rules adopted by the Board. (2005-299, s. 4.)

Chapter 91.

Pawnbrokers.

§§ 91-1 through 91-8: Repealed by Session Laws 1989, c. 638, s. 1.

Cross References. — As to the Pawnbrokers Modernization Act of 1989, see Chapter 91A.

Editor's Note. — Repealed G.S. 91-2, 91-3, and 91-4 were amended by Session Laws 1989, c. 524, s. 1.

Chapter 91A.

Pawnbrokers Modernization Act of 1989.

Sec.
91A-1. Short title.
91A-2. Purpose.
91A-3. Definitions.
91A-4. Pawnbroker authority.
91A-5. License required.
91A-6. Requirements for licensure.
91A-7. Record keeping requirements.
Sec.
91A-8. Pawnbroker fees; interest rates.
91A-9. Pawnbroker transactions.
91A-10. Prohibitions.
91A-11. Penalties.
91A-12. Municipal or county authority.
91A-13. License renewal.
91A-14. Bond.

§ 91A-1. Short title.

This Chapter shall be known and may be cited as the Pawnbrokers Modernization Act of 1989. (1989, c. 638, s. 2.)

Editor's Note. — The numbers of G.S. 91A-9 to 91A-14 were assigned by the Revisor of Statutes, the section numbers in Session Laws 1989, c. 638, s. 2 having been G.S. 91A-9 to 91A-22.

Legal Periodicals. — For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

§ 91A-2. Purpose.

The making of pawn loans and the acquisition and disposition of tangible personal property by and through pawnshops vitally affects the general economy of this State and the public interest and welfare of its citizens. In recognition of these facts, it is the policy of this State and the purpose of the Pawnbrokers Modernization Act of 1989 to:

(1) Ensure a sound system of making loans and acquiring and disposing of tangible personal property by and through pawnshops, and to prevent unlawful property transactions, particularly in stolen property, through licensing and regulating pawnbrokers;
(2) Provide for licensing fees and investigation fees of licensees;
(3) Ensure financial responsibility to the State and the general public;
(4) Ensure compliance with federal and State laws; and
(5) Assist local governments in the exercise of their police authority. (1989, c. 638, s. 2.)

§ 91A-3. Definitions.

As used in this Article, the following definitions shall apply:

(1) "Pawn" or "Pawn transaction" means a written bailment of personal property as security for a debt, redeemable on certain terms within 180 days, unless renewed, and with an implied power of sale on default.
(2) "Pawnbroker" means any person engaged in the business of lending money on the security of pledged goods and who may also purchase merchandise for resale from dealers and traders.
(3) "Pawnshop" means the location at which, or premises in which, a pawnbroker regularly conducts business.
(4) "Person" means any individual, corporation, joint venture, association, or any other legal entity, however organized.
(5) "Pledged goods" means tangible personal property which is deposited with, or otherwise actually delivered into, the possession of a pawn-

broker in the course of his business in connection with a pawn transaction.

(6) "Purchase" means any item purchased from an individual for the purpose of resale whereby the seller no longer has a vested interest in the item. (1989, c. 638, s. 2.)

CASE NOTES

***Editor's Note.** — The case cited below was decided under former G.S. 105-50.*

Broker and Pawnbroker Distinguished. — There is a great difference between the terms "broker" and "pawnbroker." A broker is an agent, middleman or negotiator, who works for a commission. A pawnbroker is not an agent at all. He is one who lends the money upon personalty pledged as security. Brokers and pawnbrokers constitute distinct classes, and entirely different license taxes may be assessed upon them. Schaul & Co. v. City of Charlotte, 118 N.C. 733, 24 S.E. 526 (1940).

§ 91A-4. Pawnbroker authority.

A pawnbroker licensee is authorized to: (i) make loans on pledges of tangible personal property, (ii) deal in bullion stocks, (iii) purchase merchandise for resale from dealers, traders, and wholesale suppliers and (iv) use its capital and funds in any lawful manner within the general scope and purpose of its creation. Notwithstanding the provisions of this section, no pawnbroker has the authority enumerated in this section unless he has fully complied with the laws regulating the particular transactions involved. (1989, c. 638, s. 2.)

§ 91A-5. License required.

It is unlawful for any person, firm, or corporation to establish or conduct a business of pawnbroker unless such person, firm, or corporation has procured a license to conduct business in compliance with the requirements of this Chapter. (1989, c. 638, s. 2.)

§ 91A-6. Requirements for licensure.

(a) To be eligible for a pawnbroker's license, an applicant must:

(1) Be of good moral character; and

(2) Not have been convicted of a felony within the last 10 years.

(b) Every person, firm or corporation desiring to engage in the business of pawnbroker shall petition the appropriate city or county agency in the area in which the pawnshop is to be operated for a license to conduct such business. Such petitions shall provide:

(1) The name and address of the person, and, in case of a firm or corporation, the names and addresses of the persons composing such firm or of the officers, directors, and stockholders of such corporation, excluding shareholders of publicly traded companies;

(2) The name of the business and the street and mailing address where the business is to be operated;

(3) A statement indicating the amount of net assets or capital proposed to be used by the petitioner in operation of the business; this statement shall be accompanied by an unaudited statement from an accountant or certified public accountant verifying the information contained in the accompanying statement;

(4) An affidavit by the petitioner that he has not been convicted of a felony; and

(5) A certificate from the chief of police, or sheriff of the county, or the State Bureau of Investigation that the petitioner has not been convicted of a felony.

(c) Licenses shall be granted under this Chapter by the city if the pawnshop is to be operated within the corporate limits of a city as defined by G.S. 160A-1, and by a county if it is to be operated outside the corporate limits of any city as defined by G.S. 160A-1.

(d) Any license granted under this Chapter may be revoked by the county or city issuing it, after a hearing, for substantial abuses of this Chapter by the licensee. (1989, c. 638, s. 2.)

§ 91A-7. Record keeping requirements.

(a) Every pawnbroker shall keep consecutively numbered records of each and every pawn transaction, which shall correspond in all essential particulars to a detachable pawn ticket or copy thereof attached to the record.

(b) The pawnbroker shall, at the time of making the pawn or purchase transaction, enter upon the pawn ticket a record of the following information which shall be typed or written in ink and in the English language:

(1) A clear and accurate description of the property, including model and serial number if indicated on the property;
(2) The name, residence address, phone number, and date of birth of pledgor;
(3) Date of the pawn transaction;
(4) Type of identification and the identification number accepted from pledgor;
(5) Description of the pledgor including approximate height, weight, sex, and race;
(6) Amount of money advanced;
(7) The date due and the amount due;
(8) All monthly pawn charges, including interest, annual percentage rate on interest, and total recovery fee; and
(9) Agreed upon "stated value" between pledgor and pawnbroker in case of loss or destruction of pledged item; unless otherwise noted, "stated value" is the same as the loan value.

(c) The following shall be printed on all pawn tickets:

(1) The statement that "ANY PERSONAL PROPERTY PLEDGED TO A PAWNBROKER WITHIN THIS STATE IS SUBJECT TO SALE OR DISPOSAL WHEN THERE HAS BEEN NO PAYMENT MADE ON THE ACCOUNT FOR A PERIOD OF 60 DAYS PAST MATURITY DATE OF THE ORIGINAL CONTRACT. NO FURTHER NOTICE IS NECESSARY.";
(2) The statement that "THE PLEDGOR OF THIS ITEM ATTESTS THAT IT IS NOT STOLEN, HAS NO LIENS OR ENCUMBRANCES, AND IS THE PLEDGOR'S TO SELL OR PAWN.";
(3) The statement that "THE ITEM PAWNED IS REDEEMABLE ONLY BY THE BEARER OF THIS TICKET OR BY IDENTIFICATION OF THE PERSON MAKING THE PAWN."; and
(4) A blank line for the pledgor's signature and the pawnbroker's signature or initials.

(d) The pledgor shall sign the pawn ticket and shall receive an exact copy of the pawn ticket which shall be signed or initialed by the pawnbroker or any employee of the pawnbroker. These records shall be available for inspection and pickup each regular workday by the sheriff of the county, or the sheriff's designee or the chief of police, or the chief's designee of the municipality in which the pawnshop is located. These records may be electronically reported to the sheriff of the county or the chief of police of the municipality in which the pawnshop is located by transmission over the Internet or by facsimile transmission in a manner authorized by the applicable sheriff or chief of police.

These records shall be a correct copy of the entries made of the pawn or purchase transaction and shall be carefully preserved without alteration, and shall be available during regular business hours.

(e) Except as otherwise provided in this Chapter, any person presenting a pawn ticket to a pawnbroker is presumed to be entitled to redeem the pledged goods described on the ticket. (1989, c. 638, s. 2; 2007-415, s. 2.)

Effect of Amendments. — Session Laws 2007-415, s. 2, effective October 1, 2007, and applicable to goods taken by a pawnbroker in pledge, pawn, or purchase on or after that date, in subsection (d), inserted "or the sheriff's designee" and inserted "or the chief's designee" in the second sentence, and added the third sentence.

§ 91A-8. Pawnbroker fees; interest rates.

No pawnbroker shall demand or receive an effective rate of interest greater than two percent (2%) per month, and no other charge of any description or for any purpose shall be made by the pawnbroker, except that the pawnbroker may charge, contract for, and recover an additional monthly fee for the following services, including but not limited to:

(1) Title investigation;
(2) Handling, appraisal, and storage;
(3) Insuring a security;
(4) Application fee;
(5) Making daily reports to local law enforcement officers; and
(6) For other expenses, including losses of every nature, and all other services.

In no event may the total of the above listed monthly fees on a pawn transaction exceed twenty percent (20%) of the principal up to a maximum of the following:

First month	$100.00
Second month	75.00
Third month	75.00
Fourth month and thereafter	50.00

In addition, pawnbrokers may charge fees for returned checks as allowed by G.S. 25-3-506. (1989, c. 638, s. 2; 1995 (Reg. Sess., 1996), c. 742, s. 37.)

§ 91A-9. Pawnbroker transactions.

In every pawn transaction:

(1) The original pawn contract shall have a maturity date of not less than 30 days, provided that nothing herein shall prevent the pledgor from redeeming the property before the maturity date;

(2) Any personal property pledged to a pawnbroker in this State is subject to sale or disposal when there has been no payment made on the account for a period of 60 days past maturity date of the original contract; provided that the contract between the pledgor and the pawnbroker is renewable if renewal is agreed upon by both the parties;

(3) Every pawn ticket or receipt for such pawn shall have printed thereon the provisions of subdivision (1) of this section which shall constitute: (i) notice of such sale or disposal, (ii) notice of intention to sell or dispose of the property without further notice, and (iii) consent to such sale or disposal. The pledgor thereby forfeits all right, title and interest of, in, and to such pawned property to the pawnbroker who thereby acquires absolute title to the same, whereupon the debt is satisfied and the pawnbroker may sell or dispose of the unredeemed

pledges as his own property. Any sale or disposal of property under this section terminates all liability of the pawnbroker and vests in the purchaser the right, title, and interest of the borrower and the pawnbroker;

(4) If the borrower loses his pawn ticket he shall not thereby forfeit his right to redeem, but may, before the lapse of the redemption period, make an affidavit with indemnification for such loss. The affidavit shall describe the property pawned and shall take the place of the lost pawn ticket unless the pawned property has already been redeemed with the original pawn ticket; and

(5) A pledgor is not obligated to redeem pledged goods or make any payment on a pawn transaction. (1989, c. 638, s. 2.)

§ 91A-10. Prohibitions.

A pawnbroker shall not:

(1) Accept a pledge from a person under the age of 18 years;

(2) Make any agreement requiring the personal liability of a pledgor in connection with a pawn transaction;

(3) Accept any waiver, in writing or otherwise, of any right or protection accorded a pledgor under this Chapter;

(4) Fail to exercise reasonable care to protect pledged goods from loss or damage;

(5) Fail to return pledged goods to a pledgor upon payment of the full amount due the pawnbroker on the pawn transaction. In the event such pledged goods are lost or damaged while in the possession of the pawnbroker, it shall be the responsibility of the pawnbroker to replace the lost or damaged goods with merchandise of like kind and equivalent value. In the event the pledgor and pawnbroker cannot agree as to replacement, the pawnbroker shall reimburse the pledgor in the amount of the value agreed upon pursuant to G.S. 91A-7(b);

(6) Take any article in pawn, pledge, or as security from any person, which is known to such pawnbroker to be stolen, unless there is a written agreement with local or State police;

(7) Sell, exchange, barter, or remove from the pawnshop any goods pledged, pawned, or purchased before the earlier of seven days after the date the pawn ticket record is electronically reported in accordance with G.S. 91A-7(d) or 30 days after the transaction, except in case of redemption by pledgor or items purchased for resale from wholesalers;

(8) Operate more than one pawnshop under one license, and such shop must be at a permanent place of business; or

(9) Take as pledged goods any manufactured mobile home, recreational vehicle, or motor vehicle other than a motorcycle. (1989, c. 638, s. 2; 2007-415, s. 1.)

Effect of Amendments. — Session Laws 2007-415, s. 1, effective October 1, 2007, and applicable to goods taken by a pawnbroker in pledge, pawn, or purchase on or after that date, substituted "before the earlier of seven days after the date the pawn ticket record is electronically reported in accordance with G.S. 91A-7(d) or 30 days" for "earlier than 48 hours" in subdivision (7).

§ 91A-11. Penalties.

(a) Every person, firm, or corporation, their guests or employees, who shall knowingly violate any of the provisions of this Chapter, shall, on conviction thereof, be deemed guilty of a Class 2 misdemeanor. If the violation is by an owner or major stockholder or managing partner of the pawnshop and the violation is knowingly committed by the owner, major stockholder, or managing partner of the pawnshop, then the license of the pawnshop may be suspended at the discretion of the court.

(b) The provision of subsection (a) shall not apply to violations of G.S. 91A-10(6) which shall be prosecuted under the North Carolina criminal statutes.

(c) Any contract of pawn the making or collecting of which violates any provision of this Chapter, except as a result of accidental or bona fide error of computation, shall be void, and the licensee shall have no right to collect, receive or retain any interest or fee whatsoever with respect to such pawn. (1989, c. 638, s. 2; 1993, c. 539, s. 655; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 91A-12. Municipal or county authority.

All of the counties and cities as defined by G.S. 160A-1 may by ordinance adopt the provisions of this Chapter and may adopt such further rules and regulations as the governing bodies of the counties and cities deem appropriate; provided, however, no county or city may regulate:

(1) Interest, fees, or recovery charges;
(2) Hours of operation, unless such regulation applies to businesses generally;
(3) The nature of the business or type of pawn transaction; or
(4) License fees in excess of rates set by the State. (1989, c. 638, s. 2.)

§ 91A-13. License renewal.

Notwithstanding any provision of this Chapter to the contrary, any person, firm, or corporation licensed as a pawnbroker on or before October 1, 1989, shall continue in force until the natural expiration thereof and all other provisions of this Chapter shall apply to such license. Such pawnbroker shall be eligible for renewal of his license upon its expiration or subsequent renewals, provided such license complies with the requirements for renewal that were in effect immediately prior to October 1, 1989. (1989, c. 638, s. 2.)

§ 91A-14. Bond.

Every person, firm, or corporation licensed under this Chapter shall, at the time of receiving the license, file with the city or county issuing the license a bond payable to such city or county in the sum of five thousand dollars ($5,000), to be executed by the licensee, and by two responsible sureties or a surety company licensed to do such business in this State, to be approved by the city or county, which shall be for the faithful performance of the requirements and obligations pertaining to the business so licensed. The city or county may sue for forfeiture of the bond upon a breach thereof. Any person who obtains a judgment against a pawnbroker and upon which judgment execution is returned unsatisfied may maintain an action in his own name upon the bond, to satisfy the judgment. (1989, c. 638, s. 2.)

Chapter 92.

Photographers.

§§ 92-1 through 92-29: Deleted.

Cross References. — As to privilege tax on photographers, see G.S. 105-41.

Editor's Note. — This Chapter, which had its origin in Public Laws 1935, c. 155, enacted to regulate the practice of photography through the agency of an examining board, has been deleted because of its invalidity.

CASE NOTES

Chapter Held Unconstitutional. — Chapter 92 of the General Statutes, relating to the licensing and supervision of photographers, was held unconstitutional as violative of former Art. I, §§ 1, 17 and 31 of the State Constitution (See now N.C. Const., Art. I, §§ 1, 19 and 34). State v. Ballance, 229 N.C. 764, 51 S.E.2d 731 (1949).

Chapter 93.

Certified Public Accountants.

Sec.
93-1. Definitions; practice of law.
93-2. Qualifications.
93-3. Unlawful use of title "certified public accountant" by individual.
93-4. Use of title by firm.
93-5. Use of title by corporation.
93-6. Practice as accountants permitted; use of misleading titles prohibited.
93-7. [Repealed.]
93-8. Public practice of accounting by corporations prohibited.

Sec.
93-9. Assistants need not be certified.
93-10. Persons certified in other states.
93-11. Not applicable to officers of State, county or municipality.
93-12. Board of Certified Public Accountant Examiners.
93-12.1. Effect of new requirements.
93-12.2. Board records are confidential.
93-13. Violation of Chapter; penalty.

§ 93-1. Definitions; practice of law.

(a) Definitions. — As used in this Chapter certain terms are defined as follows:

(1) An "accountant" is a person engaged in the public practice of accountancy who is not a certified public accountant as defined in this Chapter.

(2) "Board" means the Board of Certified Public Accountant Examiners as provided in this Chapter.

(3) A "certified public accountant" is a person who holds a certificate as a certified public accountant issued to him under the provisions of this Chapter.

(4) Repealed by Session Laws 1993, c. 518, s. 2.

(5) A person is engaged in the "public practice of accountancy" who holds himself out to the public as a certified public accountant or an accountant and in consideration of compensation received or to be received offers to perform or does perform, for other persons, services which involve the auditing or verification of financial transactions, books, accounts, or records, or the preparation, verification or certification of financial, accounting and related statements intended for publication or renders professional services or assistance in or about any and all matters of principle or detail relating to accounting procedure and systems, or the recording, presentation or certification and the interpretation of such service through statements and reports.

(b) Practice of Law. — Nothing in this Chapter shall be construed as authorizing certified public accountants or accountants to engage in the practice of law, and such person shall not engage in the practice of law unless duly licensed so to do. (1925, c. 261, s. 1; 1929, c. 219, s. 1; 1951, c. 844, s. 1; 1979, c. 750, s. 3; 1983, c. 185, ss. 1, 2; 1993, c. 518, s. 2.)

Cross References. — As to limited liability companies and their powers, see G.S. 57C-2-01 et seq.

Legal Periodicals. — For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

CASE NOTES

Promotion and Sale of Securities Not Covered by Accountant's Liability Coverage. — While certain "gray areas" exist, particularly with respect to tax law, where the professional services of accountants can become difficult to distinguish from other professional services, transactions which involved the promotion and sale of securities as a profit-making venture unrelated to taxes did not involve the practice of accounting, and insurer who had issued defendants an accountant's professional liability policy was not obligated to defend insureds in damage actions involving such transactions. Mastrom, Inc. v. Continental Cas. Co., 78 N.C. App. 483, 337 S.E.2d 162 (1985).

Applied in Scott v. Gillis, 197 N.C. 223, 148 S.E. 315 (1929).

Cited in Duggins v. North Carolina State Bd. of Certified Pub. Accountant Exmrs., 25 N.C. App. 131, 212 S.E.2d 657 (1975); Duggins v. North Carolina State Bd. of CPA Exmrs., 294 N.C. 120, 240 S.E.2d 406 (1978).

§ 93-2. Qualifications.

Any person who is a citizen of the United States, has declared the intention of becoming a citizen, is a resident alien, or is a citizen of a foreign jurisdiction which extends to citizens of this State like or similar privileges to be examined or certified, and who is over 18 years of age and of good moral character, and who has received from the State Board of Certified Public Accountant Examiners a certificate of qualification to practice as a certified public accountant shall be licensed to practice and be styled and known as a certified public accountant. (1925, c. 261, s. 2; 1979, c. 750, s. 4; 1993, c. 518, s. 3.)

§ 93-3. Unlawful use of title "certified public accountant" by individual.

It shall be unlawful for any person who has not received a certificate of qualification admitting him to practice as a certified public accountant to assume or use such a title, or to use any words, letters, abbreviations, symbols or other means of identification to indicate that the person using same has been admitted to practice as a certified public accountant. (1925, c. 261, s. 3.)

Legal Periodicals. — This section was reviewed in 3 N.C.L. Rev. 149 (1925).

§ 93-4. Use of title by firm.

It shall be unlawful for any firm, copartnership, or association to assume or use the title of certified public accountant, or to use any words, letters, abbreviations, symbols or other means of identification to indicate that the members of such firm, copartnership or association have been admitted to practice as certified public accountants, unless each of the members of such firm, copartnership or association first shall have received a certificate of qualification from the State Board of Certified Public Accountant Examiners admitting him to practice as a certified public accountant; provided, however, that the Board may exempt those persons who do not actually practice in or reside in the State of North Carolina from registering and receiving a certificate of qualifications under this section. (1925, c. 261, s. 4; 1979, c. 750, s. 5.)

§ 93-5. Use of title by corporation.

It shall be unlawful for any corporation to assume or use the title of certified public accountant, or to use any words, letters, abbreviations, symbols or other means of identification to indicate that such corporation has received a certificate of qualification from the State Board of Certified Public Accountant Examiners admitting it to practice as a certified public accountant. (1925, c. 261, s. 5.)

§ 93-6. Practice as accountants permitted; use of misleading titles prohibited.

It shall be unlawful for any person to engage in the public practice of accountancy in this State who is not a holder of a certificate as a certified public accountant issued by the Board, unless such person uses the term "accountant" and only the term "accountant" in connection with his name on all reports, letters of transmittal, or advice, and on all stationery and documents used in connection with his services as an accountant, and refrains from the use in any manner of any other title or designation in such practice. (1925, c. 261, ss. 6, 8; 1951, c. 844, s. 2; 1993, c. 518, s. 4.)

§ 93-7: Repealed by Session Laws 1993, c. 518, s. 5.

§ 93-8. Public practice of accounting by corporations prohibited.

It shall be unlawful for any certified public accountant to engage in the public practice of accountancy in this State through any corporate form, except as provided in General Statutes Chapter 55B. (1925, c. 261, s. 6; 1951, c. 844, s. 3; 1969, c. 718, s. 17; 1983, c. 185, s. 3.)

§ 93-9. Assistants need not be certified.

Nothing contained in this Chapter shall be construed to prohibit the employment by a certified public accountant or by any person, firm, copartnership, association, or corporation permitted to engage in the practice of public accounting in the State of North Carolina, of persons who have not received certificates of qualification admitting them to practice as certified public accountants, as assistant accountants or clerks: Provided, that such employees work under the control and supervision of certified public accountants and do not certify to anyone the accuracy or verification of audits or statements; and provided further, that such employees do not hold themselves out as engaged in the practice of public accounting. (1925, c. 261, s. 9; 1993, c. 518, s. 6.)

§ 93-10. Persons certified in other states.

An individual whose principal place of business is outside this State may be granted the privilege to perform or offer to perform services in this State as a certified public accountant if the individual meets all of the following conditions:

(1) Holds a valid and unrevoked certificate as a certified public accountant, or its equivalent, issued by another state, a territory of the United States, or the District of Columbia.

(2) Holds a valid and unrevoked license or permit to practice as a certified public accountant issued by another state, a territory of the United States, or the District of Columbia and that jurisdiction's requirements for licensure are substantially equivalent to the requirements of this Chapter.

(3) Notifies the State Board of Certified Public Accountant Examiners that the person intends to perform or offers to perform services in this State as a certified public accountant.

(4) Agrees to comply with the provisions of this Chapter and the rules adopted by the Board regarding notification and practice.

(5) Consents to have an administrative notice of hearing served on the licensing board in the individual's principal state of business, notwithstanding the individual notice requirements of G.S. 150B-38.

(6) Pays an annual fee not to exceed fifty dollars ($50.00). (1925, c. 261, s. 10; 1993, c. 518, s. 7; 2001-313, s. 1.)

§ 93-11. Not applicable to officers of State, county or municipality.

Nothing herein contained shall be construed to restrict or limit the power or authority of any State, county or municipal officer or appointee engaged in or upon the examination of the accounts of any public officer, his employees or appointees. (1925, c. 261, s. 12.)

§ 93-12. Board of Certified Public Accountant Examiners.

The name of the State Board of Accountancy is hereby changed to State Board of Certified Public Accountant Examiners and said name State Board of Certified Public Accountant Examiners is hereby substituted for the name State Board of Accountancy wherever the latter name appears or is used in Chapter 93 of the General Statutes. Said Board is created as an agency of the State of North Carolina and shall consist of seven members to be appointed by the Governor, five persons to be holders of valid and unrevoked certificates as certified public accountants issued under the provisions of this Chapter and two persons who are not certified public accountants who shall represent the interest of the public at large. Members of the Board shall hold office for the term of three years and until their successors are appointed. Appointments to the Board shall be made under the provisions of this Chapter as and when the terms of the members of the present State Board of Accountancy expire; provided, that all future appointments to said Board shall be made for a term of three years expiring on the thirtieth day of June. All Board members serving on June 30, 1980, shall be eligible to complete their respective terms. No member appointed to a term on or after July 1, 1980, shall serve more than two complete consecutive terms. The powers and duties of the Board shall be as follows:

(1) To elect from its members a president, vice-president and secretary-treasurer. The members of the Board shall receive compensation and reimbursement for travel expenses in accordance with G.S. 93B-5.

(2) To employ legal counsel, clerical and technical assistance and to fix the compensation therefor, and to incur such other expenses as may be deemed necessary in the performance of its duties and the enforcement of the provisions of this Chapter. Upon request the Attorney General of North Carolina will advise the Board with respect to the performance of its duties and will assign a member of his staff, or approve the employment of counsel, to represent the Board in any hearing or litigation arising under this Chapter. The Board may, in the exercise of its discretion, cooperate with similar boards of other states, territories and the District of Columbia in activities designed to bring about uniformity in standards of admission to the public practice of accountancy by certified public accountants, and may employ a uniform system of preparation of examinations to be given to candidates for certificates as certified public accountants, including the services and facilities of the American Institute of Certified Public Accountants, or of any other persons or organizations of recognized skill in the field of accountancy, in the preparation of examinations and assistance in establishing and maintaining a uniform system of

grading of examination papers, provided however, that all examinations given by said Board shall be adopted and approved by the Board and that the grade or grades given to all persons taking said examinations shall be determined and approved by the Board.

(3) To formulate rules for the government of the Board and for the examination of applicants for certificates of qualification admitting such applicants to practice as certified public accountants.

(4) To hold written, oral, and computer-based examinations of applicants for certificates of qualification at least once a year, or more often, as may be deemed necessary by the Board.

(5) To issue certificates of qualification admitting to practice as certified public accountants, each applicant who, having the qualifications herein specified, has passed an examination to the satisfaction of the Board, in "accounting," "auditing," "business law," and other related subjects.

A person is eligible to take the examination given by the Board, or to receive a certificate of qualification to practice as a certified public accountant, if the person is a citizen of the United States, has declared the intention of becoming a citizen, is a resident alien, or is a citizen of a foreign jurisdiction which extends to citizens of this State like or similar privileges to be examined or certified, is 18 years of age or over, and is of good moral character.

To be eligible to take the examination given by the Board, a person shall submit evidence satisfactory to the Board that the person holds a bachelors degree from a college or university that is accredited by one of the regional accrediting associations or from a college or university determined by the Board to have standards that are substantially equivalent to a regionally accredited institution. The degree studies shall include a concentration in accounting as prescribed by the Board or shall be supplemented with courses that are determined by the Board to be substantially equivalent to a concentration in accounting.

The Board may, in its discretion, waive the education requirement of any candidate if the Board is satisfied from the result of a special written examination given the candidate by the Board to test the candidate's educational qualifications that the candidate is as well qualified as if the candidate met the education requirements specified above. The Board may provide by regulation for the general scope of such examinations and may obtain such advice and assistance as it deems appropriate to assist it in preparing, administering and grading such special examinations.

To be eligible to receive a certificate of qualification to practice as a certified public accountant, a person shall submit evidence satisfactory to the Board that:

a. The person has completed 150 semester hours and received a bachelors degree with a concentration in accounting and other courses that the Board may require from a college or university that is accredited by a regional accrediting association or from a college or university determined by the Board to have standards that are substantially equivalent to those of a regionally accredited institution.

b. The person has the endorsement as to the person's eligibility of three certified public accountants who currently hold licenses in any state or territory of the United States or the District of Columbia.

c. The person has one of the following:
  1. One year's experience in the field of accounting under the direct supervision of a certified public accountant who currently holds a valid license in any state or territory of the United States or the District of Columbia.
  2. Four years of experience teaching accounting in a four-year college or university accredited by one of the regional accrediting associations or in a college or university determined by the Board to have standards substantially equivalent to a regionally accredited institution.
  3. Four years of experience in the field of accounting.
  4. Four years of experience teaching college transfer accounting courses at a community college or technical institute accredited by one of the regional accrediting associations.
  5. Any combination of such experience determined by the Board to be substantially equivalent to the foregoing.

  The Board may permit persons otherwise eligible to take its examinations and withhold certificates until the person has had the required experience.

(6) In its discretion to grant certificates of qualification admitting to practice as certified public accountants such applicants who shall be the holders of valid and unrevoked certificates as certified public accountants, or the equivalent, issued by or under the authority of any state, or territory of the United States or the District of Columbia, when in the judgment of the Board the requirements for the issuing or granting of such certificates or degrees are substantially equivalent to the requirements established by this Chapter: Provided, however, that the state or political subdivision of the United States upon whose certificate the reciprocal action is based grants the same privileges to holders of certificates as certified public accountants issued pursuant to the provisions of this Chapter. The Board, by general rule, may grant temporary permits to applicants under this subsection pending their qualification for reciprocal certificates.

(7) To charge for each examination provided for in this Chapter a fee not exceeding four hundred dollars ($400.00). In addition to the examination fee, if the Board uses a testing service for the preparation, administration, or grading of examinations, the Board may charge the applicant the actual cost of the examination services. The applicant shall pay all fees and costs associated with the examination at the time the application is filed with the Board. Examination fees and costs shall not be refunded unless the Board deems the applicant ineligible for examination.

(7a) To charge for each initial certificate of qualification provided for in this Chapter a fee not exceeding one hundred fifty dollars ($150.00).

(7b) To require an annual registration of each firm and to charge an annual registration fee not to exceed two hundred dollars ($200.00) for each firm with one office, and a fee not to exceed twenty-five dollars ($25.00) for each additional North Carolina office of the firm, to defray the administrative costs of accounting practice review programs. The Board may charge an annual fee not to exceed twenty-five dollars ($25.00) for each firm application for exemption from the accounting practice review program.

(8) To require the renewal of all certificates of qualification annually on the first day of July, and to charge an annual renewal fee not to exceed one hundred dollars ($100.00).

(8a) To require the registration of certified public accountant firms which have offices both within and outside of North Carolina, and the payment by such firms of an annual registration fee based on the total number of partners in each such firm, but not to exceed two thousand five hundred dollars ($2,500) per firm per year.

(8b) To formulate rules for the continuing professional education of all persons holding the certificate of certified public accountant, subject to the following provisions:

a. After January 1, 1983, any person desiring to obtain or renew a certificate as a certified public accountant must offer evidence satisfactory to the Board that the person has complied with the continuing professional education requirement approved by the Board. The Board may grant a conditional license for not more than 12 months for persons who are being licensed for the first time, or moving into North Carolina, or for other good cause, in order that the person may comply with the continuing professional education requirement.

b. The Board shall adopt rules for the administration of the continuing professional education requirement with a minimum number of hours of 20 and a maximum number of hours of 40 per year, and the Board may exempt persons who are retired or inactive from the continuing professional education requirement. The Board may also permit any certified public accountant to accumulate hours of continuing professional education in any calendar year of as much as two additional years annual requirement in advance of or subsequent to the required calendar year.

c. Any applicant who offers satisfactory evidence on forms promulgated by the Board that the applicant has participated in a continuing professional education program of the type required by the Board shall be deemed to have complied with this subdivision.

(8c) The Board may formulate rules and regulations for report review and peer review of audits, reviews, compilations, and other reports issued on financial information in the public practice of accountancy of all firms, as herein defined, subject to the following provisions:

a. After June 30, 1992, any firm desiring to obtain or maintain a registration as a firm must offer satisfactory evidence to the Board that such firm has complied with the peer review and report review requirements approved by the Board; provided, however, that the Board shall give to every firm subject to this section not less than 12 months advance notice of each peer review and report review required of the firm.

b. The Board may grant a conditional registration for not more than 24 months for firms which are being registered for the first time, or moving into North Carolina, or for other good cause, in order that such firm may comply with the report review and peer review requirements, and in order that the Board may develop a system of review rotation among the various firms that must comply with this section.

c. The peer review and report review shall be valid for a minimum of three years subject to the power of the Board to require remedial action by any firm with a deficiency in the review according to the rules established by the Board.

d. The Board shall promulgate rules and regulations for the administration of the report review and peer review requirements and the Board shall exempt firms that show to the satisfaction of the Board that they are not engaged in the public practice of accountancy or that the scope of their practice does not come within the peer review and report review guidelines established by the Board.

e. Any firm that offers satisfactory evidence to the Board that the firm has satisfactorily participated in and successfully completed a peer review or a report review of the type required by the Board shall be deemed to have complied with this section and the Board shall promulgate rules and regulations for the administration of this procedure.

f. For purposes of this section, a firm means an entity, sole proprietorship, partnership, registered limited liability partnership, professional limited liability company, or professional corporation through which one or more certificate holders engage in the public practice of accountancy through an office.

(9) Adoption of Rules of Professional Conduct; Disciplinary Action. — The Board shall have the power to adopt rules of professional ethics and conduct to be observed by certified public accountants in this State. The Board shall have the power to revoke, either permanently or for a specified period, any certificate issued under the provisions of this Chapter to a certified public accountant or to censure the holder of any such certificate or to assess a civil penalty not to exceed one thousand dollars ($1,000) for any one or combination of the following causes:

a. Conviction of a felony under the laws of the United States or of any state of the United States.

b. Conviction of any crime, an essential element of which is dishonesty, deceit or fraud.

c. Fraud or deceit in obtaining a certificate as a certified public accountant.

d. Dishonesty, fraud or gross negligence in the public practice of accountancy.

e. Violation of any rule of professional ethics and professional conduct adopted by the Board.

Any disciplinary action taken shall be in accordance with the provisions of Chapter 150B of the General Statutes. The clear proceeds of any civil penalty assessed under this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(10), (11) Repealed by Session Laws 1993, c. 518, s. 8.

(12) To submit annually on or before the first day of May to the Secretary of Revenue the names of all persons who have qualified under this Chapter as certified public accountants. Privilege license issued under G.S. 105-41 shall designate whether such license is issued to a certified public accountant or an accountant.

(13) The Board shall keep a complete record of all its proceedings and shall annually submit a full report to the Governor.

(14) All fees collected on behalf of the Board and all receipts of every kind and nature, as well as the compensation paid the members of the Board and the necessary expenses incurred by them in the performance of the duties imposed upon them, shall be reported annually to the State Treasurer. All fees and other moneys received by the Board pursuant to the provisions of the General Statutes shall be kept in a separate fund by the treasurer of the Board, to be held and expended only for such purposes as are proper and necessary to the discharge of the duties of the Board and to enforce the provisions of this Chapter. No expense incurred by the Board shall be charged against the State.

(15) Any certificate of qualification issued under the provisions of this Chapter, or issued under the provisions of Chapter 157 of the Public

Laws of 1913, shall be forfeited for the failure of the holder to renew same and to pay the renewal fee therefor to the State Board of Accountancy within 30 days after demand for such renewal fee shall have been made by the State Board of Accountancy.

(16) To apply to the courts, in its own name, for injunctive relief to prevent violations of this Chapter or violations of any rules adopted pursuant to this Chapter. Any court may grant injunctive relief regardless of whether criminal prosecution or any other action is instituted as a result of the violation. A single violation is sufficient to invoke the injunctive relief under this subdivision.

(17) The Board shall have the power to acquire, hold, rent, encumber, alienate, and otherwise deal with real property in the same manner as a private person or corporation, subject only to approval of the Governor and the Council of State as to the acquisition, rental, encumbering, leasing, and sale of real property. Collateral pledged by the Board for an encumbrance is limited to the assets, income, and revenues of the Board. (1925, c. 261, s. 11; 1939, c. 218, s. 1; 1951, c. 844, ss. 4-9; 1953, c. 1041, s. 20; 1959, c. 1188; 1961, c. 1010; 1971, c. 738, ss. 1-3; 1973, c. 476, s. 193; c. 1331, s. 3; 1975, c. 107; 1975, 2nd Sess., c. 983, s. 69; 1977, c. 804, ss. 1, 2; 1979, c. 750, ss. 6-10; 1979, 2nd Sess., c. 1087, ss. 1, 2; 1981, c. 10; 1983, c. 185, ss. 4-11; 1985, c. 149; 1987, c. 353; c. 827, ss. 1, 79; 1989, c. 624; 1991, c. 214, s. 1; 1991 (Reg. Sess., 1992), c. 1011, s. 6; 1993, c. 518, s. 8; 1995, c. 137, s. 1; 1997-157, s. 1; 1997-284, s. 1; 1998-215, s. 130; 1998-216, s. 6; 1998-217, s. 51; 1999-440, s. 3; 2001-313, ss. 2, 3, 4, 5.)

Cross References. — As to privilege tax, see G.S. 105-41.

Legal Periodicals. — For note on equal protection and residence requirements, see 49 N.C.L. Rev. 753 (1971).

For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

CASE NOTES

Members of Board Are State Officials. — Under the former act creating and incorporating the State Board of Accountancy, its members would be regarded as State officials to the extent of their duties specified in the statute. State ex rel. Att'y Gen. v. Scott, 182 N.C. 865, 109 S.E. 789 (1921), decided under former statute.

Exercise of Police Power. — The former statute creating the State Board of Accountancy, with authority to pass upon applications and issue licenses to those qualified as public accountants, was within the exercise of the police powers of the State. State ex rel. Att'y Gen. v. Scott, 182 N.C. 865, 109 S.E. 789 (1921), decided under former statute.

When License Not Required. — Former G.S. 7023 of the Consolidated Statutes did not embrace within its terms an isolated instance of the employment of a firm of certified public accountants licensed in another state, who sent their representative to this State to acquire information from the books of a corporation for a statement of its condition to be made out in the state in which the auditing concern was authorized to do business. Respess v. Rex Spinning Co., 191 N.C. 809, 133 S.E. 391 (1926), decided under former statute.

The exercise of the powers of the Board is coextensive with the State boundaries, and may not be exercised beyond them. State ex rel. Att'y Gen. v. Scott, 182 N.C. 865, 109 S.E. 789 (1921), decided under former statute.

Classification in subdivision (5) is not essentially arbitrary and without any reasonable basis. The rule has been uniformly applied. It has been uniformly observed by the Board. No discrimination has been shown. Thus, its application does not deny the equal protection of the laws guaranteed by the State and federal Constitutions. Duggins v. North Carolina State Bd. of CPA Exmrs., 25 N.C. App. 131, 212 S.E.2d 657 (1975), aff'd, 294 N.C. 120, 240 S.E.2d 406 (1978), decided under section as it stood prior to 1977 revision of subdivision.

The requirement in subdivision (5) that an applicant for certification have two years' experience under the tutelage of an accountant engaged in the public practice of accountancy is rationally related to the legislative purpose of ensuring that only an applicant qualified and prepared to enter the public practice by himself be certified. Duggins v. North Carolina State Bd. of CPA Exmrs., 294 N.C. 120, 240 S.E.2d 406 (1978), decided under section as it stood prior to 1977 revision of subdivision.

To achieve the statutory purpose that only competent and experienced applicants be certified, subdivision (5) must be interpreted as requiring that an applicant's experience not only be received under the supervision of an accountant but that it be in the public field of accountancy. Duggins v. North Carolina State Bd. of CPA Exmrs., 294 N.C. 120, 240 S.E.2d 406 (1978), decided under section as it stood prior to 1977 revision of subdivision.

Subdivision (5) requires that an applicant for certification who relies upon two years' experience must have worked under a C.P.A. in public practice. Duggins v. North Carolina State Bd. of CPA Exmrs., 294 N.C. 120, 240 S.E.2d 406 (1978), decided under section as it stood prior to 1977 revision of subdivision.

Experience with an attorney-C.P.A. is not sufficient for certification unless the attorney-C.P.A. is in the "public practice of accountancy" as that phrase is used in G.S. 93-1(5). Duggins v. North Carolina State Bd. of CPA Exmrs., 25 N.C. App. 131, 212 S.E.2d 657 (1975), aff'd, 294 N.C. 120, 240 S.E.2d 406 (1978), decided under section as it stood prior to 1977 revision of subdivision.

Approval of CPA Firm Name Change. — Certified public accounting firm failed to show that the North Carolina State Board of Certified Public Accountant Examiners erred by denying the accounting firm's proposed name change as the Board had authority under G.S. 93-12 to regulate name changes, and the Board's decision that the proposed name change had a capacity or tendency to deceive, in violation of N.C. Admin. Code. Tit. 21, r. 8N.0307, was supported by substantial evidence. McGladrey & Pullen, LLP v. N.C. State Bd. of CPA Exam'rs, 171 N.C. App. 610, 615 S.E.2d 339, 2005 N.C. App. LEXIS 1274 (2005), cert. denied, notice of appeal dismissed, 360 N.C. 65, 621 S.E.2d 627 (2005), aff'd, 360 N.C. 399, 627 S.E.2d 461 (2006).

Cited in Glover v. North Carolina, 301 F. Supp. 364 (E.D.N.C. 1969).

§ 93-12.1. Effect of new requirements.

Any person who applies to the Board of Certified Public Accountant Examiners before July 1, 1983, to take the examination, who meets the educational requirement as it existed prior to June 4, 1979, and complies with any of the experience requirements of this Chapter shall be deemed to have met the prerequisites to taking such examination. (1979, c. 750, s. 11.)

§ 93-12.2. Board records are confidential.

Records, papers, and other documents containing information collected or compiled by the Board, its members, or employees, as a result of a complaint, investigation, inquiry, or interview in connection with an application for examination, certification, or registration, or in connection with a certificate holder's professional ethics and conduct, shall not be considered public records within the meaning of Chapter 132 of the General Statutes. Any notice or statement of charges against a certificate holder or applicant, or any notice to a certificate holder or applicant of a hearing to be held by the Board is a public record, even though it may contain information collected and compiled as a result of a complaint, investigation, inquiry, or interview conducted by the Board. If any record, paper, or other document containing information collected and compiled by the Board is admitted into evidence in a hearing held by the Board, it shall then be a public record within the meaning of Chapter 132 of the General Statutes. (1997-157, s. 2.)

§ 93-13. Violation of Chapter; penalty.

A violation of G.S. 93-3, 93-4, 93-5, 93-6, or 93-8 shall be a Class 1 misdemeanor. (1925, c. 261, s. 11; 1983, c. 185, s. 12; 1993, c. 539, s. 656; 1994, Ex. Sess., c. 24, s. 14(c); 2007-83, s. 1.)

Effect of Amendments. — Session Laws 2007-83, s. 1, effective December 1, 2007, and applicable to violations occurring on or after that date, rewrote the section.

Chapter 93A.

Real Estate License Law.

Article 1.

Real Estate Brokers and Salespersons.

Sec.
93A-1. License required of real estate brokers.
93A-2. Definitions and exceptions.
93A-3. Commission created; compensation; organization.
93A-4. Applications for licenses; fees; qualifications; examinations; privilege licenses; renewal or reinstatement of license; power to enforce provisions.
93A-4.1. Continuing education.
93A-4.2. Broker-in-charge qualification.
93A-4.3. Elimination of salesperson license; conversion of salesperson licenses to broker licenses.
93A-4A. [Recodified.]
93A-5. Register of applicants; roster of brokers; financial report to Secretary of State.
93A-6. Disciplinary action by Commission.
93A-6.1. Commission may subpoena witnesses, records, documents, or other materials.
93A-7. Power of courts to revoke.
93A-8. Penalty for violation of Chapter.
93A-9. Licensing nonresidents.
93A-10. Nonresident licensees; filing of consent as to service of process and pleadings.
93A-11. Reimbursement by real estate independent contractor of brokers' workers' compensation.
93A-12. Disputed monies.
93A-13 through 93A-15. [Reserved.]

Article 2.

Real Estate Recovery Fund.

93A-16. Real Estate Recovery Fund created; payment to fund; management.
93A-17. Grounds for payment; notice and application to Commission.
93A-18. Hearing; required showing.
93A-19. Response and defense by Commission and judgment debtor; proof of conversion.
93A-20. Order directing payment out of fund; compromise of claims.
93A-21. Limitations; pro rata distribution; attorney fees.
93A-22. Repayment to fund; automatic suspension of license.
93A-23. Subrogation of rights.
93A-24. Waiver of rights.
Sec.
93A-25. Persons ineligible to recover from fund.
93A-26. Disciplinary action against licensee.
93A-27 through 93A-31. [Reserved.]

Article 3.

Private Real Estate Schools.

93A-32. Definitions.
93A-33. Commission to administer Article; authority of Commission to conduct investigations, issue licenses, and promulgate regulations.
93A-34. License required; application for license; fees; requirements for issuance of license.
93A-35. Duration and renewal of licenses; transfer of school ownership.
93A-36. Execution of bond required; applicability to branch schools; actions upon bond.
93A-37. Contracts with unlicensed schools and evidences of indebtedness made null and void.
93A-38. Suspension, revocation or denial of license.

Article 4.

Time Shares.

93A-39. Title.
93A-40. Registration required of time share projects; real estate license required.
93A-41. Definitions.
93A-42. Time shares deemed real estate.
93A-43. Partition.
93A-44. Public offering statement.
93A-45. Purchaser's right to cancel; escrow; violation.
93A-46. Prizes.
93A-47. Time shares proxies.
93A-48. Exchange programs.
93A-49. Service of process on exchange company.
93A-50. Securities laws apply.
93A-51. Rule-making authority.
93A-52. Application for registration of time share project; denial of registration; renewal; reinstatement; and termination of developer's interest.
93A-53. Register of applicants; roster of registrants; registered projects; financial report to Secretary of State.
93A-54. Disciplinary action by Commission.
93A-55. Private enforcement.

Sec.
93A-56. Penalty for violation of Article.
93A-57. Release of liens.
93A-58. Registrar required; criminal penalties; project broker.
93A-59. Preservation of time share purchaser's claims and defenses.

Sec.
93A-60 through 93A-69. [Reserved.]

Article 5.

Real Estate Appraisers.

93A-70 through 93A-81. [Repealed.]

ARTICLE 1.

Real Estate Brokers and Salespersons.

§ 93A-1. License required of real estate brokers.

From and after July 1, 1957, it shall be unlawful for any person, partnership, corporation, limited liability company, association, or other business entity in this State to act as a real estate broker, or directly or indirectly to engage or assume to engage in the business of real estate broker or to advertise or hold himself or herself or themselves out as engaging in or conducting such business without first obtaining a license issued by the North Carolina Real Estate Commission (hereinafter referred to as the Commission), under the provisions of this Chapter. A license shall be obtained from the Commission even if the person, partnership, corporation, limited liability company, association, or business entity is licensed in another state and is affiliated or otherwise associated with a licensed real estate broker in this State. (1957, c. 744, s. 1; 1969, c. 191, s. 1; 1983, c. 81, ss. 1, 2; 1995, c. 351, s. 19; 1999-229, s. 1; 2005-395, s. 1.)

Effect of Amendments. — Session Laws 2005-395, s. 1, effective April 1, 2006, deleted "and real estate salespersons" from the end of the section heading; deleted "or real estate salesperson" following "real estate broker" twice in the section; and deleted "or salesperson" following "real estate broker" in the last sentence.

Legal Periodicals. — For comment on this Chapter, see 36 N.C.L. Rev. 44 (1957).

For survey of 1982 law on property, see 61 N.C.L. Rev. 1171 (1983).

CASE NOTES

Constitutionality. — The real estate business affects a substantial public interest and may be regulated for the purpose of protecting and promoting the general welfare of the people. State v. Warren, 252 N.C. 690, 114 S.E.2d 660 (1960).

This Chapter was declared constitutional in State v. Warren, 252 N.C. 690, 114 S.E.2d 660 (1960); McArver v. Gerukos, 265 N.C. 413, 144 S.E.2d 277 (1965).

The purpose of this Chapter. — is to protect sellers, purchasers, lessors and lessees of real property from fraudulent or incompetent brokers and salespersons. McArver v. Gerukos, 265 N.C. 413, 144 S.E.2d 277 (1965); North Carolina Real Estate Licensing Bd. v. Aikens, 31 N.C. App. 8, 228 S.E.2d 493 (1976); Furr v. Fonville Morisey Realty, Inc., 130 N.C. App. 541, 503 S.E.2d 401 (1998), cert. dismissed, 351 N.C. 41, 519 S.E.2d 314 (1999).

Chapter Must Be Strictly Construed. — Because this is a statute restricting to a special class of persons the right to engage in a lawful occupation, this Chapter must be strictly construed so as not to extend it to activities and transactions not intended by the legislature to be included. McArver v. Gerukos, 265 N.C. 413, 144 S.E.2d 277 (1965).

This Chapter must be construed with a regard to the evil which it is intended to suppress. McArver v. Gerukos, 265 N.C. 413, 144 S.E.2d 277 (1965); North Carolina Real Estate Licensing Bd. v. Aikens, 31 N.C. App. 8, 228 S.E.2d 493 (1976).

This section must be construed with a regard to the evil that it is intended to suppress, and as a criminal offense, it must be strictly construed so as not to extend it to activities and transactions not intended by the legislature to be included. Furr v. Fonville Morisey Realty, Inc., 130 N.C. App. 541, 503 S.E.2d 401 (1998), cert. dismissed, 351 N.C. 41, 519 S.E.2d 314 (1999).

Any violation of its provisions is declared to be a criminal offense. McArver v. Gerukos, 265 N.C. 413, 144 S.E.2d 277 (1965).

One who conducts activities pursuant to a finder's fee contract is engaged indirectly in the business of being a real estate broker or salesperson. Davis v. Sellers, 115 N.C. App. 1, 443 S.E.2d 879 (1994), cert. denied, 339 N.C. 610, 454 S.E.2d 248 (1995).

In-State and Out-of State Brokers. — In a real estate transaction involving an out-of-state buyer/lessee, the interests of the parties are better served if the out-of-state party is allowed to rely on the combined efforts of a local broker and a broker familiar with its particular situation, and in such an arrangement the North Carolina broker will be legally and professionally responsible for the acts of the cooperating out-of-state broker as well as for its own acts in the venture. Furr v. Fonville Morisey Realty, Inc., 130 N.C. App. 541, 503 S.E.2d 401 (1998), cert. dismissed, 351 N.C. 41, 519 S.E.2d 314 (1999).

Unlicensed Foreign Brokers. — A lease transaction involving North Carolina real property in which a local and an out-of-state broker cooperated was not void against public policy simply because the out-of-state broker was not licensed in North Carolina. Furr v. Fonville Morisey Realty, Inc., 130 N.C. App. 541, 503 S.E.2d 401 (1998), cert. dismissed, 351 N.C. 41, 519 S.E.2d 314 (1999).

Cited in In re Dillingham, 257 N.C. 684, 127 S.E.2d 584 (1962); Carver v. Lykes, 262 N.C. 345, 137 S.E.2d 139 (1964); Gower v. Strout Realty, Inc., 56 N.C. App. 603, 289 S.E.2d 880 (1982); Hayman v. Stafford, 77 N.C. App. 154, 334 S.E.2d 438 (1985); Koger Properties, Inc. v. Lowe, 106 N.C. App. 387, 416 S.E.2d 585 (1992); State v. Clemmons, 111 N.C. App. 569, 433 S.E.2d 748 (1993); Bruggeman v. Meditrust Acquisition Co., 138 N.C. App. 612, 532 S.E.2d 215 (2000).

§ 93A-2. Definitions and exceptions.

(a) A real estate broker within the meaning of this Chapter is any person, partnership, corporation, limited liability company, association, or other business entity who for a compensation or valuable consideration or promise thereof lists or offers to list, sells or offers to sell, buys or offers to buy, auctions or offers to auction (specifically not including a mere crier of sales), or negotiates the purchase or sale or exchange of real estate, or who leases or offers to lease, or who sells or offers to sell leases of whatever character, or rents or offers to rent any real estate or the improvement thereon, for others.

(a1) The term broker-in-charge within the meaning of this Chapter means a real estate broker who has been designated as the broker having responsibility for the supervision of real estate salespersons engaged in real estate brokerage at a particular real estate office and for other administrative and supervisory duties as the Commission shall prescribe by rule.

(a2) The term provisional broker within the meaning of this Chapter means a real estate broker who, pending acquisition and documentation to the Commission of the education or experience prescribed by either G.S. 93A-4(a1) or G.S. 93A-4.3, must be supervised by a broker-in-charge when performing any act for which a real estate license is required.

(b) The term real estate salesperson within the meaning of this Chapter shall mean and include any person who was formerly licensed by the Commission as a real estate salesperson before April 1, 2006.

(c) The provisions of this Chapter do not apply to and do not include:

(1) Any person, partnership, corporation, limited liability company, association, or other business entity who, as owner or lessor, shall perform any of the acts aforesaid with reference to property owned or leased by them, where the acts are performed in the regular course of or as incident to the management of that property and the investment therein.

(2) Any person acting as an attorney-in-fact under a duly executed power of attorney from the owner authorizing the final consummation of performance of any contract for the sale, lease or exchange of real estate.

(3) The acts or services of an attorney-at-law.

(4) Any person, while acting as a receiver, trustee in bankruptcy, guardian, administrator or executor or any person acting under order of any court.

(5) Any person, while acting as a trustee under a trust agreement, deed of trust or will, or that person's regular salaried employees.

(6) Any salaried person employed by a licensed real estate broker, for and on behalf of the owner of any real estate or the improvements thereon, which the licensed broker has contracted to manage for the owner, if the salaried employee's employment is limited to: exhibiting units on the real estate to prospective tenants; providing the prospective tenants with information about the lease of the units; accepting applications for lease of the units; completing and executing preprinted form leases; and accepting security deposits and rental payments for the units only when the deposits and rental payments are made payable to the owner or the broker employed by the owner. The salaried employee shall not negotiate the amount of security deposits or rental payments and shall not negotiate leases or any rental agreements on behalf of the owner or broker.

(7) Any owner who personally leases or sells the owner's own property.

(8) Any housing authority organized in accordance with the provisions of Chapter 157 of the General Statutes and any regular salaried employees of the housing authority when performing acts authorized in this Chapter as to any property owned or leased by the housing authority. This exception shall not apply to any person, partnership, corporation, limited liability company, association, or other business entity that contracts with a housing authority to sell or manage property owned or leased by the housing authority. (1957, c. 744, s. 2; 1967, c. 281, s. 1; 1969, c. 191, s. 2; 1975, c. 108; 1983, c. 81, ss. 4, 5; 1985, c. 535, s. 1; 1995, c. 351, s. 20; 1999-229, ss. 2, 3; 1999-409, s. 1; 2001-487, s. 23(a); 2005-395, ss. 2, 3.)

Effect of Amendments. — Session Laws 2005-395, ss. 2 and 3, effective April 1, 2006, added subsection (a2); and rewrote subsection (b).

Legal Periodicals. — For article on rules, ethics and reform in connection with transferring North Carolina real estate, see 49 N.C.L. Rev. 593 (1971).

For survey of 1976 case law on commercial law, see 55 N.C.L. Rev. 943 (1977).

For note on the use of state constitutional law to void occupational licensing statutes which unreasonably restrict freedom of occupational choice, see 13 Wake Forest L. Rev. 507 (1977).

For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

Constitutionality of Amendment. — The amendment to subsection (a) by Session Laws 1975, c. 108 was unconstitutional as repugnant to N.C. Const., Art. I, § 1 and 19. North Carolina Real Estate Licensing Bd. v. Aikens, 31 N.C. App. 8, 228 S.E.2d 493 (1976).

This Chapter does not apply to a sale by an owner of his own note secured by a deed of trust upon his property. McArver v. Gerukos, 265 N.C. 413, 144 S.E.2d 277 (1965).

Owner exemption clauses of Chapter 93A have been effectively eliminated from this section insofar as licensed real estate brokers and salespersons are concerned. Section 6 of Chapter 616 of the 1979 Session Laws, effective May 21, 1979 and compiled in G.S. 93A-6, expressly provided that, notwithstanding anything to the contrary in Chapter 93A, the board shall have the power to suspend or revoke the license of a real estate broker or real estate salesperson who violates any of the provisions of Chapter 93A when selling or leasing his own property. Cox v. North Carolina Real Estate Licensing Bd., 47 N.C. App. 135, 266 S.E.2d 851, cert. denied, 301 N.C. 87, 273 S.E.2d 296 (1980).

Shareholder is not an owner of realty of the corporation in which the shares are held so as to bring the shareholder within the "owner" exemption provisions of this section. Cox v. North Carolina Real Estate Licensing Bd., 47 N.C. App. 135, 266 S.E.2d 851, cert.

denied, 301 N.C. 87, 273 S.E.2d 296 (1980).

Person Who Purchases or Leases Land for His Own Account. — Although this Chapter does not expressly exempt from its provisions one who purchases or leases land for his own account, it defines "real estate broker" as a person who does these specified acts "for others." McArver v. Gerukos, 265 N.C. 413, 144 S.E.2d 277 (1965).

The legislature did not intend for this Chapter to apply to a person, partnership or association who purchases land for his or its own account, even though such purchase is for resale. McArver v. Gerukos, 265 N.C. 413, 144 S.E.2d 277 (1965).

Where plaintiffs allege a contract to buy real estate on their own account under the terms of the listing agreement made by owner with defendant-broker and to share in the sales commission with defendant, and plaintiffs were not engaging in brokerage activities "for others" but were acting for themselves in buying the land and in reducing the purchase price through the commission sharing agreement with defendant, plaintiff's agreement does not violate the licensing statute and it is enforceable. Gower v. Strout Realty, Inc., 56 N.C. App. 603, 289 S.E.2d 880 (1982).

This Chapter does not forbid a licensed real estate broker to embark with an unlicensed person upon a joint venture in which all of the unlicensed party's activities will be such as are not within the contemplation of this Chapter nor does this Chapter forbid them to agree that they will share all of the receipts from the activities of both of them. Such a contract, when enforced as made, does not violate the policy declared by the legislature in this Chapter. McArver v. Gerukos, 265 N.C. 413, 144 S.E.2d 277 (1965).

A contract by one who is not a licensed real estate broker or salesperson with another person to buy land, or an option thereon, for their own account and, thereafter to resell such land, or option, and divide the profits would not be a contract to do an act prohibited by this Chapter. McArver v. Gerukos, 265 N.C. 413, 144 S.E.2d 277 (1965).

Applied in Raab & Co. v. Independence Corp., 9 N.C. App. 674, 177 S.E.2d 337 (1970); Hayman v. Stafford, 77 N.C. App. 154, 334 S.E.2d 438 (1985).

§ 93A-3. Commission created; compensation; organization.

(a) There is hereby created the North Carolina Real Estate Commission, hereinafter called the Commission. The Commission shall consist of nine members, seven members to be appointed by the Governor, one member to be appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121, and one member to be appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121. At least three members of the Commission shall be licensed real estate brokers. At least two members of the Commission shall be persons who are not involved directly or indirectly in the real estate or real estate appraisal business. Members of the Commission shall serve three-year terms, so staggered that the terms of three members expire in one year, the terms of three members expire in the next year, and the terms of three members expire in the third year of each three-year period. The members of the Commission shall elect one of their members to serve as chairman of the Commission for a term of one year. The Governor may remove any member of the Commission for misconduct, incompetency, or willful neglect of duty. The Governor shall have the power to fill all vacancies occurring on the Commission, except vacancies in legislative appointments shall be filled under G.S. 120-122.

(b) The provisions of G.S. 93B-5 notwithstanding, members of the Commission shall receive as compensation for each day spent on work for the Commission a per diem in an amount established by the Commission by rule, and mileage reimbursement for transportation by privately owned automobile at the business standard mileage rate set by the Internal Revenue Service per mile of travel along with actual cost of tolls paid. The total expense of the administration of this Chapter shall not exceed the total income therefrom; and none of the expenses of said Commission or the compensation or expenses of any office thereof or any employee shall ever be paid or payable out of the treasury of the State of North Carolina; and neither the Commission nor any officer or employee thereof shall have any power or authority to make or incur any expense, debt or other financial obligation binding upon the State of North Carolina. After all expenses of operation, the Commission may set aside an expense reserve each year. The Commission may deposit moneys in accounts, certificates of deposit, or time deposits as the Commission may approve, in any bank, savings and loan association, or trust company. Moneys also may be invested in the same classes of securities referenced in G.S. 159-30(c).

(c) The Commission shall have power to make reasonable bylaws, rules and regulations that are not inconsistent with the provisions of this Chapter and the General Statutes; provided, however, the Commission shall not make rules or regulations regulating commissions, salaries, or fees to be charged by licensees under this Chapter.

(c1) The provisions of G.S. 93A-1 and G.S. 93A-2 notwithstanding, the Commission may adopt rules to permit a real estate broker to pay a fee or other valuable consideration to a travel agent for the introduction or procurement of tenants or potential tenants in vacation rentals as defined in G.S. 42A-4. Rules adopted pursuant to this subsection may include a definition of the term "travel agent", may regulate the conduct of permitted transactions, and may limit the amount of the fee or the value of the consideration that may be paid to the travel agent. However, the Commission may not authorize a person or entity not licensed as a broker to negotiate any real estate transaction on behalf of another.

(c2) The Commission shall adopt a seal for its use, which shall bear thereon the words "North Carolina Real Estate Commission." Copies of all records and papers in the office of the Commission duly certified and authenticated by the seal of the Commission shall be received in evidence in all courts and with like effect as the originals.

(d) The Commission may employ an Executive Director and professional and clerical staff as may be necessary to carry out the provisions of this Chapter and to put into effect the rules and regulations that the Commission may promulgate. The Commission shall fix salaries and shall require employees to make good and sufficient surety bond for the faithful performance of their duties. The Commission shall reimburse its employees for travel on official business. Mileage expenses for transportation by privately owned automobile shall be reimbursed at the business standard mileage set by the Internal Revenue Service per mile of travel along with the actual tolls paid. Other travel expenses shall be reimbursed in accordance with G.S. 138-6. The Commission may, when it deems it necessary or convenient, delegate to the Executive Director, legal counsel for the Commission, or other Commission staff, professional or clerical, the Commission's authority and duties under this Chapter, but the Commission may not delegate its authority to make rules or its duty to act as a hearing panel in accordance with the provisions of G.S. 150B-40(b).

(e) The Commission shall be entitled to the services of the Attorney General of North Carolina, in connection with the affairs of the Commission or may on approval of the Attorney General, employ an attorney to assist or represent it in the enforcement of this Chapter, as to specific matters, but the fee paid for such service shall be approved by the Attorney General. The Commission may prefer a complaint for violation of this Chapter before any court of competent jurisdiction, and it may take the necessary legal steps through the proper legal offices of the State to enforce the provisions of this Chapter and collect the penalties provided therein.

(f) The Commission is authorized to acquire, hold, convey, rent, encumber, alienate, and otherwise deal with real property in the same manner as a private person or corporation, subject only to the approval of the Governor and Council of State. The rents, proceeds, and other revenues and benefits of the ownership of real property shall inure to the Commission. Collateral pledged by the Commission for any encumbrance of real property shall be limited to the assets, income, and revenues of the Commission. Leases, deeds, and other instruments relating to the Commission's interest in real property shall be valid when executed by the executive director of the Commission. The Commission may create and conduct education and information programs relating to the real estate business for the information, education, guidance and protection of the general public, licensees, and applicants for license. The education and information programs may include preparation, printing and distribution of publications and articles and the conduct of conferences, seminars, and lectures. The Commission may claim the copyright to written materials it creates and may charge fees for publications and programs. (1957, c. 744, s. 3; 1967, c. 281, s. 2; c. 853, s. 1; 1971, c. 86, s. 1; 1979, c. 616, ss. 1, 2; 1983, c. 81, ss. 1, 2, 6-8; 1989, c. 563, s. 1; 1993, c. 419, s. 9; 1999-229, s. 4; 1999-405, s. 2; 1999-431, s. 3.4(a); 2000-140, s. 19(a); 2001-293, ss. 1, 2; 2002-168, s. 3; 2005-374, s. 1; 2005-395, s. 4; 2007-366, s. 1.)

Effect of Amendments. — Session Laws 2005-395, s. 4, effective April 1, 2006, deleted "or real estate salespersons" at the end of the third sentence in subsection (a); and deleted "or salesperson" following "a broker" in the last sentence of subsection (c1).

Session Laws 2007-366, s. 1, effective August 17, 2007, deleted "not to exceed ten percent (10%) of the previous year's gross income; then any surplus shall go to the general fund of the State of North Carolina" at the end of the third sentence of subsection (b).

§ 93A-4. Applications for licenses; fees; qualifications; examinations; privilege licenses; renewal or reinstatement of license; power to enforce provisions.

(a) Any person, partnership, corporation, limited liability company, association, or other business entity hereafter desiring to enter into business of and obtain a license as a real estate broker shall make written application for such license to the Commission in the form and manner prescribed by the Commission. Each applicant for a license as a real estate broker shall be at least 18 years of age. Each applicant for a license as a real estate broker shall, within three years preceding the date the application is made, have satisfactorily completed, at a school approved by the Commission, an education program consisting of at least 75 hours of classroom instruction in subjects determined by the Commission, or shall possess real estate education or experience in real estate transactions which the Commission shall find equivalent to the education program. Each applicant for a license as a real estate broker shall be required to pay a fee, fixed by the Commission but not to exceed thirty dollars ($30.00).

(a1) Each person who is issued a real estate broker license on or after April 1, 2006, shall initially be classified as a provisional broker and shall, within three years following initial licensure, satisfactorily complete, at a school approved by the Commission, a postlicensing education program consisting of 90 hours of classroom instruction in subjects determined by the Commission or shall possess real estate education or experience in real estate transactions which the Commission shall find equivalent to the education program. The Commission may, by rule, establish a schedule for completion of the prescribed postlicensing education that requires provisional brokers to complete portions of the 90-hour postlicensing education program in less than three years, and provisional brokers must comply with this schedule in order to be entitled to actively engage in real estate brokerage. Upon completion of the postlicensing education program, the provisional status of the broker's license shall be terminated. When a provisional broker fails to complete all 90 hours of required postlicensing education within three years following initial licensure, the broker's license shall be cancelled, and the Commission may, in its discretion, require the person whose license was cancelled to satisfy the postlicensing education program and the requirements for original licensure prescribed in this Chapter as a condition of license reinstatement, including the examination requirements and the license reinstatement fee prescribed by subsection (c) of this section.

(a2) An approved school shall pay a fee of ten dollars ($10.00) per licensee to the Commission for each licensee completing a postlicensing education course conducted by the school, provided that these fees shall not be charged to a community college, junior college, college, or university located in this State and accredited by the Southern Association of Colleges and Schools.

(b) Except as otherwise provided in this Chapter, any person who submits an application to the Commission in proper manner for a license as real estate broker shall be required to take an examination. The examination may be administered orally, by computer, or by any other method the Commission deems appropriate. The Commission may require the applicant to pay the Commission or a provider contracted by the Commission the actual cost of the examination and its administration. The cost of the examination and its administration shall be in addition to any other fees the applicant is required to pay under subsection (a) of this section. The examination shall determine the applicant's qualifications with due regard to the paramount interests of the public as to the applicant's competency. A person who fails the license examination shall be entitled to know the result and score. A person who passes the exam shall be notified only that the person passed the examination. Whether a person passed or failed the examination shall be a matter of public record; however, the scores for license examinations shall not be considered public records. Nothing in this subsection shall limit the rights granted to any person under G.S. 93B-8.

An applicant for licensure under this Chapter shall satisfy the Commission that he or she possesses the competency, honesty, truthfulness, integrity, and general moral character necessary to protect the public interest and promote public confidence in the real estate brokerage business. The Commission may investigate the moral character of each applicant for licensure and require an applicant to provide the Commission with a criminal record report. All applicants shall obtain criminal record reports from one or more reporting services designated by the Commission to provide criminal record reports. Applicants are required to pay the designated reporting service for the cost of these reports. If the results of any required competency examination and investigation of the applicant's moral character shall be satisfactory to the Commission, then the Commission shall issue to the applicant a license, authorizing the applicant to act as a real estate broker in the State of North Carolina, upon the payment of privilege taxes now required by law or that may hereafter be required by law.

Notwithstanding G.S. 150B-38(c), in a contested case commenced upon the request of a party applying for licensure regarding the question of the moral character or fitness of the applicant, if notice has been reasonably attempted, but cannot be given to the applicant personally or by certified mail in accordance with G.S. 150B-38(c), the notice of hearing shall be deemed given to the applicant when a copy of the notice is deposited in an official depository of the United States Postal Service addressed to the applicant at the latest mailing address provided by the applicant to the Commission or by any other means reasonably designed to achieve actual notice to the applicant.

(b1) The Department of Justice may provide a criminal record check to the Commission for a person who has applied for a license through the Commission. The Commission shall provide to the Department of Justice, along with the request, the fingerprints of the applicant, any additional information required by the Department of Justice, and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The Commission shall keep all information pursuant to this subsection privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this subsection.

(c) All licenses issued by the Commission under the provisions of this Chapter shall expire on the 30th day of June following issuance or on any other date that the Commission may determine and shall become invalid after that date unless reinstated. A license may be renewed 45 days prior to the expiration date by filing an application with and paying to the Executive Director of the Commission the license renewal fee. The license renewal fee is thirty dollars ($30.00) unless the Commission sets the fee at a higher amount. The Commission may set the license renewal fee at an amount that does not exceed fifty dollars ($50.00). The license renewal fee may not increase by more than five dollars ($5.00) during a 12-month period. The Commission may adopt rules establishing a system of license renewal in which the licenses expire annually with varying expiration dates. These rules shall provide for prorating the annual fee to cover the initial renewal period so that no licensee shall be charged an amount greater than the annual fee for any 12-month period. The fee for reinstatement of an expired license shall be fifty-five dollars ($55.00). In the event a licensee fails to obtain a reinstatement of such license within six months after the expiration date thereof, the Commission may, in its discretion, consider such person as not having been previously licensed, and thereby subject to the provisions of this Chapter relating to the issuance of an original license, including the examination requirements set forth herein. Duplicate licenses may be issued by the Commission upon payment of a fee of five dollars ($5.00) by the licensee. Commission certification of a licensee's license history shall be made only after the payment of a fee of ten dollars ($10.00).

(d) The Commission is expressly vested with the power and authority to make and enforce any and all reasonable rules and regulations connected with license application, examination, renewal, and reinstatement as shall be deemed necessary to administer and enforce the provisions of this Chapter. The Commission is further authorized to adopt reasonable rules and regulations necessary for the approval of real estate schools, instructors, and textbooks and rules that prescribe specific requirements pertaining to instruction, administration, and content of required education courses and programs.

(e) Nothing contained in this Chapter shall be construed as giving any authority to the Commission nor any licensee of the Commission as authorizing any licensee to engage in the practice of law or to render any legal service as specifically set out in G.S. 84-2.1 or any other legal service not specifically referred to in said section. (1957, c. 744, s. 4; 1967, c. 281, s. 3; c. 853, s. 2; 1969, c. 191, s. 3; 1973, c. 1390; 1975, c. 112; 1979, c. 614, ss. 2, 3, 6; c. 616, ss. 2-5; 1983, c. 81, ss. 2, 9, 11; c. 384; 1985, c. 535, ss. 2-5; 1995, c. 22, s. 1; 1999-200, s. 1.; 2000-140, s. 19(b); 2002-147, s. 11; 2002-168, s. 4; 2003-361, s. 1; 2005-395, s. 5; 2007-366, s. 2.)

Effect of Amendments. — Session Laws 2005-395, s. 5, effective April 1, 2006, in subsection (a), deleted "or real estate salesperson" following "real estate broker" in the first, second and last sentences, deleted the former third sentence which related to real estate fundamentals course requirement for real estate salespersons, substituted "75 hours" for "60 hours" in the present third sentence, and deleted "which shall be in addition to the course required for a real estate salesperson license" also in the present third sentence; added subsections (a1) and (a2); in the first paragraph of subsection (b), deleted "or a license as real estate salesperson" following "real estate broker" in the first sentence and deleted the former sixth sentence, which read: "A person holding a real estate salesperson license in this State and applying for a real estate broker license shall not be required to take an additional examination under this subsection."; and deleted "or real estate salesperson" following "real estate broker" in the last sentence of the second paragraph of subsection (b).

Session Laws 2007-366, s. 2, effective August 17, 2007, added the third paragraph of subsection (b).

Legal Periodicals. — For note on the use of state constitutional law to void occupational licensing statutes which unreasonably restrict freedom of occupational choice, see 13 Wake Forest L. Rev. 507 (1977).

For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts, " see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

Requisite Character and Integrity. — The Real Estate Commission properly concluded as a matter of law that an applicant for licensure as a real estate salesperson lacked the requisite integrity, where he had been convicted of soliciting a crime against nature, and the applicant's failure to be a law abiding citizen was relevant to determine if he possessed the requisite character and integrity. Hodgkins v. North Carolina Real Estate Comm'n, 130 N.C. App. 626, 504 S.E.2d 789 (1998).

Grounds for Suspension or Revocation. — Unless the specific provision provides otherwise, the Commission may suspend or revoke a license issued pursuant to this section for any of the acts enumerated in G.S. 93A-6(a)(1) through (12) without regard to whether the acts were connected in any way with the pursuit of the licensed privilege of a real estate broker or salesperson. Watson v. North Carolina Real Estate Comm'n, 87 N.C. App. 637, 362 S.E.2d 294 (1987).

Cited in North Carolina Real Estate Licensing Bd. v. Gallman, 52 N.C. App. 118, 277 S.E.2d 853 (1981); Correll v. Boulware, 74 N.C. App. 631, 329 S.E.2d 695 (1985).

OPINIONS OF ATTORNEY GENERAL

Board May Not Establish Specific Number of Hours for Course of Study in Real Estate Transactions. — See opinion of Attorney General to Mr. Joseph P. Schweidler, N.C. Real Estate Licensing Board, 42 N.C.A.G. 288 (1973), issued prior to the 1973 amendment to this section.

§ 93A-4.1. Continuing education.

(a) The Commission shall establish a program of continuing education for real estate brokers. An individual licensed as a real estate broker is required to complete continuing education requirements in an amount not to exceed eight classroom hours of instruction a year during any license renewal period in subjects and at times the Commission deems appropriate. Any licensee who fails to complete continuing education requirements pursuant to this section shall not actively engage in the business of real estate broker.

(a1) The Commission may, as part of the broker continuing education requirements, require real estate brokers-in-charge to complete during each annual license period a special continuing education course consisting of not more than four classroom hours of instruction in subjects prescribed by the Commission.

(b) The Commission shall establish procedures allowing for a deferral of continuing education for brokers while they are not actively engaged in real estate brokerage.

(c) The Commission may adopt any reasonable rules not inconsistent with this Chapter to give purpose and effect to the continuing education requirement, including rules that govern:

(1) The content and subject matter of continuing education courses.
(2) The curriculum of courses required.
(3) The criteria, standards, and procedures for the approval of courses, course sponsors, and course instructors.
(4) The methods of instruction.
(5) The computation of course credit.
(6) The ability to carry forward course credit from one year to another.
(7) The deferral of continuing education for brokers and salespersons not engaged in brokerage.
(8) The waiver of or variance from the continuing education requirement for hardship or other reasons.
(9) The procedures for compliance and sanctions for noncompliance.

(d) The Commission may establish a nonrefundable course application fee to be charged to a course sponsor for the review and approval of a proposed continuing education course. The fee shall not exceed one hundred twenty-five dollars ($125.00) per course. The Commission may charge the sponsor of an approved course a nonrefundable fee not to exceed seventy-five dollars ($75.00) for the annual renewal of course approval.

An approved course sponsor shall pay a fee of ten dollars ($10.00) per licensee to the Commission for each licensee completing an approved continuing education course conducted by the sponsor.

The Commission shall not charge a course application fee, a course renewal fee, or any other fee for a continuing education course sponsored by a community college, junior college, college, or university located in this State and accredited by the Southern Association of Colleges and Schools.

(e) The Commission may award continuing education credit for an unapproved course or related educational activity. The Commission may prescribe procedures for a licensee to submit information on an unapproved course or related educational activity for continuing education credit. The Commission may charge a fee to the licensee for each course or activity submitted. The fee shall not exceed fifty dollars ($50.00). (1993, c. 492, s. 1; 1999-229, s. 5; 2003-361, s. 2; 2005-395, s. 6.)

Editor's Note. — This section is former G.S. 93A-4A, as recodified by Session Laws 2005-395, s. 6. The historical citation from the former section has been added to this section as recodified.

§ 93A-4.2. Broker-in-charge qualification.

To be qualified to serve as a broker-in-charge of a real estate office, a real estate broker shall possess at least two years of full-time real estate brokerage experience or equivalent part-time real estate brokerage experience within the previous five years or real estate education or experience in real estate transactions that the Commission finds equivalent to such experience and shall complete, within a time prescribed by the Commission, a course of study prescribed by the Commission for brokers-in-charge not to exceed 12 classroom hours of instruction. A provisional broker may not be designated as a broker-in-charge. (2005-395, s. 7.)

Editor's Note. — Session Laws 2005-395, s. 26, made this section effective April 1, 2006.

§ 93A-4.3. Elimination of salesperson license; conversion of salesperson licenses to broker licenses.

(a) Effective April 1, 2006, the Commission shall discontinue issuing real estate salesperson licenses. Also effective April 1, 2006, all salesperson licenses shall become broker licenses, and each person holding a broker license that was changed from salesperson to broker on that date shall be classified as a provisional broker as defined in G.S. 93A-2(a2).

(b) A provisional broker as contemplated in subsection (a) of this section who was issued a salesperson license prior to October 1, 2005, shall, not later than April 1, 2008, complete a broker transition course prescribed by the Commission, not to exceed 24 classroom hours of instruction, or shall demonstrate to the Commission that he or she possesses four years' full-time real estate brokerage experience or equivalent part-time real estate brokerage experience within the previous six years. If the provisional broker satisfies this requirement by April 1, 2008, the provisional status of his or her broker license will be terminated, and the broker will not be required to complete the 90-classroom-hour broker postlicensing education program prescribed by G.S. 93A-4(a1). If the provisional broker fails to satisfy this requirement by April 1, 2008, his or her license will be placed on inactive status, if not already on inactive status, and he or she must complete the 90-classroom-hour broker postlicensing education program prescribed by G.S. 93A-4(a1) in order to terminate the provisional status of the broker license and to be eligible to return his or her license to active status.

(c) An approved school or sponsor shall pay a fee of ten dollars ($10.00) per licensee to the Commission for each licensee completing a broker transition course conducted by the school or sponsor, provided that these fees shall not be charged to a community college, junior college, college, or university located in this State and accredited by the Southern Association of Colleges and Schools.

(d) A provisional broker as contemplated in subsection (a) of this section, who was issued a salesperson license between October 1, 2005, and March 31, 2006, shall, not later than April 1, 2009, satisfy the requirements of G.S. 93A-4(a1). Upon satisfaction of the requirements of G.S. 93A-4(a1), the provisional status of the broker's license will be terminated. If the provisional broker fails to satisfy the requirements of G.S. 93A-4(a1) by April 1, 2009, the broker's license shall be cancelled, and the person will be subject to the requirements for licensure reinstatement prescribed by G.S. 93A-4(a1).

(e) A broker who was issued a broker license prior to April 1, 2006, shall not be required to complete either the 90-classroom-hour broker postlicensing education program prescribed by G.S. 93A-4(a1) or the broker transition course prescribed by subsection (b) of this section.

(f) For the purpose of determining a licensee's status, rights, and obligations under this section, the Commission may treat a person who is issued a license on or after the October 1, 2005, or April 1, 2006, dates cited in subsections (a), (b), (d), or (e) of this section as though the person had been issued a license prior to those dates if the only reason the person's license was not issued prior to those dates was that the person's application was pending a determination by the Commission as to whether the applicant possessed the requisite moral character for licensure. If a license application is pending on April 1, 2006, for any reason other than a determination by the Commission as to the applicant's moral character for licensure, and if the applicant has not satisfied all education and examination requirements for licensing in effect on April 1, 2006, the applicant's application shall be cancelled and the application fee refunded.

(g) No applications for a real estate salesperson license shall be accepted by the Commission between September 1, 2005, and September 30, 2005. (2005-395, s. 7.)

§ 93A-4A: Recodified as G.S. 93A-4.1 by Session Laws 2005-395, s. 6.

§ 93A-5. Register of applicants; roster of brokers; financial report to Secretary of State.

(a) The Executive Director of the Commission shall keep a register of all applicants for license, showing for each the date of application, name, place of residence, and whether the license was granted or refused. Said register shall be prima facie evidence of all matters recorded therein.

(b) The Executive Director of the Commission shall also keep a current roster showing the names and places of business of all licensed real estate brokers, which roster shall be kept on file in the office of the Commission and be open to public inspection.

(c) On or before the first day of September of each year, the Commission shall file with the Secretary of State a copy of the roster of real estate brokers holding certificates of license, and at the same time shall also file with the Secretary of State a report containing a complete statement of receipts and disbursements of the Commission for the preceding fiscal year ending June 30 attested by the affidavit of the Executive Director of the Commission. (1957, c. 744, s. 5; 1969, c. 191, s. 4; 1983, c. 81, ss. 2, 9, 12.; 2000-140, s. 19(b); 2005-395, s. 8.)

Effect of Amendments. — Session Laws 2005-395, s. 8, effective April 1, 2006, deleted "and salespersons" following "brokers" from the section heading; and deleted "and real estate salespersons" following "brokers" in subsections (b) and (c).

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

Cited in Glover v. North Carolina, 301 F. Supp. 364 (E.D.N.C. 1969).

§ 93A-6. Disciplinary action by Commission.

(a) The Commission has power to take disciplinary action. Upon its own initiative, or on the complaint of any person, the Commission may investigate the actions of any person or entity licensed under this Chapter, or any other person or entity who shall assume to act in such capacity. If the Commission finds probable cause that a licensee has violated any of the provisions of this Chapter, the Commission may hold a hearing on the allegations of misconduct.

The Commission has power to suspend or revoke at any time a license issued under the provisions of this Chapter, or to reprimand or censure any licensee, if, following a hearing, the Commission adjudges the licensee to be guilty of:

(1) Making any willful or negligent misrepresentation or any willful or negligent omission of material fact.

(2) Making any false promises of a character likely to influence, persuade, or induce.

(3) Pursuing a course of misrepresentation or making of false promises through agents, advertising or otherwise.

(4) Acting for more than one party in a transaction without the knowledge of all parties for whom he or she acts.

(5) Accepting a commission or valuable consideration as a real estate salesperson for the performance of any of the acts specified in this

Article or Article 4 of this Chapter, from any person except his or her broker-in-charge or licensed broker by whom he or she is employed.

(6) Representing or attempting to represent a real estate broker other than the broker by whom he or she is engaged or associated, without the express knowledge and consent of the broker with whom he or she is associated.

(7) Failing, within a reasonable time, to account for or to remit any monies coming into his or her possession which belong to others.

(8) Being unworthy or incompetent to act as a real estate broker in a manner as to endanger the interest of the public.

(9) Paying a commission or valuable consideration to any person for acts or services performed in violation of this Chapter.

(10) Any other conduct which constitutes improper, fraudulent or dishonest dealing.

(11) Performing or undertaking to perform any legal service, as set forth in G.S. 84-2.1, or any other acts constituting the practice of law.

(12) Commingling the money or other property of his or her principals with his or her own or failure to maintain and deposit in a trust or escrow account in an insured bank or savings and loan association in North Carolina all money received by him or her as a real estate licensee acting in that capacity, or an escrow agent, or the custodian or manager of the funds of another person or entity which relate to or concern that person's or entity's interest or investment in real property, provided, these accounts shall not bear interest unless the principals authorize in writing the deposit be made in an interest bearing account and also provide for the disbursement of the interest accrued.

(13) Failing to deliver, within a reasonable time, a completed copy of any purchase agreement or offer to buy and sell real estate to the buyer and to the seller.

(14) Failing, at the time the transaction is consummated, to deliver to the seller in every real estate transaction, a complete detailed closing statement showing all of the receipts and disbursements handled by him or her for the seller or failing to deliver to the buyer a complete statement showing all money received in the transaction from the buyer and how and for what it was disbursed.

(15) Violating any rule or regulation promulgated by the Commission.

The Executive Director shall transmit a certified copy of all final orders of the Commission suspending or revoking licenses issued under this Chapter to the clerk of superior court of the county in which the licensee maintains his or her principal place of business. The clerk shall enter these orders upon the judgment docket of the county.

(b) Following a hearing, the Commission shall also have power to suspend or revoke any license issued under the provisions of this Chapter or to reprimand or censure any licensee when:

(1) The licensee has obtained a license by false or fraudulent representation;

(2) The licensee has been convicted or has entered a plea of guilty or no contest upon which final judgment is entered by a court of competent jurisdiction in this State, or any other state, of the criminal offenses of: embezzlement, obtaining money under false pretense, fraud, forgery, conspiracy to defraud, or any other offense involving moral turpitude which would reasonably affect the licensee's performance in the real estate business;

(3) The licensee has violated any of the provisions of G.S. 93A-6(a) when selling, leasing, or buying the licensee's own property;

(4) The broker's unlicensed employee, who is exempt from the provisions of this Chapter under G.S. 93A-2(c)(6), has committed, in the regular course of business, any act which, if committed by the broker, would constitute a violation of G.S. 93A-6(a) for which the broker could be disciplined; or

(5) The licensee, who is also a State-licensed or State-certified real estate appraiser pursuant to Chapter 93E of the General Statutes, has violated any provisions of Chapter 93E of the General Statutes and has been reprimanded or has had an appraiser license or certificate suspended or revoked by the Appraisal Board.

(c) The Commission may appear in its own name in superior court in actions for injunctive relief to prevent any person from violating the provisions of this Chapter or rules promulgated by the Commission. The superior court shall have the power to grant these injunctions even if criminal prosecution has been or may be instituted as a result of the violations, or whether the person is a licensee of the Commission.

(d) Each broker shall maintain complete records showing the deposit, maintenance, and withdrawal of money or other property owned by the broker's principals or held in escrow or in trust for the broker's principals. The Commission may inspect these records periodically, without prior notice and may also inspect these records whenever the Commission determines that they are pertinent to an investigation of any specific complaint against a licensee.

(e) When a person or entity licensed under this Chapter is accused of any act, omission, or misconduct which would subject the licensee to disciplinary action, the licensee, with the consent and approval of the Commission, may surrender the license and all the rights and privileges pertaining to it for a period of time established by the Commission. A person or entity who surrenders a license shall not thereafter be eligible for or submit any application for licensure as a real estate broker or salesperson during the period of license surrender.

(f) In any contested case in which the Commission takes disciplinary action authorized by any provision of this Chapter, the Commission may also impose reasonable conditions, restrictions, and limitations upon the license, registration, or approval issued to the disciplined person or entity. In any contested case concerning an application for licensure, time share project registration, or school, sponsor, instructor, or course approval, the Commission may impose reasonable conditions, restrictions, and limitations on any license, registration, or approval it may issue as a part of its final decision. (1957, c. 744, s. 6; 1967, c. 281, s. 4; c. 853, s. 3; 1969, c. 191, s. 5; 1971, c. 86, s. 2; 1973, c. 1112; c. 1331, s. 3; 1975, c. 28; 1979, c. 616, ss. 6, 7; 1981, c. 682, s. 15; 1983, c. 81, s. 13; 1987, c. 516, ss. 1, 2; 1989, c. 563, s. 2; 1993, c. 419, s. 10; 1999-229, s. 6; 2000-149, s. 19(b); 2001-487, s. 23(b); 2002-168, s. 5; 2005-374, s. 2; 2005-395, s. 9.)

Editor's Note. — The amendment of this section by Session Laws 2005-395, s. 9, effective April 1, 2006, will have no effect, as the section was identically amended, in subdivisions (a)(3) and (a)(8), by Session Laws 2005-374, s. 2, effective September 8, 2005.

Legal Periodicals. — For comment, "Offer to Purchase and Contract: Buyer Beware," see 8 Campbell L. Rev. 473 (1986).

CASE NOTES

Constitutionality. — Subdivision (a)(8) of this section, as it read prior to the 1983 amendment, was not unconstitutionally vague, nor did it lack the necessary explicitness to put reasonable persons on notice as to the conduct proscribed. Correll v. Boulware, 74 N.C. App. 631, 329 S.E.2d 695 (1985).

Strict Construction. — This section is penal in nature, is in derogation of the common law and must be strictly construed. North

Carolina Real Estate Licensing Bd. v. Woodard, 27 N.C. App. 398, 219 S.E.2d 271, cert. denied, 288 N.C. 731, 220 S.E.2d 621 (1975).

Section Is Penal. — The portion of this section which empowers the Board to revoke the license of a real estate broker or salesperson is penal in its nature and should not be construed to include anything as a ground for revocation which is not embraced within its terms. In re Dillingham, 257 N.C. 684, 127 S.E.2d 584 (1962); Parrish v. North Carolina Real Estate Licensing Bd., 41 N.C. App. 102, 254 S.E.2d 268 (1979).

Adequate procedure for judicial review is provided by this section. In re Dillingham, 257 N.C. 684, 127 S.E.2d 584 (1962), decided prior to the 1967 amendment of this section.

Licensee on Appeal Is Entitled to Trial de Novo. — See In re Dillingham, 257 N.C. 684, 127 S.E.2d 584 (1962), decided prior to the 1967 amendment of this section.

Insufficient Notice of Charges. — Notice to the respondent that he was charged with violating subdivisions (a)(1), (a)(4), and (a)(10) of this section did not adequately apprise the respondent of the charges against him so as to enable him to prepare his defense, where he was subsequently found guilty of violating subdivision (a)(8) of this section. Parrish v. North Carolina Real Estate Licensing Bd., 41 N.C. App. 102, 254 S.E.2d 268 (1979).

Subdivision (a)(4) Not to Be Initially Applied by Federal Court. — The General Assembly did not intend subdivision (a)(4) of this section to be initially applied by a federal court, although both federal and state courts may review Commission actions under subdivision (a)(4) after such actions are concluded. John v. Robbins, 764 F. Supp. 379 (M.D.N.C. 1991).

This section allows the Board to revoke or suspend a license for any one of several listed misdeeds. Only one violation is needed to revoke or suspend one's license, and one act may constitute a violation of more than one subsection of this section. Correll v. Boulware, 74 N.C. App. 631, 329 S.E.2d 695 (1985).

Activities Need Not Be Related to Brokering or Selling. — For case holding that the fact that by subsequent amendment the legislature chose to omit the words "any of the acts mentioned herein" from the introductory language of subsection (a), on which the court in In re Dillingham, 257 N.C. 684, 127 S.E.2d 584 (1962) relied, shows the clear intent to omit the requirement that the activities giving rise to a suspension or revocation must be directly related to real estate brokering or selling, see Watson v. North Carolina Real Estate Comm'n, 87 N.C. App. 637, 362 S.E.2d 294 (1987), cert. denied, 321 N.C. 746, 365 S.E.2d 296 (1988).

Suspension or Revocation for Activities Not Directly Related to Brokering or Selling. — The subsequent amendment of this section evidences the legislature's clear intent to remove the requirements placed on the earlier version of the statute by In re Dillingham, 257 N.C. 684, 127 S.E.2d 584 (1962), that the activities giving rise to a suspension or revocation must be directly related to real estate brokering or selling. Therefore, the Commission could find real estate broker knowingly permitted the use of altered tapes in his Commission hearing, violating subdivision (a)(8) and (a)(10) of this section. Watson v. North Carolina Real Estate Comm'n, 87 N.C. App. 637, 362 S.E.2d 294 (1987), cert. denied, 321 N.C. 746, 365 S.E.2d 296 (1988).

Unless the specific provision provides otherwise, the Commission may suspend or revoke a license issued pursuant to G.S. 93A-4 for any of the acts enumerated in subdivisions (a)(1) to (a)(12) of this section, without regard to whether the acts were connected in any way with the pursuit of the licensed privilege of a real estate broker or salesperson. Watson v. North Carolina Real Estate Comm'n, 87 N.C. App. 637, 362 S.E.2d 294 (1987).

Dishonesty of Licensee as Owner. — The licensing act should not be interpreted to require a licensee to be honest as a broker or salesperson while allowing him to be dishonest as an owner. North Carolina Real Estate Licensing Bd. v. Gallman, 52 N.C. App. 118, 277 S.E.2d 853 (1981).

This Chapter is not concerned with a licensed broker's sharing of his commissions with an unlicensed associate, unless the reason for such sharing is the performance by the unlicensed associate of acts which violate the Chapter. McArver v. Gerukos, 265 N.C. 413, 144 S.E.2d 277 (1965).

Filing a false and fraudulent income tax return, either individually or jointly, is not an offense similar to conspiracy to defraud, in which latter offense the unlawful agreement is the gist of the offense, nor is it similar to embezzlement, obtaining money under false pretenses, or forgery within the meaning of this section. North Carolina Real Estate Licensing Bd. v. Coe, 19 N.C. App. 84, 198 S.E.2d 19 (1973).

Incompetence to Act as Broker or Salesperson. — Subdivision (a)(8) of this section requires findings on issues that are not included in the other subdivisions. Parrish v. North Carolina Real Estate Licensing Bd., 41 N.C. App. 102, 254 S.E.2d 268 (1979).

Subdivision (a)(8) as Lesser Included Offense. — Subdivisions (a)(1) and (a)(10) of this section do not raise any issues of respondent's worthiness or competency to act as a real estate agent or broker, or his ability to safeguard the interests of the public. Therefore, the contention that subdivision (a)(8) of this section is a lesser included offense of subdivisions (a)(1) and (a)(10) of this section is without merit. Parrish v. North Carolina Real Estate Licensing Bd., 41 N.C. App. 102, 254 S.E.2d 268 (1979).

Finding Inadequate to Suspend License. — Finding by the Real Estate Licensing Board that "there is substantial evidence" that a real estate agent acted in violation of subdivision (a)(8) of this section in certain respects is insufficient to support a suspension of the agent's license since it is necessary for the Board to find that the agent "is deemed guilty of" a violation of the statute before his license can be suspended. North Carolina Real Estate Licensing Bd. v. Woodard, 27 N.C. App. 398, 219 S.E.2d 271, cert. denied, 288 N.C. 731, 220 S.E.2d 621 (1975).

The finding that respondent on a single occasion failed to obtain an earnest money deposit is insufficient to support the conclusion that he was unworthy and incompetent in violation of subdivision (a)(8) of this section. Parrish v. North Carolina Real Estate Licensing Bd., 41 N.C. App. 102, 254 S.E.2d 268 (1979).

Findings that respondent agent made a secret profit of $8,000, after the payment of expenses, by purchasing property and reselling it to third party and by failing to disclose to third party his purchase price of the property, and by failing to disclose to the sellers his selling price, and that he received $18,720.44 from third party but paid only $10,858.72 to bank on his loan on the property, causing loss to third party, supported the conclusion that respondent violated this section. Correll v. Boulware, 74 N.C. App. 631, 329 S.E.2d 695 (1985).

Sale of Broker's Own Notes Secured by Deeds of Trust. — A real estate broker, in selling his own notes secured by deeds of trust, did not act as a real estate broker as defined in G.S. 93A-2, and any misconduct in performing such acts did not warrant the Board or the court on appeal to revoke his license on such ground under former version of this section. In re Dillingham, 257 N.C. 684, 127 S.E.2d 584 (1962). But see, Watson v. North Carolina Real Estate Comm'n, 87 N.C. App. 637, 362 S.E.2d 294 (1987), cert. denied, 321 N.C. 746, 365 S.E.2d 296 (1988).

Keeping Disorderly House. — Evidence offered by the Board to the effect that a real estate broker had pleaded guilty to a charge of operating a disorderly house shows acts of a vile and decadent character committed by him, but such acts are not connected in any way with the pursuit of his licensed privilege as a real estate broker, and are not a ground for revocation of his license, and such evidence was correctly excluded as irrelevant and immaterial under former version of this section. In re Dillingham, 257 N.C. 684, 127 S.E.2d 584 (1962). But see, Watson v. North Carolina Real Estate Comm'n, 87 N.C. App. 637, 362 S.E.2d 294 (1987), cert. denied, 321 N.C. 746, 365 S.E.2d 296 (1988).

Failure to Check Federal Flood Hazard Maps. — Because mere inaction does not constitute negligence in the absence of a duty to act and real estate agent was under no duty to search the federal flood hazard maps, the fact that she did not search these maps, discover that the property was located in a flood plain, and inform plaintiffs could not constitute a negligent omission under subdivision (a)(1). Clouse v. Gordon, 115 N.C. App. 500, 445 S.E.2d 428 (1994).

A real estate broker may maintain an action for malicious prosecution against a person who maliciously and without probable cause institutes proceedings before the Real Estate Licensing Board terminated in favor of the broker, charging conduct constituting ground for revocation or suspension of the broker's license. Carver v. Lykes, 262 N.C. 345, 137 S.E.2d 139 (1964).

Applied in Edwards v. Latham, 60 N.C. App. 759, 299 S.E.2d 819 (1983).

Cited in Abernathy v. Ralph Squires Realty Co., 55 N.C. App. 354, 285 S.E.2d 325 (1982); Property Shop, Inc. v. Mountain City Inv. Co., 56 N.C. App. 644, 290 S.E.2d 222 (1982); Frieson v. North Carolina Real Estate Licensing Bd., 72 N.C. App. 665, 325 S.E.2d 293 (1985); Davis v. Sellers, 115 N.C. App. 1, 443 S.E.2d 879 (1994), cert. denied, 339 N.C. 610, 454 S.E.2d 248 (1995); Elliott v. North Carolina Psychology Bd., 348 N.C. 230, 498 S.E.2d 616 (1998); McDonald v. Skeen, 152 N.C. App. 228, 567 S.E.2d 209, cert. denied, 356 N.C. 437, 571 S.E.2d 221, cert. dismissed, 356 N.C. 437, 571 S.E.2d 222 (2002).

§ 93A-6.1. Commission may subpoena witnesses, records, documents, or other materials.

(a) The Commission, Executive Director, or other representative designated by the Commission may issue a subpoena for the appearance of witnesses deemed necessary to testify concerning any matter to be heard before or investigated by the Commission. The Commission may issue a subpoena ordering any person in possession of records, documents, or other materials, however maintained, that concern any matter to be heard before or investigated by the Commission to produce the records, documents, or other materials for inspection or deliver the same into the custody of the Commission's authorized representatives. Upon written request, the Commission shall revoke a subpoena if it finds that the evidence, the production of which is required, does not relate to a matter in issue, or if the subpoena does not describe with sufficient particularity the evidence, the production of which is required, or if for any other reason in law the subpoena is invalid. If any person shall fail to fully and promptly comply with a subpoena issued under this section, the Commission may apply to any judge of the superior court resident in any county where the person to whom the subpoena is issued maintains a residence or place of business for an order compelling the person to show cause why he or she should not be held in contempt of the Commission and its processes. The court shall have the power to impose punishment for acts that would constitute direct or indirect contempt if the acts occurred in an action pending in superior court.

(b) The Commission shall be exempt from the requirements of Chapter 53B of the General Statutes with regard to subpoenas issued to compel the production of a licensee's trust account records held by any financial institution. Notwithstanding that exemption, the Commission shall serve, pursuant to G.S. 1A-1, Rule 4(j) of the N.C. Rules of Civil Procedure or by certified mail to the licensee's last known address, a copy of the subpoena and notice that the subpoena has been served upon the financial institution. Service of the subpoena and notice on the licensee shall be made within 10 days following service of the subpoena on the financial institution holding the trust account records. (1999-229, s. 7; 2005-395, s. 10.)

Effect of Amendments. — Session Laws 2005-395, s. 10, effective April 1, 2006, added "or deliver the same into the custody of the Commission's authorized representative" at the end of the second sentence in subsection (a).

§ 93A-7. Power of courts to revoke.

Whenever any person, partnership, association or corporation claiming to have been injured or damaged by the gross negligence, incompetency, fraud, dishonesty or misconduct on the part of any licensee following the calling or engaging in the business herein described and shall file suit upon such claim against such licensee in any court of record in this State and shall recover judgment thereon, such court may as part of its judgment or decree in such case, if it deem it a proper case in which so to do, order a written copy of the transcript of record in said case to be forwarded by the clerk of court to the chairman of the said Commission with a recommendation that the licensee's certificate of license be revoked. (1957, c. 744, s. 7; 1983, c. 81, s. 2.)

CASE NOTES

Cited in John v. Robbins, 764 F. Supp. 379 (M.D.N.C. 1991).

§ 93A-8. Penalty for violation of Chapter.

Any person violating the provisions of this Chapter shall upon conviction thereof be deemed guilty of a Class 1 misdemeanor. (1957, c. 744, s. 8; 1993, c. 539, s. 657; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Violation Precludes Recovery of Commissions by Foreign Real Estate Firms. — A foreign real estate firm that has not secured a North Carolina real estate license and a certificate of authority to transact business in this State cannot maintain an action to recover commissions on the lease of real estate in this State. Raab & Co. v. Independence Corp., 9 N.C. App. 674, 177 S.E.2d 337 (1970).

§ 93A-9. Licensing nonresidents.

(a) An applicant from another state, which offers licensing privileges to residents of North Carolina, may be licensed by conforming to all the provisions of this Chapter and, in the discretion of the Commission, such other terms and conditions as are required of North Carolina residents applying for license in such other state; provided that the Commission may exempt from the examination prescribed in G.S. 93A-4 a broker or salesperson duly licensed in another state if a similar exemption is extended to licensed brokers from North Carolina. A license applicant who has been a resident of North Carolina for not more than 90 days may be considered by the Commission as a nonresident for the purposes of this subsection.

(b) The Commission may issue a limited broker's license to a person or an entity from another state or territory of the United States without regard to whether that state or territory offers similar licensing privileges to residents in North Carolina if the person or entity satisfies all of the following:

(1) Is of good moral character and licensed as a real estate broker or salesperson in good standing in another state or territory of the United States.

(2) Only engages in business as a real estate broker in North Carolina in transactions involving commercial real estate and while the person or entity is affiliated with a resident North Carolina real estate broker.

(3) Complies with the laws of this State regulating real estate brokers and rules adopted by the Commission.

The Commission may require an applicant for licensure under this subsection to pay a fee not to exceed three hundred dollars ($300.00). All licenses issued under this subsection shall expire on June 30 of each year following issuance or on a date that the Commission deems appropriate unless the license is renewed pursuant to the requirements of G.S. 93A-4. A person or entity licensed under this subsection may be disciplined by the Commission for violations of this Chapter as provided in G.S. 93A-6 and G.S. 93A-54.

Any person or entity licensed under this subsection shall be affiliated with a resident North Carolina real estate broker, and the resident North Carolina real estate broker shall actively and personally supervise the licensee in a manner that reasonably assures that the licensee complies with the requirements of this Chapter and rules adopted by the Commission. A person or entity licensed under this subsection shall not, however, be affiliated with a resident North Carolina real estate provisional broker. The Commission may exempt applicants for licensure under this subsection from examination and the other licensing requirements under G.S. 93A-4. The Commission may adopt rules as it deems necessary to give effect to this subsection, including rules establishing: (i) qualifications for licensure; (ii) licensure and renewal procedures; (iii) requirements for continuing education; (iv) conduct of persons and entities licensed under this subsection and their affiliated resident real estate brokers; (v) a definition of commercial real estate; and (vi) any requirements or limitations on affiliation between resident real estate brokers and persons or entities seeking licensure under this subsection. (1957, c. 744, s. 9; 1967, c. 281, s. 5; 1969, c. 191, s. 6; 1971, c. 86, s. 3; 1983, c. 81, s. 2.; 2000-140, s. 19(b); 2003-361, s. 3; 2005-395, s. 11.)

Effect of Amendments. — Session Laws 2005-395, s. 11, effective April 1, 2006, in subsection (a), deleted "and salespersons" following "brokers" in the first sentence and added the second sentence; deleted "or salesperson's" following "broker's" in the first sentence of subsection (b); deleted "or salesperson" following "broker" twice in subdivision (b)(2); deleted "salespersons and" following "brokers and" in subdivision (b)(3); and in the last paragraph of the section, deleted "or salesperson" following "broker" twice, deleted "or salespersons" following "brokers" twice, and added the present second sentence.

§ 93A-10. Nonresident licensees; filing of consent as to service of process and pleadings.

Every nonresident applicant shall file an irrevocable consent that suits and actions may be commenced against such applicant in any of the courts of record of this State, by the service of any process or pleading authorized by the laws of this State in any county in which the plaintiff may reside, by serving the same on the Executive Director of the Commission, said consent stipulating and agreeing that such service of such process or pleadings on said Executive Director shall be taken and held in all courts to be valid and binding as if due service had been made personally upon the applicant in this State. This consent shall be duly acknowledged, and, if made by a corporation, shall be executed by an officer of the corporation. The signature of the officer on the consent to service instrument shall be sufficient to bind the corporation and no further authentication is necessary. An application from a corporation or other business entity shall be signed by an officer of the corporation or entity or by an individual designated by the Commission. In all cases where process or pleadings shall be served, under the provisions of this Chapter, upon the Executive Director of the Commission, such process or pleadings shall be served in duplicate, one of which shall be filed in the office of the Commission and the other shall be forwarded immediately by the Executive Director of the Commission, by registered mail, to the last known business address of the nonresident licensee against which such process or pleadings are directed. (1957, c. 744, s. 10; 1983, c. 81, ss. 3, 10; 2003-361, s. 4.)

§ 93A-11. Reimbursement by real estate independent contractor of brokers' workers' compensation.

(a) Notwithstanding the provisions of G.S. 97-21 or any other provision of law, a real estate broker may include in the governing contract with a real estate salesperson whose nonemployee status is recognized pursuant to section 3508 of the United States Internal Revenue Code, 26 U.S.C. § 3508, an agreement for the salesperson to reimburse the broker for the cost of covering that salesperson under the broker's workers' compensation coverage of the broker's business.

(b) Nothing in this section shall affect a requirement under any other law to provide workers' compensation coverage or in any manner exclude from coverage any person, firm, or corporation otherwise subject to the provisions of Article 1 of Chapter 97 of the General Statutes. (1995, c. 127, s. 1.; 2000-140, s. 19(b).)

§ 93A-12. Disputed monies.

(a) A real estate broker licensed under this Chapter may deposit with the clerk of court in accordance with this section monies, other than a residential security deposit, the ownership of which are in dispute and that the real estate broker received while acting in a fiduciary capacity.

(b) The disputed monies shall be deposited with the clerk of court in the county in which the property for which the disputed monies are being held is located. At the time of depositing the disputed monies, the real estate broker shall certify to the clerk of court that the persons who are claiming ownership of the disputed monies have been notified in accordance with subsection (c) of this section that the disputed monies are to be deposited with the clerk of court and that the persons may initiate a special proceeding with the clerk of court to recover the disputed monies.

(c) Notice to the persons who are claiming ownership to the disputed monies required under subsection (b) of this section shall be provided by delivering a copy of the notice to the person or by mailing it to the person by first-class mail, postpaid, properly addressed to the person at the person's last known address.

(d) A real estate broker shall not deposit disputed monies with the clerk of court until 90 days following notification of the persons claiming ownership of the disputed monies.

(e) Upon the filing of a special proceeding to recover the disputed monies, the clerk shall determine the rightful ownership of the monies and distribute the disputed monies accordingly. If no special proceeding is filed with the clerk of court within one year of the disputed monies being deposited with the clerk of court, the disputed monies shall be deemed unclaimed and shall be delivered by the clerk of court to the State Treasurer in accordance with the provisions of Article 4 of Chapter 116B of the General Statutes. (2005-395, s. 12.)

§§ 93A-13 through 93A-15: Reserved for future codification purposes.

ARTICLE 2.

Real Estate Recovery Fund.

§ 93A-16. Real Estate Recovery Fund created; payment to fund; management.

(a) There is hereby created a special fund to be known as the "Real Estate Recovery Fund" which shall be set aside and maintained by the North Carolina Real Estate Commission. The fund shall be used in the manner provided under this Article for the payment of unsatisfied judgments where the aggrieved person has suffered a direct monetary loss by reason of certain acts committed by any real estate salesperson licensed before April 1, 2006, or by any real estate broker.

(b) On September 1, 1979, the Commission shall transfer the sum of one hundred thousand dollars ($100,000) from its expense reserve fund to the Real Estate Recovery Fund. Thereafter, the Commission may transfer to the Real Estate Recovery Fund additional sums of money from whatever funds the Commission may have, provided that, if on December 31 of any year the amount remaining in the fund is less than fifty thousand dollars ($50,000), the Commission may determine that each person or entity licensed under this Chapter, when renewing a license, shall pay in addition to the license renewal fee, a fee not to exceed ten dollars ($10.00) per broker and five dollars ($5.00) per salesperson as shall be determined by the Commission for the purpose of replenishing the fund.

(c) The Commission shall invest and reinvest the monies in the Real Estate Recovery Fund in the same manner as provided by law for the investment of funds by the clerk of superior court. The proceeds from such investments shall be deposited to the credit of the fund.

(d) The Commission shall have the authority to adopt reasonable rules and procedures not inconsistent with the provisions of this Article, to provide for the orderly, fair and efficient administration and payment of monies held in the

Real Estate Recovery Fund. (1979, c. 614, s. 1; 1983, c. 81, ss. 1, 2; 1987, c. 516, ss. 3-5.; 2000-140, s. 19(b); 2001-487, s. 23(c); 2005-395, s. 13.)

Effect of Amendments. — Session Laws 2005-395, s. 13, effective April 1, 2006, substituted "salesperson licensed before April 1, 2006, or by any real estate broker" for "broker or salesperson licensed under this Chapter" in the last sentence of subsection (a).

§ 93A-17. Grounds for payment; notice and application to Commission.

(a) An aggrieved person who has suffered a direct monetary loss by reason of the conversion of trust funds by a real estate salesperson licensed before April 1, 2006, or by any licensed real estate broker shall be eligible to recover, subject to the limitations of this Article, the amount of trust funds converted and which is otherwise unrecoverable provided that:

(1) The act or acts of conversion which form the basis of the claim for recovery occurred on or after September 1, 1979;

(2) The aggrieved person has sued the real estate broker or salesperson in a court of competent jurisdiction and has filed with the Commission written notice of such lawsuit within 60 days after its commencement unless the claim against the Real Estate Recovery Fund is for an amount less than three thousand dollars ($3,000), excluding attorneys fees, in which case the notice may be filed within 60 days after the termination of all judicial proceedings including appeals;

(3) The aggrieved person has obtained final judgment in a court of competent jurisdiction against the real estate broker or salesperson on grounds of conversion of trust funds arising out of a transaction which occurred when such broker or salesperson was licensed and acting in a capacity for which a license is required; and

(4) Execution of the judgment has been attempted and has been returned unsatisfied in whole or in part.

Upon the termination of all judicial proceedings including appeals, and for a period of one year thereafter, a person eligible for recovery may file a verified application with the Commission for payment out of the Real Estate Recovery Fund of the amount remaining unpaid upon the judgment which represents the actual and direct loss sustained by reason of conversion of trust funds. A copy of the judgment and return of execution shall be attached to the application and filed with the Commission. The applicant shall serve upon the judgment debtor a copy of the application and shall file with the Commission an affidavit or certificate of such service.

(b) For the purposes of this Article, the term "trust funds" shall include all earnest money deposits, down payments, sales proceeds, tenant security deposits, undisbursed rents and other such monies which belong to another or others and are held by a real estate broker or salesperson acting in that capacity. Trust funds shall also include all time share purchase monies which are required to be held in trust by G.S. 93A-45(c) during the time they are, in fact, so held. Trust funds shall not include, however, any funds held by an independent escrow agent under G.S. 93A-42 or any funds which the court may find to be subject to an implied, constructive or resulting trust.

(c) For the purposes of this Article, the terms "licensee", "broker", and "salesperson" shall include only individual persons licensed under this Chapter as brokers or individual persons who were licensed under this Chapter as salespersons prior to April 1, 2006. The terms "licensee", "broker", and "salesperson" shall not include a time share developer, time share project, independent escrow agent, corporation or other entity licensed under this Chapter. (1979, c. 614, s. 1; 1983, c. 81, ss. 2, 14; 1987, c. 516, s. 6; 1999-229, s. 8.; 2000-140, s. 19(b); 2005-395, s. 14.)

Effect of Amendments. — Session Laws 2005-395, s. 14, effective April 1, 2006, substituted "real estate salesperson licensed before April 1, 2006, or by any licensed real estate broker" for "real estate broker or salesperson licensed under this Chapter" in subsection (a); substituted "brokers or individual ... 'salesperson' shall" for "brokers and salespersons and shall" in subsection (c).

§ 93A-18. Hearing; required showing.

Upon application by an aggrieved person, the Commission shall conduct a hearing and the aggrieved person shall be required to show that the aggrieved person:

(1) Is not a spouse of the judgment debtor or a person representing the spouse;
(2) Is making application not more than one year after termination of all judicial proceedings, including appeals, in connection with the judgment;
(3) Has complied with all requirements of this Article;
(4) Has obtained a judgment as described in G.S. 93A-17, stating the amount owing thereon at the date of application;
(5) Has made all reasonable searches and inquiries to ascertain whether the judgment debtor is possessed of real or personal property or other assets liable to be sold or applied in satisfaction of the judgment;
(6) After searching as described in subdivision (5) of this section, has discovered no real or personal property or other assets liable to be sold or applied, or has discovered certain of them, describing them, but the amount so realized was insufficient to satisfy the judgment, stating the amount realized and the balance remaining due on the judgment after application of the amount realized;
(7) Has diligently pursued the aggrieved person's remedies, which include attempting execution on the judgment against all the judgment debtors, which execution has been returned unsatisfied; and
(8) Knows of no assets of the judgment debtor and has attempted collection from all other persons who may be liable for the transaction for which the aggrieved person seeks payment from the Real Estate Recovery Fund if there be any such other persons. (1979, c. 614, s. 1; 1987, c. 516, s. 7; 2001-487, s. 23(d).)

Editor's Note. — The second sentence of subdivision (7) was designated as subdivision (8) at the direction of the Revisor of Statutes.

§ 93A-19. Response and defense by Commission and judgment debtor; proof of conversion.

(a) Whenever the Commission proceeds upon an application as set forth in this Article, counsel for the Commission may defend such action on behalf of the fund and shall have recourse to all appropriate means of defense, including the examination of witnesses. The judgment debtor may defend such action on his or her own behalf and shall have recourse to all appropriate means of defense, including the examination of witnesses. Counsel for the Commission and the judgment debtor may file responses to the application, setting forth answers and defenses. Responses shall be filed with the Commission and copies shall be served upon every party by the filing party. If at any time it appears there are no triable issues of fact and the application for payment from the fund is without merit, the Commission shall dismiss the application. A motion to dismiss may be supported by affidavit of any person or persons having knowledge of the facts and may be made on the basis that the application or the judgment referred to therein do not form a basis for meritorious recovery within the purview of G.S. 93A-17, that the applicant has not complied with the provisions of this Article, or that the liability of the fund with regard to the particular licensee or transaction has been exhausted; provided, however, notice of the motion shall be given at least 10 days prior to the time fixed for hearing. If the applicant or judgment debtor fails to appear at the hearing after receiving notice of the hearing, the applicant or judgment debtor waives the person's rights unless the absence is excused by the Commission.

(b) Whenever the judgment obtained by an applicant is by default, stipulation, or consent, or whenever the action against the licensee was defended by a trustee in bankruptcy, the applicant, for purposes of this Article, shall have the burden of proving the cause of action for conversion of trust funds. Otherwise, the judgment shall create a rebuttable presumption of the conversion of trust funds. This presumption is a presumption affecting the burden of producing evidence. (1979, c. 614, s. 1; 1983, c. 81, s. 2; 1987, c. 516, s. 8; 1999-229, s. 9; 2001-487, s. 23(e).)

§ 93A-20. Order directing payment out of fund; compromise of claims.

Applications for payment from the Real Estate Recovery Fund shall be heard and decided by a majority of the members of the Commission. If, after a hearing, the Commission finds the claim should be paid from the fund, the Commission shall enter an order requiring payment from the fund of whatever sum the Commission shall find to be payable upon the claim in accordance with the limitations contained in this Article.

Subject to Commission approval, a claim based upon the application of an aggrieved person may be compromised; however, the Commission shall not be bound in any way by any compromise or stipulation of the judgment debtor. If a claim appears to be otherwise meritorious, the Commission may waive procedural defects in the application for payment. (1979, c. 614, s. 1; 1983, c. 81, s. 2; 1987, c. 516, s. 9; 1999-229, s. 10.)

§ 93A-21. Limitations; pro rata distribution; attorney fees.

(a) Payments from the Real Estate Recovery Fund shall be subject to the following limitations:

(1) The right to recovery under this Article shall be forever barred unless application is made within one year after termination of all proceedings including appeals, in connection with the judgment;

(2) The fund shall not be liable for more than twenty-five thousand dollars ($25,000) per transaction regardless of the number of persons aggrieved or parcels of real estate involved in such transaction; and

(3) The liability of the fund shall not exceed in the aggregate twenty-five thousand dollars ($25,000) for any one licensee within a single calendar year, and in no event shall it exceed in the aggregate fifty thousand dollars ($50,000) for any one licensee.

(4) The fund shall not be liable for payment of any judgment awards of consequential damages, multiple or punitive damages, civil penalties, incidental damages, special damages, interest, costs of court or action or other similar awards.

(b) If the maximum liability of the fund is insufficient to pay in full the valid claims of all aggrieved persons whose claims relate to the same transaction or to the same licensee, the amount for which the fund is liable shall be distributed among the claimants in a ratio that their respective claims bear to the total of such valid claims or in such manner as the Commission, in its discretion, deems equitable. Upon petition of counsel for the Commission, the Commission may require all claimants and prospective claimants to be joined in one proceeding to the end that the respective rights of all such claimants to the Real Estate Recovery Fund may be equitably resolved. A person who files an application for payment after the maximum liability of the fund for the licensee or transaction has been exhausted shall not be entitled to payment and may not seek judicial review of the Commission's award of payment to any party except upon a showing that the Commission abused its discretion.

(c) In the event an aggrieved person is entitled to payment from the fund in an amount of one thousand five hundred dollars ($1,500) or less, the Commission may allow such person to recover from the fund reasonable attorney's fees incurred in effecting such recovery. Reimbursement for attorney's fees shall be limited to those fees incurred in effecting recovery from the fund and shall not include any fee incurred in obtaining judgment against the licensee. (1979, c. 614, s. 1; 1983, c. 81, ss. 2, 15; 1987, c. 516, ss. 10-13; 1999-229, s. 11.)

§ 93A-22. Repayment to fund; automatic suspension of license.

Should the Commission pay from the Real Estate Recovery Fund any amount in settlement of a claim or toward satisfaction of a judgment against a licensed real estate broker or salesperson, any license issued to the broker or salesperson shall be automatically suspended upon the effective date of the order authorizing payment from the fund. No such broker or salesperson shall be granted a reinstatement until the fund has been repaid in full, including interest at the legal rate as provided for in G.S. 24-1. (1979, c. 614, s. 1; 1983, c. 81, s. 2; 1987, c. 516, s. 14.; 2000-140, s. 19(b); 2001-487, s. 23(f); 2005-395, s. 15.)

Effect of Amendments. — Session Laws 2005-395, s. 15, effective April 1, 2006, substituted "any license issued to" for "the license of" in the first sentence.

§ 93A-23. Subrogation of rights.

When the Commission has paid from the Real Estate Recovery Fund any sum to the judgment creditor, the Commission shall be subrogated to all of the rights of the judgment creditor to the extent of the amount so paid and the judgment creditor shall assign all right, title, and interest in the judgment to the extent of the amount so paid to the Commission and any amount and interest so recovered by the Commission on the judgment shall be deposited in the Real Estate Recovery Fund. (1979, c. 614, s. 1; 1983, c. 81, s. 2; 1987, c. 516, s. 15; 2001-487, s. 23(g).)

§ 93A-24. Waiver of rights.

The failure of an aggrieved person to comply with this Article shall constitute a waiver of any rights hereunder. (1979, c. 614, s. 1.)

§ 93A-25. Persons ineligible to recover from fund.

No real estate broker or real estate salesperson who suffers the loss of any commission from any transaction in which he or she was acting in the capacity of a real estate broker or real estate salesperson shall be entitled to make application for payment from the Real Estate Recovery Fund for the loss. (1979, c. 614, s. 1.; 2000-140, s. 19(b); 2001-487, s. 23(h).)

§ 93A-26. Disciplinary action against licensee.

Nothing contained in this Article shall limit the authority of the Commission to take disciplinary action against any licensee under this Chapter, nor shall the repayment in full of all obligations to the fund by any licensee nullify or modify the effect of any other disciplinary proceeding brought under this Chapter. (1979, c. 614, s. 1; 1983, c. 81, s. 2.)

§§ 93A-27 through 93A-31: Reserved for future codification purposes.

Article 3.

Private Real Estate Schools.

§ 93A-32. Definitions.

As used in this Article:

(1) "Commission" means the North Carolina Real Estate Commission.

(2) "Private real estate school" means any real estate educational entity which is privately owned and operated by an individual, partnership, corporation, limited liability company, or association, and which conducts, for a profit or tuition charge, real estate broker prelicensing or postlicensing courses prescribed by G.S. 93A-4(a) or (a1), provided that a proprietary business or trade school licensed by the State Board of Community Colleges under G.S. 115D-90 to conduct courses other than those real estate courses described herein shall not be considered to be a private real estate school. (1979, 2nd Sess., c. 1193, s. 1; 1983, c. 81, ss. 1, 2; 1989, c. 563, s. 3; 1993, c. 419, s. 11; c. 553, s. 29.1.; 2000-140, s. 19(b); 2005-395, s. 16.)

Effect of Amendments. — Session Laws 2005-395, s. 16, effective April 1, 2006, in subdivision (2), inserted "limited liability company" preceding "or association," substituted "real estate broker prelicensing or postlicensing" for "real estate salesperson or broker prelicensing" and added "or (a1)" preceding "provided that"; and made a minor punctuation change.

§ 93A-33. Commission to administer Article; authority of Commission to conduct investigations, issue licenses, and promulgate regulations.

The Commission shall have authority to administer and enforce this Article and to issue licenses to private real estate schools as defined herein which have complied with the requirements of this Article and regulations promulgated by the Commission. Through licensing applications, periodic reports required of licensed schools, periodic investigations and inspections of schools, and appropriate regulations, the Commission shall exercise general supervisory authority over private real estate schools, the object of such supervision being to protect the public interest and to assure the conduct of quality real estate education programs. To this end the Commission is authorized and directed to promulgate such regulations as it deems necessary which are not inconsistent with the provisions of this Article and which relate to the subject areas set out in G.S. 93A-34(c). (1979, 2nd Sess., c. 1193, s. 1; 1983, c. 81, s. 2.)

§ 93A-34. License required; application for license; fees; requirements for issuance of license.

(a) No person, partnership, corporation or association shall operate or maintain or offer to operate in this State a private real estate school as defined herein unless a license is first obtained from the Commission in accordance with the provisions of this Article and the rules and regulations promulgated by the Commission under this Article. For licensing purposes, each branch location where a school conducts courses shall be considered a separate school requiring a separate license.

(b) Application for a license shall be filed in the manner and upon the forms prescribed by the Commission for that purpose. The Commission may by rule set nonrefundable application fees not to exceed two hundred fifty dollars ($250.00) for each school location and fifty dollars ($50.00) for each real estate broker prelicensing or postlicensing course. The application for a license shall be accompanied by the appropriate fees and shall contain the following:

(1) Name and address of the applicant and the school;
(2) Names, biographical data, and qualifications of director, administrators and instructors;
(3) Description of school facilities and equipment;
(4) Description of course(s) to be offered and instructional materials to be utilized;
(5) Information on financial resources available to equip and operate the school;
(6) Information on school policies and procedures regarding administration, record keeping, entrance requirements, registration, tuition and fees, grades, student progress, attendance, and student conduct;
(7) Copies of bulletins, catalogues and other official publications;
(8) Copy of bond required by G.S. 93A-36;
(9) Such additional information as the Commission may deem necessary to enable it to determine the adequacy of the instructional program and the ability of the applicant to operate a school in such a manner as would best serve the public interest.

(c) After due investigation and consideration by the Commission, a license shall be issued to the applicant when it is shown to the satisfaction of the Commission that the applicant and school are in compliance with the following standards, as well as the requirements of any supplemental regulations of the Commission regarding these standards:

(1) The program of instruction is adequate in terms of quality, content and duration.
(2) The director, administrators and instructors are adequately qualified by reason of education and experience.
(3) There are adequate facilities, equipment, instructional materials and instructor personnel to provide instruction of good quality.
(4) The school has adopted adequate policies and procedures regarding administration, instruction, record keeping, entrance requirements, registration, tuition and fees, grades, student progress, attendance, and student conduct.
(5) The school publishes and provides to all students upon enrollment a bulletin, catalogue or similar official publication which is certified as being true and correct in content and policy by an authorized school official, and which contains the following information:
    a. Identifying data and publication date;
    b. Name(s) of school and its full-time officials and faculty;
    c. School's policies and procedures relating to entrance requirements, registration, grades, student progress, attendance, student conduct and refund of tuition and fees;

   d. Detailed schedule of tuition and fees;
   e. Detailed course outline of all courses offered.

(6) Adequate records as prescribed by the Commission are maintained in regard to grades, attendance, registration and financial operations.

(7) Institutional standards relating to grades, attendance and progress are enforced in a satisfactory manner.

(8) The applicant is financially sound and capable of fulfilling educational commitments made to students.

(9) The school's owner(s), director, administrators and instructors are of good reputation and character.

(10) The school's facilities and equipment comply with all applicable local, State and federal laws and regulations regarding health, safety, and welfare, including the Americans with Disabilities Act and other laws relating to accessibility standards for places of public accommodation.

(11) The school does not utilize advertising of any type which is false or misleading, either by actual statement, omission or intimation.

(12) Such additional standards as may be deemed necessary by the Commission to assure the conduct of adequate instructional programs and the operation of schools in a manner which will best serve the public interest. (1979, 2nd Sess., c. 1193, s. 1; 1983, c. 81, ss. 1, 2; 1989, c. 563, s. 4; 1993, c. 419, s. 12.; 2000-140, s. 19(b); 2005-395, s. 17.)

Effect of Amendments. — Session Laws 2005-395, s. 17, effective April 1, 2006, substituted "real estate broker prelicensing or postlicensing" for "real estate salesperson or broker prelicensing" in subsection (b); and rewrote subdivision (c)(10).

§ 93A-35. Duration and renewal of licenses; transfer of school ownership.

(a) All licenses issued shall expire on June 30 following the date of issuance.

(b) Licenses shall be renewable annually on July 1, provided that a renewal application accompanied by the appropriate renewal fees has been filed not later than June 1 in the form and manner prescribed by the Commission, and provided further that the applicant and school are found to be in compliance with the standards established for issuance of an original license. The Commission may by rule set nonrefundable renewal fees not to exceed one hundred twenty-five dollars ($125.00) for each school location and twenty-five dollars ($25.00) for each real estate salesperson or broker prelicensing course.

(c) In the event a school is sold or ownership is otherwise transferred, the license issued to the original owner is not transferable to the new owner. Such new owner must make application for an original license as prescribed by this Article and Commission regulations. (1979, 2nd Sess., c. 1193, s. 1; 1983, c. 81, ss. 1, 2; 1989, c. 563, s. 5; 1993, c. 419, s. 13.; 2000-140, s. 19(b).)

§ 93A-36. Execution of bond required; applicability to branch schools; actions upon bond.

(a) Before the Commission shall issue a license the applicant shall execute a bond in the sum of five thousand dollars ($5,000), payable to the State of North Carolina, signed by a solvent guaranty company authorized to do business in the State of North Carolina, and conditioned that the principal in said bond will carry out and comply with each and every contract or agreement, written or verbal, made and entered into by the applicant's school acting by and through its officers and agents with any student who desires to enter such school and to take any courses offered therein and that said principal will refund to such students all amounts collected in tuition and fees in case of failure on the part of the party obtaining a license from the Commission to open and operate a private real estate school or to provide the instruction agreed to or contracted for. Such bond shall be required for each school for which a license is required and shall be first approved by the Commission and then filed with the clerk of superior court of the county in which the school is located, to be recorded by such clerk in a book provided for that purpose. A separate bond shall not be required for each branch of a licensed school.

(b) In any and all cases where the party licensed by the Commission fails to fulfill its obligations under any contract or agreement, written or verbal, made and entered into with any student, then the State of North Carolina, upon the relation of the student(s) entering into said contract or agreement, shall have a cause of action against the principal and surety on the bond herein required for the full amount of payments made to such party, plus court costs and six percent (6%) interest from the date of payment of said amount. Such suits shall be brought in Wake County Superior Court within one year of the alleged default. (1979, 2nd Sess., c. 1193, s. 1; 1983, c. 81, s. 2; 1999-229, s. 12.)

§ 93A-37. Contracts with unlicensed schools and evidences of indebtedness made null and void.

All contracts or agreements entered into on or after October 1, 1980, by private real estate schools, as defined in this Article, with students or prospective students, and all promissory notes or other evidence of indebtedness taken on or after October 1, 1980, in lieu of cash payments by such schools, shall be null and void unless such schools are duly licensed as required by this Article on the date of such contract or agreement or taking of any promissory note or other evidence of indebtedness. (1979, 2nd Sess., c. 1193, s. 1.)

§ 93A-38. Suspension, revocation or denial of license.

The Commission shall have the power to suspend, revoke, deny issuance, or deny renewal of license to operate a private real estate school. In all proceedings to suspend, revoke or deny a license, the provisions of Chapter 150B of the General Statutes shall be applicable. The Commission may suspend, revoke, or deny such license when it finds:

(1) That the applicant for or holder of such license has refused or failed to comply with any of the provisions of this Article or the rules or regulations promulgated thereunder;

(2) That the applicant for or holder of such license has knowingly presented to the Commission false or misleading information relating to matters within the purview of the Commission under this Article;

(3) That the applicant for or holder of such license has presented to its students or prospective students false or misleading information relating to its instructional program, to the instructional programs of other institutions or to employment opportunities;

(4) That the applicant for or holder of such license has failed to comply with the provisions of any contract or agreement entered into with a student;

(5) That the applicant for or holder of such license has at any time refused to permit authorized representatives of the Commission to inspect the school, or failed to make available to them upon request full information relating to matters within the purview of the Commission under the provisions of this Article or the rules or regulations promulgated thereunder; or

(6) That the applicant for or holder of such license or any officer of a corporate licensee or corporation applying for a license, any partner of

a partnership licensee or partnership applying for a license, or any member of a limited liability company licensee or limited liability company applying for a license has pleaded guilty, entered a plea of nolo contendere or been found guilty of a crime involving moral turpitude in any state or federal court. (1979, 2nd Sess., c. 1193, s. 1; 1983, c. 81, s. 2; 1987, c. 827, s. 1; 2005-395, s. 18.)

Effect of Amendments. — Session Laws 2005-395, s. 18, effective April 1, 2006, in subdivision (6), deleted "or" preceding "any partner" and inserted "or any member of a limited liability company licensee or limited liability company applying for a license" preceding "has pleaded guilty."

ARTICLE 4.

Time Shares.

§ 93A-39. Title.

This Article shall be known and may be cited as the "North Carolina Time Share Act." (1983, c. 814, s. 1.)

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

For comment, "North Carolina's Time Share Act: Guidelines for Those Who Buy and Sell Time," see 20 Wake Forest L. Rev. 931 (1984).

§ 93A-40. Registration required of time share projects; real estate license required.

(a) It shall be unlawful for any person in this State to engage or assume to engage in the business of a time share salesperson without first obtaining a real estate broker license issued by the North Carolina Real Estate Commission under the provisions of Article 1 of this Chapter, and it shall be unlawful for a time share developer to sell or offer to sell a time share located in this State without first obtaining a certificate of registration for the time share project to be offered for sale issued by the North Carolina Real Estate Commission under the provisions of this Article.

(b) A person responsible as general partner, corporate officer, joint venturer or sole proprietor who intentionally acts as a time share developer, allowing the offering of sale or the sale of time shares to a purchaser, without first obtaining registration of the time share project under this Article shall be guilty of a Class I felony. (1983, c. 814, s. 1; 1987, c. 516, s. 16.; 2000-140, s. 19(b); 2005-395, s. 19.)

Effect of Amendments. — Session Laws 2005-395, s. 19, effective April 1, 2006, in subsection (a), substituted "It shall" for "From and after July 1, 1984, it shall" and deleted "or salesperson" following "broker."

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-41. Definitions.

When used in this Article, unless the context otherwise requires, the term:

(1) "Commission" means the North Carolina Real Estate Commission;

(2) "Developer" means any person or entity which creates a time share or a time share project or program, purchases a time share for purpose

of resale, or is engaged in the business of selling its own time shares and shall include any person or entity who controls, is controlled by, or is in common control with the developer which is engaged in creating or selling time shares for the developer, but a person who purchases a time share for his or her occupancy, use, and enjoyment shall not be deemed a developer;

(3) "Enrolled" means paid membership in exchange programs or membership in an exchange program evidenced by written acceptance or confirmation of membership;

(4) "Exchange company" means any person operating an exchange program;

(5) "Exchange program" means any opportunity or procedure for the assignment or exchange of time shares among purchasers in the same or other time share project;

(5a) "Independent escrow agent" means a licensed attorney located in this State or a financial institution located in this State;

(6) "Managing agent" means a person who undertakes the duties, responsibilities, and obligations of the management of a time share program;

(7) "Person" means one or more natural persons, corporations, partnerships, associations, trusts, other entities, or any combination thereof;

(7a) "Project broker" means a natural person licensed as a real estate broker and designated by the developer to supervise brokers at the time share project;

(8) "Purchaser" means any person other than a developer or lender who owns or acquires an interest or proposes to acquire an interest in a time share;

(9) "Time share" means a right to occupy a unit or any of several units during five or more separated time periods over a period of at least five years, including renewal options, whether or not coupled with a freehold estate or an estate for years in a time share project or a specified portion thereof, including, but not limited to, a vacation license, prepaid hotel reservation, club membership, limited partnership, vacation bond, or a plan or system where the right to use is awarded or apportioned on the basis of points, vouchers, split, divided, or floating use;

(9a) "Time share instrument" means an instrument transferring a time share or any interest, legal or beneficial, in a time share to a purchaser, including a contract, installment contract, lease, deed, or other instrument;

(10) "Time share program" means any arrangement for time shares whereby real property has been made subject to a time share;

(11) "Time share project" means any real property that is subject to a time share program;

(11a) "Time share registrar" means a natural person who is designated by the developer to record or cause time share instruments and lien releases to be recorded and to fulfill the other duties imposed by this Article;

(12) "Time share salesperson" means a person who sells or offers to sell on behalf of a developer a time share to a purchaser; and

(13) "Time share unit" or "unit" means the real property or real property improvement in a project which is divided into time shares and designated for separate occupancy and use. (1983, c. 814, s. 1; 1985, c. 578, s. 1; 1999-229, ss. 13, 14.; 2000-140, s. 19(b); 2005-395, s. 20.)

Effect of Amendments. — Session Laws 2005-395, s. 20, effective April 1, 2006, deleted "and salespersons" following "brokers" in subdivision (7a).

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-42. Time shares deemed real estate.

(a) A time share is deemed to be an interest in real estate, and shall be governed by the law of this State relating to real estate.

(b) A purchaser of a time share may in accordance with G.S. 47-18 register the time share instrument by which the purchaser acquired the interest and upon such registration shall be entitled to the protection provided by Chapter 47 of the General Statutes for the recordation of other real property instruments. A time share instrument transferring or encumbering a time share shall not be rejected for recordation because of the nature or duration of that estate, provided all other requirements necessary to make an instrument recordable are complied with.

(c) The developer shall record or cause to be recorded a time share instrument:

(1) Not less than six days nor more than 45 days following the execution of the contract of sale by the purchaser; or

(2) Not later than 180 days following the execution of the contract of sale by the purchaser, provided that all payments made by the purchaser shall be placed by the developer with an independent escrow agent upon the expiration of the 10-day escrow period provided by G.S. 93A-45(c).

(d) The independent escrow agent provided by G.S. 93A-42(c)(2) shall deposit and maintain the purchaser's payments in an insured trust or escrow account in a bank or savings and loan association located in this State. The trust or escrow account may be interest-bearing and the interest earned shall belong to the developer, if agreed upon in writing by the purchaser; provided, however, if the time share instrument is not recorded within the time periods specified in this section, then the interest earned shall belong to the purchaser. The independent escrow agent shall return all payments to the purchaser at the expiration of 180 days following the execution of the contract of sale by the purchaser, unless prior to that time the time share instrument has been recorded. However, if prior to the expiration of 180 days following the execution of the contract of sale, the developer and the purchaser provide their written consent to the independent escrow agent, the developer's obligation to record the time share instrument and the escrow period may be extended for an additional period of 120 days. Upon recordation of the time share instrument, the independent escrow agent shall pay the purchaser's funds to the developer. Upon request by the Commission, the independent escrow agent shall promptly make available to the Commission inspection of records of money held by the independent escrow agent.

(e) In no event shall the developer be required to record a time share instrument if the purchaser is in default of the purchaser's obligations.

(f) Recordation under the provisions of this section of the time share instrument shall constitute delivery of that instrument from the developer to the purchaser. (1983, c. 814, s. 1; 1985, c. 578, ss. 2, 3; 1989, c. 302; 2001-487, s. 23(i).)

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-43. Partition.

When a time share is owned by two or more persons as tenants in common or as joint tenants either may seek a partition by sale of that interest but no purchaser of a time share may maintain an action for partition by sale or in kind of the unit in which such time share is held. (1983, c. 814, s. 1.)

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-44. Public offering statement.

Each developer shall fully and conspicuously disclose in a public offering statement:

(1) The total financial obligation of the purchaser, which shall include the initial purchase price and any additional charges to which the purchaser may be subject;

(2) Any person who has or may have the right to alter, amend or add to charges to which the purchaser may be subject and the terms and conditions under which such charges may be imposed;

(3) The nature and duration of each agreement between the developer and the person managing the time share program or its facilities;

(4) The date of availability of each amenity and facility of the time share program when they are not completed at the time of sale of a time share;

(5) The specific term of the time share;

(6) The purchaser's right to cancel within five days of execution of the contract and how that right may be exercised under G.S. 93A-45;

(7) A statement that under North Carolina law an instrument conveying a time share must be recorded in the Register of Deeds Office to protect that interest; and

(8) Any other information which the Commission may by rule require.

The public offering statement shall also contain a one page cover containing a summary of the text of the statement. (1983, c. 814, s. 1.)

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-45. Purchaser's right to cancel; escrow; violation.

(a) A developer shall, before transfer of a time share and no later than the date of any contract of sale, provide a prospective purchaser with a copy of a public offering statement containing the information required by G.S. 93A-44. The contract of sale is voidable by the purchaser for five days after the execution of the contract. The contract shall conspicuously disclose the purchaser's right to cancel under this subsection and how that right may be exercised. The purchaser may not waive this right of cancellation. Any oral or written declaration or instrument that purports to waive this right of cancellation is void.

(b) A purchaser may elect to cancel within the time period set out in subsection (a) by hand delivering or by mailing notice to the developer or the time share salesperson. Cancellation under this section is without penalty and upon receipt of the notice all payments made prior to cancellation must be refunded immediately.

(c) Any payments received by a time share developer or time share salesperson in connection with the sale of the time share shall be immediately deposited by such developer or salesperson in a trust or escrow account in an insured bank or savings and loan association in North Carolina and shall remain in such account for 10 days or cancellation by the purchaser, whichever occurs first. Payments held in such trust or escrow accounts shall be deemed to belong to the purchaser and not the developer. In lieu of such escrow requirements, the Commission shall have the authority to accept, in its discretion, alternative financial assurances adequate to protect the purchaser's interest during the contract cancellation period, including but not limited to a surety bond, corporate bond, cash deposit or irrevocable letter of credit in an amount equal to the escrow requirements.

(d) If a developer fails to provide a purchaser to whom a time share is transferred with the statement as required by subsection (a), the purchaser, in addition to any rights to damages or other relief, is entitled to receive from the developer an amount equal to ten percent (10%) of the sales price of the time share not to exceed three thousand dollars ($3,000). A receipt signed by the purchaser stating that the purchaser has received the statement required by subsection (a) is prima facie evidence of delivery of the statement. (1983, c. 814, s. 1; 1985, c. 578, s. 4.; 2000-140, s. 19(b); 2001-487, s. 23(j).)

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-46. Prizes.

An advertisement of a time share which includes the offer of a prize or other inducement shall fully comply with the provisions of Chapter 75 of the General Statutes. (1983, c. 814, s. 1.)

§ 93A-47. Time shares proxies.

No proxy, power of attorney or similar device given by the purchaser of a time share regarding the management of the time share program or its facilities shall exceed one year in duration, but the same may be renewed from year to year. (1983, c. 814, s. 1.)

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-48. Exchange programs.

(a) If a purchaser is offered the opportunity to subscribe to any exchange program, the developer shall, except as provided in subsection (b), deliver to the purchaser, prior to the execution of (i) any contract between the purchaser and the exchange company, and (ii) the sales contract, at least the following information regarding the exchange program:

(1) The name and address of the exchange company;

(2) The names of all officers, directors, and shareholders owning five percent (5%) or more of the outstanding stock of the exchange company;

(3) Whether the exchange company or any of its officers or directors has any legal or beneficial interest in any developer or managing agent for any time share project participating in the exchange program and, if so, the name and location of the time share project and the nature of the interest;

(4) Unless the exchange company is also the developer a statement that the purchaser's contract with the exchange company is a contract separate and distinct from the sales contract;

(5) Whether the purchaser's participation in the exchange program is dependent upon the continued affiliation of the time share project with the exchange program;

(6) Whether the purchaser's membership or participation, or both, in the exchange program is voluntary or mandatory;

(7) A complete and accurate description of the terms and conditions of the purchaser's contractual relationship with the exchange company and the procedure by which changes thereto may be made;

(8) A complete and accurate description of the procedure to qualify for and effectuate exchanges;

(9) A complete and accurate description of all limitations, restrictions, or priorities employed in the operation of the exchange program, including, but not limited to, limitations on exchanges based on seasonality, unit size, or levels of occupancy, expressed in boldfaced type, and, in the event that such limitations, restrictions, or priorities are not uniformly applied by the exchange program, a clear description of the manner in which they are applied;

(10) Whether exchanges are arranged on a space available basis and whether any guarantees of fulfillment of specific requests for exchanges are made by the exchange program;

(11) Whether and under what circumstances an owner, in dealing with the exchange company, may lose the use and occupancy of the owner's time share in any properly applied for exchange without being provided with substitute accommodations by the exchange company;

(12) The expenses, fees or range of fees for participation by owners in the exchange program, a statement whether any such fees may be altered by the exchange company, and the circumstances under which alterations may be made;

(13) The name and address of the site of each time share project or other property which is participating in the exchange program;

(14) The number of units in each project or other property participating in the exchange program which are available for occupancy and which qualify for participation in the exchange program, expressed within the following numerical groupings, 1-5, 6-10, 11-20, 21-50 and 51, and over;

(15) The number of owners with respect to each time share project or other property which are eligible to participate in the exchange program expressed within the following numerical groupings, 1-100, 101-249, 250-499, 500-999, and 1,000 and over, and a statement of the criteria used to determine those owners who are currently eligible to participate in the exchange program;

(16) The disposition made by the exchange company of time shares deposited with the exchange program by owners eligible to participate in the exchange program and not used by the exchange company in effecting exchanges;

(17) The following information which, except as provided in subsection (b) below, shall be independently audited by a certified public accountant in accordance with the standards of the Accounting Standards Board of the American Institute of Certified Public Accountants and reported for each year no later than July 1, of the succeeding year:

a. The number of owners enrolled in the exchange program and such numbers shall disclose the relationship between the exchange company and owners as being either fee paying or gratuitous in nature;

b. The number of time share projects or other properties eligible to participate in the exchange program categorized by those having a contractual relationship between the developer or the association and the exchange company and those having solely a contractual relationship between the exchange company and owners directly;

c. The percentage of confirmed exchanges, which shall be the number of exchanges confirmed by the exchange company divided by the number of exchanges properly applied for, together with a complete and accurate statement of the criteria used to determine whether an exchange requested was properly applied for;

d. The number of time shares or other intervals for which the exchange company has an outstanding obligation to provide an exchange to an owner who relinquished a time share or interval during the year in exchange for a time share or interval in any future year; and

e. The number of exchanges confirmed by the exchange company during the year; and

(18) A statement in boldfaced type to the effect that the percentage described in sub-subdivision c. of subdivision (17) of this subsection is a summary of the exchange requests entered with the exchange company in the period reported and that the percentage does not indicate a purchaser's/owner's probabilities of being confirmed to any specific choice or range of choices, since availability at individual locations may vary.

The purchaser shall certify in writing to the receipt of the information required by this subsection and any other information which the Commission may by rule require.

(b) The information required by subdivisions (a)(2), (3), (13), (14), (15), and (17) shall be accurate as of December 31 of the year preceding the year in which the information is delivered, except for information delivered within the first 180 days of any calendar year which shall be accurate as of December 31 of the year two years preceding the year in which the information is delivered to the purchaser. The remaining information required by subsection (a) shall be accurate as of a date which is no more than 30 days prior to the date on which the information is delivered to the purchaser.

(c) In the event an exchange company offers an exchange program directly to the purchaser or owner, the exchange company shall deliver to each purchaser or owner, concurrently with the offering and prior to the execution of any contract between the purchaser or owner and the exchange company the information set forth in subsection (a) above. The requirements of this paragraph shall not apply to any renewal of a contract between an owner and an exchange company.

(d) All promotional brochures, pamphlets, advertisements, or other materials disseminated by the exchange company to purchasers in this State which contain the percentage of confirmed exchanges described in (a)(17)c. must include the statement set forth in (a)(18). (1983, c. 814, s. 1; 2001-487, s. 23(k).)

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-49. Service of process on exchange company.

Any exchange company offering an exchange program to a purchaser shall be deemed to have made an irrevocable appointment of the Commission to receive service of lawful process in any proceeding against the exchange company arising under this Article. (1983, c. 814, s. 1.)

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-50. Securities laws apply.

The North Carolina Securities Act, Chapter 78A, shall also apply, in addition to the laws relating to real estate, to time shares deemed to be investment contracts or to other securities offered with or incident to a time share; provided, in the event of such applicability of the North Carolina Securities Act, any offer or sale of time shares registered under this Article shall not be subject to the provisions of G.S. 78A-24 and any real estate broker registered under Article 1 of this Chapter shall not be subject to the provisions of G.S. 78A-36. (1983, c. 814, s. 1.; 2000-140, s. 19(b); 2005-395, s. 21.)

Effect of Amendments. — Session Laws 2005-395, s. 21, effective April 1, 2006, deleted "or salesperson" following "broker" in the last sentence.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-51. Rule-making authority.

The Commission shall have the authority to adopt rules and regulations that are not inconsistent with the provisions of this Article and the General Statutes of North Carolina. The Commission may prescribe forms and procedures for submitting information to the Commission. (1983, c. 814, s. 1.)

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-52. Application for registration of time share project; denial of registration; renewal; reinstatement; and termination of developer's interest.

(a) Prior to the offering in this State of any time share located in this State, the developer of the time share project shall make written application to the Commission for the registration of the project. The application shall be accompanied by a fee in an amount fixed by the Commission but not to exceed one thousand five hundred dollars ($1,500), and shall include a description of the project, copies of proposed time share instruments including public offering statements, sale contracts, deeds, and other documents referred to therein, information pertaining to any marketing or managing entity to be employed by the developer for the sale of time shares in a time share project or the management of the project, information regarding any exchange program available to the purchaser, an irrevocable appointment of the Commission to receive service of any lawful process in any proceeding against the developer or the developer's time share salespersons arising under this Article, and such other information as the Commission may by rule require.

Upon receipt of a properly completed application and fee and upon a determination by the Commission that the sale and management of the time shares in the time share project will be directed and conducted by persons of good moral character, the Commission shall issue to the developer a certificate of registration authorizing the developer to offer time shares in the project for sale. The Commission shall within 15 days after receipt of an incomplete application, notify the developer by mail that the Commission has found specified deficiencies, and shall, within 45 days after the receipt of a properly completed application, either issue the certificate of registration or notify the developer by mail of any specific objections to the registration of the project. The certificate shall be prominently displayed in the office of the developer on the site of the project.

The developer shall promptly report to the Commission any and all changes in the information required to be submitted for the purpose of the registration. The developer shall also immediately furnish the Commission complete information regarding any change in its interest in a registered time share project. In the event a developer disposes of, or otherwise terminates its interest in a time share project, the developer shall certify to the Commission in writing that its interest in the time share project is terminated and shall return to the Commission for cancellation the certificate of registration.

(b) In the event the Commission finds that there is substantial reason to deny the application for registration as a time share project, the Commission shall notify the applicant that such application has been denied and shall afford the applicant an opportunity for a hearing before the Commission to show cause why the application should not be denied. In all proceedings to deny a certificate of registration, the provisions of Chapter 150B of the General Statutes shall be applicable.

(c) The acceptance by the Commission of an application for registration shall not constitute the approval of its contents or waive the authority of the Commission to take disciplinary action as provided by this Article.

(d) All certificates of registration granted and issued by the Commission under the provisions of this Article shall expire on the 30th day of June following issuance thereof, and shall become invalid after such date unless reinstated. Renewal of such certificate may be effected at any time during the month of June preceding the date of expiration of such registration upon proper application to the Commission and by the payment of a renewal fee fixed by the Commission but not to exceed one thousand five hundred dollars ($1,500) for each time share project. The developer shall, when making application for renewal, also provide a copy of the report required in G.S. 93A-48. Each certificate reinstated after the expiration date thereof shall be subject to a fee of fifty dollars ($50.00) in addition to the required renewal fee. In the event a time share developer fails to reinstate the registration within 12 months after the expiration date thereof, the Commission may, in its discretion, consider the time share project as not having been previously registered, and thereby subject to the provisions of this Article relating to the issuance of an original certificate. Duplicate certificates may be issued by the Commission upon payment of a fee of one dollar ($1.00) by the registrant developer. Except as prescribed by Commission rules, all fees paid pursuant to this Article shall be nonrefundable. (1983, c. 814, s. 1; 1985, c. 578, s. 5; 1987, c. 827, s. 1; 1999-229, s. 15.; 2000-140, s. 19(b); 2005-395, s. 22.)

Effect of Amendments. — Session Laws 2005-395, s. 22, effective April 1, 2006, in subsection (a), substituted "one thousand five hundred dollars ($1,500)" for "fifteen hundred dollars ($1500)" in the second sentence and inserted "time share" preceding "salespersons" in the last sentence; and deleted "late filing" preceding "fee of fifty" in the fourth sentence of subsection (d).

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-53. Register of applicants; roster of registrants; registered projects; financial report to Secretary of State.

(a) The Executive Director of the Commission shall keep a register of all applicants for certificates of registration, showing for each the date of application, name, business address, and whether the certificate was granted or refused.

(b) The Executive Director of the Commission shall also keep a current roster showing the name and address of all time share projects registered with the Commission. The roster shall be kept on file in the office of the Commission and be open to public inspection.

(c) On or before the first day of September of each year, the Commission shall file with the Secretary of State a copy of the roster of time share projects registered with the Commission and a report containing a complete statement of income received by the Commission in connection with the registration of time share projects for the preceding fiscal year ending June 30th attested by the affidavit of the Executive Director of the Commission. The report shall be made a part of those annual reports required under the provisions of G.S. 93A-5. (1983, c. 814, s. 1.)

§ 93A-54. Disciplinary action by Commission.

(a) The Commission has power to take disciplinary action. Upon its own motion, or on the verified complaint of any person, the Commission may investigate the actions of any time share salesperson, developer, or project broker of a time share project registered under this Article, or any other person or entity who shall assume to act in such capacity. If the Commission finds probable cause that a time share salesperson, developer, or project broker has violated any of the provisions of this Article, the Commission may hold a hearing on the allegations of misconduct.

The Commission has the power to suspend or revoke at any time a real estate license issued to a time share salesperson or project broker, or a certificate of registration of a time share project issued to a developer; or to reprimand or censure such salesperson, developer, or project broker; or to fine such developer in the amount of five hundred dollars ($500.00) for each violation of this Article, if, after a hearing, the Commission adjudges either the salesperson, developer, or project broker to be guilty of:

(1) Making any willful or negligent misrepresentation or any willful or negligent omission of material fact about any time share or time share project;

(2) Making any false promises of a character likely to influence, persuade, or induce;

(3) Pursuing a course of misrepresentation or making of false promises through agents, salespersons, advertising or otherwise;

(4) Failing, within a reasonable time, to account for all money received from others in a time share transaction, and failing to remit such monies as may be required in G.S. 93A-45 of this Article;

(5) Acting as a time share salesperson or time share developer in a manner as to endanger the interest of the public;

(6) Paying a commission, salary, or other valuable consideration to any person for acts or services performed in violation of this Article;

(7) Any other conduct which constitutes improper, fraudulent, or dishonest dealing;

(8) Performing or undertaking to perform any legal service as set forth in G.S. 84-2.1, or any other acts not specifically set forth in that section;

(9) Failing to deposit and maintain in a trust or escrow account in an insured bank or savings and loan association in North Carolina all money received from others in a time share transaction as may be required in G.S. 93A-45 of this Article or failing to place with an independent escrow agent the funds of a time share purchaser when required by G.S. 93A-42(c);

(10) Failing to deliver to a purchaser a public offering statement containing the information required by G.S. 93A-44 and any other disclosures that the Commission may by regulation require;

(11) Failing to comply with the provisions of Chapter 75 of the General Statutes in the advertising or promotion of time shares for sale, or failing to assure such compliance by persons engaged on behalf of a developer;

(12) Failing to comply with the provisions of G.S. 93A-48 in furnishing complete and accurate information to purchasers concerning any exchange program which may be offered to such purchaser;

(13) Making any false or fraudulent representation on an application for registration;

(14) Violating any rule or regulation promulgated by the Commission;

(15) Failing to record or cause to be recorded a time share instrument as required by G.S. 93A-42(c), or failing to provide a purchaser the protection against liens required by G.S. 93A-57(a); or

(16) Failing as a time share project broker to exercise reasonable and adequate supervision of the conduct of sales at a project or location by the brokers and salespersons under the time share project broker's control.

(a1) The clear proceeds of fines collected pursuant to subsection (a) of this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(b) Following a hearing, the Commission shall also have power to suspend or revoke any certificate of registration issued under the provisions of this Article or to reprimand or censure any developer when the registrant has been convicted or has entered a plea of guilty or no contest upon which final judgment is entered by a court of competent jurisdiction in this State, or any other state, of the criminal offenses of: embezzlement, obtaining money under false pretense, fraud, forgery, conspiracy to defraud, or any other offense involving moral turpitude which would reasonably affect the developer's performance in the time share business.

(c) The Commission may appear in its own name in superior court in actions for injunctive relief to prevent any person or entity from violating the provisions of this Article or rules promulgated by the Commission. The superior court shall have the power to grant these injunctions even if criminal prosecution has been or may be instituted as a result of the violations, or regardless of whether the person or entity has been registered by the Commission.

(d) Each developer shall maintain or cause to be maintained complete records of every time share transaction including records pertaining to the deposit, maintenance, and withdrawal of money required to be held in a trust or escrow account, or as otherwise required by the Commission, under G.S. 93A-45 of this Article. The Commission may inspect these records periodically without prior notice and may also inspect these records whenever the Commission determines that they are pertinent to an investigation of any specific complaint against a registrant.

(e) When a licensee is accused of any act, omission, or misconduct under this Article which would subject the licensee to disciplinary action, the licensee may, with the consent and approval of the Commission, surrender the licensee's license and all the rights and privileges pertaining to it for a period of time to be established by the Commission. A licensee who surrenders a license shall not be eligible for, or submit any application for, licensure as a real estate broker or registration of a time share project during the period of license surrender. For the purposes of this section, the term licensee shall include a time share developer. (1983, c. 814, s. 1; 1985, c. 578, ss. 6-10; 1987, c. 516, ss. 17, 18; 1998-215, s. 138.; 2000-140, s. 19(b); 2001-487, s. 23(l); 2005-395, s. 23.)

Effect of Amendments. — Session Laws 2005-395, s. 23, effective April 1, 2006, substituted "salespersons" for "salesperson" preceding "advertising" in subdivision (a)(3); and deleted "or salesperson" preceding "or registration" in subsection (e).

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-55. Private enforcement.

The provisions of the Article shall not be construed to limit in any manner the right of a purchaser or other person injured by a violation of this Article to bring a private action. (1983, c. 814, s. 1.)

§ 93A-56. Penalty for violation of Article.

Except as provided in G.S. 93A-40(b) and G.S. 93A-58, any person violating the provisions of this Article shall be guilty of a Class 1 misdemeanor. (1983, c. 814, s. 1; 1985, c. 578, s. 11; 1987, c. 516, s. 19; 1993, c. 539, s. 658; 1994, Ex. Sess., c. 24, s. 14(c).)

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-57. Release of liens.

(a) Prior to any recordation of the instrument transferring a time share, the developer shall record and furnish notice to the purchaser of a release or subordination of all liens affecting that time share, or shall provide a surety bond or insurance against the lien from a company acceptable to the Commission as provided for liens on real estate in this State, or such underlying lien document shall contain a provision wherein the lienholder subordinates its rights to that of a time share purchaser who fully complies with all of the provisions and terms of the contract of sale.

(b) Unless a time share owner or a time share owner who is his predecessor in title agree otherwise with the lienor, if a lien other than a mortgage or deed of trust becomes effective against more than one time share in a time share project, any time share owner is entitled to a release of his time share from a lien upon payment of the amount of the lien attributable to his time share. The amount of the payment must be proportionate to the ratio that the time share owner's liability bears to the liabilities of all time share owners whose interests are subject to the lien. Upon receipt of payment, the lien holder shall promptly deliver to the time share owner a release of the lien covering that time share. After payment, the managing agent may not assess or have a lien against that time share for any portion of the expenses incurred in connection with that lien. (1983, c. 814, s. 1; 1985, c. 578, s. 12.)

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-58. Registrar required; criminal penalties; project broker.

(a) Every developer of a registered project shall, by affidavit filed with the Commission, designate a natural person to serve as time share registrar for its registered projects. The registrar shall be responsible for the recordation of time share instruments and the release of liens required by G.S. 93A-42(c) and G.S. 93A-57(a). A developer may, from time to time, change the designated time share registrar by proper filing with the Commission and by otherwise complying with this subsection. No sales or offers to sell shall be made until the registrar is designated for a time share project.

The registrar has the duty to ensure that the provisions of this Article are complied with in a time share project for which the person is registrar. No registrar shall record a time share instrument except as provided by this Article.

(b) A time share registrar is guilty of a Class I felony if he or she knowingly or recklessly fails to record or cause to be recorded a time share instrument as required by this Article.

A person responsible as general partner, corporate officer, joint venturer or sole proprietor of the developer of a time share project is guilty of a Class I felony if the person intentionally allows the offering for sale or the sale of time share to purchasers without first designating a time share registrar.

(c) The developer shall designate for each project and other locations where time shares are sold or offered for sale a project broker. The project broker shall act as supervising broker for all time share salespersons at the project or other location and shall directly, personally, and actively supervise all such persons at the project or other location in a manner to reasonably ensure that the sale of time shares will be conducted in accordance with the provisions of this Chapter. (1985, c. 578, s. 13; 1987, c. 516, s. 20; 1993, c. 539, s. 1289; 1994, Ex. Sess., c. 24, s. 14(c).; 2000-140, s. 19(b); 2001-487, s. 23(m); 2005-395, s. 24.)

Effect of Amendments. — Session Laws 2005-395, s. 24, effective April 1, 2006, in subsection (c), substituted "time share" for "persons licensed as" and "such persons at the" for "persons licensed as brokers or salespersons at the."

§ 93A-59. Preservation of time share purchaser's claims and defenses.

(a) For one year following the execution of an instrument of indebtedness for the purchase of a time share, the purchaser of a time share may assert against the seller, assignee of the seller, or other holder of the instrument of indebtedness, any claims or defenses available against the developer or the original seller, and the purchaser may not waive the right to assert these claims or defenses in connection with a time share purchase. Any recovery by the purchaser on a claim asserted against an assignee of the seller or other holder of the instrument of indebtedness shall not exceed the amount paid by the purchaser under the instrument. A holder shall be the person or entity with the rights of a holder as set forth in G.S. 25-3-301.

(b) Every instrument of indebtedness for the purchase of a time share shall set forth the following provision in a clear and conspicuous manner:

> "NOTICE
>
> FOR A PERIOD OF ONE YEAR FOLLOWING THE EXECUTION OF THIS INSTRUMENT OF INDEBTEDNESS, ANY HOLDER OF THIS INSTRUMENT OF INDEBTEDNESS IS SUBJECT TO ALL CLAIMS

AND DEFENSES WHICH THE PURCHASER COULD ASSERT AGAINST THE SELLER OF THE TIME SHARE. RECOVERY BY THE PURCHASER SHALL NOT EXCEED AMOUNTS PAID BY THE PURCHASER UNDER THIS INSTRUMENT."

(1985, c. 578, s. 13.)

§§ 93A-60 through 93A-69: Reserved for future codification purposes.

ARTICLE 5.

Real Estate Appraisers.

§§ 93A-70 through 93A-81: Repealed by Session Laws 1993, c. 419, s. 7.

Editor's Note. — Session Laws 1989, c. 563, through the enactment of Article 5, gave the Real Estate Commission authority to license and certify appraisers, with the Appraisal Board created within the Commission as an advisory board. The article was originally enacted as G.S. 93A-60 to 93A-71, but was renumbered as G.S. 93A-70 to 93A-81 at the direction of the Revisor of Statutes. Session Laws 1993, c. 419, s. 7 repealed Article 5 effective July 1, 1994. Section 6 of Session Laws 1993, c. 419, also effective July 1, 1994, enacted the North Carolina Appraisers Act, G.S. 93E-1-1 et seq., which created the North Carolina Appraisal Board as an independent body.

Chapter 93B.

Occupational Licensing Boards.

Sec.
93B-1. Definitions.
93B-2. Annual reports required; contents; open to inspection.
93B-3. Register of persons licensed; information as to licensed status of individuals.
93B-4. Audit of Occupational Licensing Boards; payment of costs.
93B-5. Compensation and employment of board members.
93B-6. Use of funds for lobbying prohibited.
93B-7. Rental of state-owned office space.
93B-8. Examination procedures.
93B-9. Age requirements.
93B-10. Expiration of term of appointment of board member.
Sec.
93B-11. Interest from State Treasurer's Investment Program.
93B-12. Information from licensing boards having authority over health care providers.
93B-13. Revocation when licensing privilege forfeited for nonpayment of child support or for failure to comply with subpoena.
93B-14. Information on applicants for licensure.
93B-15. Payment of license fees by members of the armed forces.
93B-16. Occupational board liability for negligent acts.

§ 93B-1. Definitions.

As used in this Chapter:

"License" means any license (other than a privilege license), certificate, or other evidence of qualification which an individual is required to obtain before he may engage in or represent himself to be a member of a particular profession or occupation.

"Occupational licensing board" means any board, committee, commission, or other agency in North Carolina which is established for the primary purpose of regulating the entry of persons into, and/or the conduct of persons within, a particular profession or occupation, and which is authorized to issue licenses; "occupational licensing board" does not include State agencies, staffed by full-time State employees, which as a part of their regular functions may issue licenses. (1957, c. 1377, s. 1.)

Waiver of Deadlines, Fees, and Penalties for Deployed Military Personnel. — Session Laws 2003-300, ss. 1 to 3, as amended by Session Laws 2004-203, s. 80, provides: "Deployed Military Personnel Defined. — As used in this act, the term 'deployed military personnel' includes both of the following:

"(1) A member of the armed forces or the armed forces reserves of the United States on active duty in support of Operation Iraqi Freedom on or after January 1, 2003.

"(2) A member of the North Carolina Army National Guard or the North Carolina Air National Guard called to active duty in support of Operation Iraqi Freedom on or after January 1, 2003.

"Proof. — Verification by the military member's command specifying deployment is conclusive evidence of the military member's deployment.

"Waiver of Deadlines, Fees, and Penalties. — Except as prohibited by the Constitution, the Governor may extend deadlines and waive penalties or fees as is necessary to alleviate hardship created for deployed military personnel serving in Operation Iraqi Freedom. This authority includes the authority to do all of the following:

"(1) Extend for up to 90 days from the end of deployment the validity of a permanent or temporary drivers license issued under G.S. 20-7 to deployed military personnel.

"(2) Waive civil penalties and restoration fees under G.S. 20-309 for any deployed military personnel whose motor vehicle liability insurance lapsed during the period of deployment or within 90 days after the military member returned to North Carolina if the military member certifies to the Division of Motor Vehicles that the motor vehicle was not driven on the highway by anyone during the period in which the motor vehicle was uninsured and that the owner now has liability insurance on the motor vehicle.

"(3) Allow up to 90 days from the end of deployment for any deployed military personnel to renew an occupational license. During the period of deployment or active duty and until the expiration of the 90-day period provided for in this subdivision, expired occupational licenses that are within the scope of this act remain valid, as if they had not expired. For the purposes of this section, the term 'occupational license' means any license (other than a privilege license), certificate, or other evidence of qualification that an individual is required to obtain before the individual may engage in or represent himself or herself to be a member of a particular profession or occupation.

"(4) Require that any renewal fee applicable to the renewal of a license under subdivision (3) of this section be prorated over the period covered by the license and reduced in proportion to the period of time that the licensee was deployed outside the State."

For similar provisions concerning "Operation Enduring Freedom" or "Operation Noble Eagle," including other operations with differing names arising out of the same occurrence, see Session Laws 2001-508, ss. 3 to 5(b).

Encourage Certain Occupational Licensing Boards to Develop Policies for Expediting the Licensing Process for Military Spouses. — Session Laws 2005-445, ss. 2.1 and 2.2, provide: "Findings. — The General Assembly finds that:

"(1) According to the Department of Defense, the unemployment rate of military spouses is three times greater than the average American spouse in the same age group;

"(2) The mobile military lifestyle causes some military spouses to endure long periods of unemployment and, thus, loss of income; and

"(3) Professional licensing requirements often differ among states, which in turn may limit career advancement or deter reentry into the workforce for military families moving to new locations.

"In an effort to support military personnel and their families, each occupational licensing board in this State is encouraged to develop policies that would make the licensing process for military spouses more efficient and expedient. In expediting the licensing process, an occupational licensing board shall review its current licensing process especially as it relates to military personnel. After reviewing the licensing process, the licensing board may develop and implement policies regarding licensure that provide for assistance to military spouses and dependents to ensure a smooth process when military families move into this State or are transferred out of this State. Implementation of these policies shall not apply to occupational licensing boards regulating health care professionals.

"This section does not apply to health professions or to teaching."

OPINIONS OF ATTORNEY GENERAL

Motor Vehicle Dealers' Advisory Board is not an occupational licensing board as defined in this section. See opinion of Attorney General to Mr. Lester Teal, Controller, 57 N.C.A.G. 77 (1987).

§ 93B-2. Annual reports required; contents; open to inspection.

(a) Each occupational licensing board shall file with the Secretary of State, the Attorney General, and the Joint Legislative Administrative Procedure Oversight Committee an annual report containing all of the following information:

(1) The address of the board, and the names of its members and officers.
(2) The number of persons who applied to the board for examination.
(3) The number who were refused examination.
(4) The number who took the examination.
(5) The number to whom initial licenses were issued.
(6) The number who applied for license by reciprocity or comity.
(7) The number who were granted licenses by reciprocity or comity.
(8) The number of licenses suspended or revoked.
(9) The number of licenses terminated for any reason other than failure to pay the required renewal fee.

(10) The substance of any anticipated request by the occupational licensing board to the General Assembly to amend statutes related to the occupational licensing board.

(11) The substance of any anticipated change in rules adopted by the occupational licensing board or the substance of any anticipated adoption of new rules by the occupational licensing board.

(b) Each occupational licensing board shall file with the Secretary of State, the Attorney General, the Office of State Budget and Management, and the Joint Legislative Administrative Procedure Oversight Committee a financial report that includes the source and amount of all funds credited to the occupational licensing board and the purpose and amount of all funds disbursed by the occupational licensing board during the previous 12-month period.

(c) The reports required by this section shall be open to public inspection. (1957, c. 1377, s. 2; 1969, c. 42; 2006-70, s. 1; 2007-323, s. 23.2.)

Editor's Note. — Session Laws 2006-70, s. 2, provides, in part, that the first reports required by G.S. 93B-2 are due no later than July 1, 2007.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2006-70, s. 1, effective July 1, 2006, designated the formerly undesignated paragraphs as present subsections (a) and (c); in subsection (a), rewrote the introductory language, added subdivisions (10) and (11), and made stylistic changes throughout; and added subsection (b).

Session Laws 2007-323, s. 23.2, effective July 1, 2007, inserted "the Office of State Budget and Management" in subsection (b).

§ 93B-3. Register of persons licensed; information as to licensed status of individuals.

Each occupational licensing board shall prepare a register of all persons currently licensed by the board and shall supplement said register annually by listing the changes made in it by reason of new licenses issued, licenses revoked or suspended, death, or any other cause. The board shall, upon request of any citizen of the State, inform the requesting person as to the licensed status of any individual. (1957, c. 1377, s. 3.)

§ 93B-4. Audit of Occupational Licensing Boards; payment of costs.

The books, records, and operations of each occupational licensing board shall be subject to the oversight of the State Auditor pursuant to Article 5A of Chapter 147 of the General Statutes.

The cost of all audits shall be paid from funds of the occupational licensing board audited. (1957, c. 1377, s. 4; 1965, c. 661; 1973, c. 1301; 1983, c. 913, s. 11.)

§ 93B-5. Compensation and employment of board members.

(a) Board members shall receive as compensation for their services per diem not to exceed one hundred dollars ($100.00) for each day during which they are engaged in the official business of the board.

(b) Board members shall be reimbursed for all necessary travel expenses in an amount not to exceed that authorized under G.S. 138-6(a) for officers and employees of State departments. Actual expenditures of board members in excess of the maximum amounts set forth in G.S. 138-6(a) for travel and subsistence may be reimbursed if the prior approval of the State Director of Budget is obtained and such approved expenditures are within the established and published uniform standards and criteria of the State Director of Budget authorized under G.S. 138-7 for extraordinary charges for hotels, meals, and convention registration for State officers and employees, whenever such charges are the result of required official business of the Board.

(c) Repealed by Session Laws 1981, c. 757, s. 2.

(d) Except as provided herein board members shall not be paid a salary or receive any additional compensation for services rendered as members of the board.

(e) Board members shall not be permanent, salaried employees of said board.

(f) Repealed by Session Laws 1975, c. 765, s. 1. (1957, c. 1377, s. 5; 1973, c. 1303, s. 1; c. 1342, s. 1; 1975, c. 765, s. 1; 1981, c. 757, ss. 1, 2; 1991 (Reg. Sess., 1992), c. 1011, s. 1.)

Cross References. — For compensation and expenses of the Board of Examiners in Optometry, see G.S. 90-122. For compensation and expenses of the Board of Chiropractic Examiners, see G.S. 90-156.

Editor's Note. — As to limitations on use of State aircraft, see Editor's note regarding Session Laws 2001-424, s. 6.12 at G.S. 138-5.

§ 93B-6. Use of funds for lobbying prohibited.

Occupational licensing boards shall not use any funds to promote or oppose in any manner the passage by the General Assembly of any legislation. (1973, c. 1302.)

§ 93B-7. Rental of state-owned office space.

Any occupational licensing board, which financially operates on the licensing fees charged and also occupies state-owned office space, shall pay rent, in a reasonable amount to be determined by the Governor, to the State for the occupancy of such space. (1973, c. 1300.)

§ 93B-8. Examination procedures.

(a) Each applicant for an examination given by any occupational licensing board shall be informed in writing or print of the required grade for passing the examination prior to the taking of such examination.

(b) Each applicant for an examination given by any occupational licensing board shall be identified, for purposes of the examination, only by number rather than by name.

(c) Each applicant who takes an examination given by any occupational licensing board, and does not pass such examination, shall have the privilege to review his examination in the presence of the board or a representative of the board. Except as provided in this subsection, an occupational licensing board shall not be required to disclose the contents of any examination or of any questions which have appeared thereon, or which may appear thereon in the future.

(d) Notwithstanding the provisions of this section, under no circumstances shall an occupational licensing board be required to disclose to an applicant questions or answers to tests provided by recognized testing organizations pursuant to contracts which prohibit such disclosures. (1973, c. 1334, s. 1; 1991, c. 360, s. 1.)

§ 93B-9. Age requirements.

Any other provision notwithstanding, no occupational licensing board may require that an individual be more than 18 years of age as a requirement for receiving a license. (1973, c. 1356.)

§ 93B-10. Expiration of term of appointment of board member.

A board member serving on an occupational and professional licensing board whose term of appointment has expired shall continue to serve until a successor is appointed and qualified. (1973, c. 1373, s. 1.)

§ 93B-11. Interest from State Treasurer's Investment Program.

Any interest earned by an occupational licensing board under G.S. 147-69.3(d) may be used only for the following purposes:

(1) To reduce fees;
(2) Improve services offered to licensees and the public; or
(3) For educational purposes to benefit licensees or the public. (1983, c. 515, s. 2.)

§ 93B-12. Information from licensing boards having authority over health care providers.

(a) Every occupational licensing board having authority to license physicians, physician assistants, nurse practitioners, and nurse midwives in this State shall modify procedures for license renewal to include the collection of information specified in this section for each board's regular renewal cycle. The purpose of this requirement is to assist the State in tracking the availability of health care providers to determine which areas in the State suffer from inequitable access to specific types of health services and to anticipate future health care shortages which might adversely affect the citizens of this State. Occupational licensing boards shall collect, report, and update the following information:

(1) Area of health care specialty practice;
(2) Address of all locations where the licensee practices; and
(3) Other information the occupational licensing board deems relevant to assisting the State in achieving the purpose set out in this section, including social security numbers for research purposes only in matching other data sources.

(b) Every occupational licensing board required to collect information pursuant to subsection (a) of this section shall report and update the information on an annual basis to the Department of Health and Human Services. The Department shall provide this information to programs preparing primary care physicians, physicians assistants, and nurse practitioners upon request by the program and by the Board of Governors of The University of North Carolina. Information provided by the occupational licensing board pursuant to this subsection may be provided in such form as to omit the identity of the health care licensee. (1995, c. 507, s. 23A.4; 1996, 2nd Ex. Sess., c. 17, s. 16.4; 1997-443, s. 11A.118(a).)

§ 93B-13. Revocation when licensing privilege forfeited for nonpayment of child support or for failure to comply with subpoena.

(a) Upon receipt of a court order, pursuant to G.S. 50-13.12 and G.S. 110-142.1, revoking the occupational license of a licensee under its jurisdiction, an occupational licensing board shall note the revocation in its records, report the action within 30 days to the Department of Health and Human Services, and follow the normal postrevocation rules and procedures of the board as if the revocation had been ordered by the board. The revocation shall remain in effect until the board receives certification by the clerk of superior court or the Department of Health and Human Services in an IV-D case that the licensee is no longer delinquent in child support payments, or, as applicable, that the licensee is in compliance with or is no longer subject to the subpoena that was the basis for the revocation.

(b) Upon receipt of notification from the Department of Health and Human Services that a licensee under an occupational licensing board's jurisdiction has forfeited the licensee's occupational license pursuant to G.S. 110-142.1, then the occupational licensing board shall send a notice of intent to revoke or suspend the occupational license of that licensee as provided by G.S. 110-142.1(d). If the license is revoked as provided by the provisions of G.S. 110-142.1, the revocation shall remain in effect until the board receives certification by the designated representative or the child support enforcement agency that the licensee is no longer delinquent in child support payments, or, as applicable, that the licensee is in compliance with or no longer subject to a subpoena that was the basis for the revocation.

(c) If at the time the court revokes a license pursuant to subsection (a) of this section, or if at the time the occupational licensing board revokes a license pursuant to subsection (b) of this section, the occupational licensing board has revoked the same license under the licensing board's disciplinary authority over licensees under its jurisdiction, and that revocation period is greater than the revocation period resulting from forfeiture pursuant to G.S. 50-13.12 or G.S. 110-142.1 then the revocation period imposed by the occupational licensing board applies.

(d) Immediately upon certification by the clerk of superior court or the child support enforcement agency that the licensee whose license was revoked pursuant to subsection (a) or (b) of this section is no longer delinquent in child support payments, the occupational licensing board shall reinstate the license. Immediately upon certification by the clerk of superior court or the child support enforcement agency that the licensee whose license was revoked because of failure to comply with a subpoena is in compliance with or no longer subject to the subpoena, the occupational licensing board shall reinstate the license. Reinstatement of a license pursuant to this section shall be made at no additional cost to the licensee. (1995, c. 538, s. 1.3; 1997-433, s. 5.4; 1997-443, s. 11A.118(a); 1998-17, s. 1; 2003-288, s. 2.)

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number as enacted by Session Laws 1995, c. 538, s. 1.3, having been G.S. 93B-12.

§ 93B-14. Information on applicants for licensure.

Every occupational licensing board shall require applicants for licensure to provide to the Board the applicant's social security number. This information shall be treated as confidential and may be released only as follows:

(1) To the State Child Support Enforcement Program of the Department of Health and Human Services upon its request and for the purpose of enforcing a child support order.

(2) To the Department of Revenue for the purpose of administering the State's tax laws. (1997-433, s. 4.6; 1997-443, s. 11A-122; 1998-17, s. 1; 1998-162, s. 9.)

§ 93B-15. Payment of license fees by members of the armed forces.

An individual who is serving in the armed forces of the United States and to whom G.S. 105-249.2 grants an extension of time to file a tax return is granted an extension of time to pay any license fee charged by an occupational licensing board as a condition of retaining a license granted by the board. The extension is for the same period that would apply if the license fee were a tax. (1998-95, s. 8; 1999-337, s. 12.)

§ 93B-16. Occupational board liability for negligent acts.

(a) An occupational licensing board may purchase commercial insurance of any kind to cover all risks or potential liability of the board, its members, officers, employees, and agents, including the board's liability under Articles 31 and 31A of Chapter 143 of the General Statutes.

(b) Occupational licensing boards shall be deemed State agencies for purposes of Articles 31 and 31A of Chapter 143 of the General Statutes, and board members and employees of occupational licensing boards shall be considered State employees for purposes of Articles 31 and 31A of Chapter 143 of the General Statutes. To the extent an occupational licensing board purchases commercial liability insurance coverage in excess of one hundred fifty thousand dollars ($150,000) per claim for liability arising under Article 31 or 31A of Chapter 143 of the General Statutes, the provisions of G.S. 143-299.4 shall not apply. To the extent that an occupational licensing board purchases commercial insurance coverage for liability arising under Article 31 or 31A of Chapter 143 of the General Statutes, the provisions of G.S. 143-300.6(c) shall not apply.

(c) The purchase of insurance by an occupational licensing board under this section shall not be construed to waive sovereign immunity or any other defense available to the board, its members, officers, employees, or agents in an action or contested matter in any court, agency, or tribunal. The purchase of insurance by an occupational licensing board shall not be construed to alter or expand the limitations on claims or payments established in G.S. 143-299.2 or limit the right of board members, officers, employees, or agents to defense by the State as provided by G.S. 143-300.3. (2002-168, s. 1.)

Chapter 93C.

Watchmakers.

§§ **93C-1 through 93C-18:** Repealed by Session Laws 1977, c. 712, s. 2.

Chapter 93D.

North Carolina State Hearing Aid Dealers and Fitters Board.

Sec.
93D-1. Definitions.
93D-2. Fitting and selling without license unlawful.
93D-3. North Carolina State Hearing Aid Dealers and Fitters Board; composition, organization, duties and compensation.
93D-4. Board may enjoin illegal practices.
93D-5. Requirements for registration; examinations; apprentice licenses.
93D-6. Persons selling in other jurisdictions.
93D-7. Statements of sale.
93D-8. Examination of applicants; issue of license certificate.
Sec.
93D-9. Registration of apprentices.
93D-10. Registration and notice.
93D-11. Annual fees; failure to pay; expiration of license; occupational instruction courses.
93D-12. License to be displayed at office.
93D-13. Discipline, suspension, revocation of licenses; records.
93D-14. Persons not affected.
93D-15. Violation of Chapter.
93D-16. Severability.

§ 93D-1. Definitions.

For the purposes of this Chapter:

(1) "Board" shall mean the North Carolina State Hearing Aid Dealers and Fitters Board.

(2) "Fitting and selling hearing aids" shall mean the evaluation or measurement of the powers or range of human hearing by means of an audiometer or by other means and the consequent selection or adaptation or sale or rental of hearing aids intended to compensate for hearing loss including the making of an impression of the ear.

(3) "Hearing aid" shall mean any instrument or device designed for or represented as aiding, improving or compensating for defective human hearing and any parts, attachments or accessories of such an instrument or device. (1969, c. 999.)

Legal Periodicals. — For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

§ 93D-2. Fitting and selling without license unlawful.

It shall be unlawful for any person to fit or sell hearing aids unless he has first obtained a license from the North Carolina State Hearing Aid Dealers and Fitters Board or is an apprentice working under the supervision of a board licensee. (1969, c. 999; 1981, c. 601, s. 1.)

§ 93D-3. North Carolina State Hearing Aid Dealers and Fitters Board; composition, organization, duties and compensation.

(a) There is hereby created a board whose duty it shall be to carry out the purposes and enforce the provisions of this Chapter, and which shall be known as the "North Carolina State Hearing Aid Dealers and Fitters Board." The Board shall be composed of seven members. Four members who have been actively engaged in the fitting and selling of hearing aids for three years shall be appointed by the Governor. These initial appointments are for the following terms: one for one year, one for two years, one for three years and one for four years. All appointments made on or after July 1, 1981, shall be for terms of three years.

One member shall be appointed by the Governor who shall be a physician practicing in North Carolina, preferably specializing in the field of otolaryngology. All appointments shall be for terms of three years.

One member shall be appointed by the Governor from a list of two audiologists residing in North Carolina, which list shall be compiled by the North Carolina Speech and Hearing Association. This initial appointment shall be for a term of three years. All appointments made on or after July 1, 1981, shall be for a term of three years.

One member shall be appointed by the Governor to represent the interest of the public at large. This member shall have no ties to the hearing aid business nor shall he be an audiologist. The Governor shall appoint the public member not later than July 1, 1981, to serve a term of three years.

All Board members serving on June 30, 1981, shall be eligible to complete their respective terms. No member appointed to a term on or after July 1, 1981, shall serve more than two complete consecutive terms.

Vacancies on the Board shall be filled by appointment of the Governor. Appointees shall serve the unexpired term of their predecessor in office and must be appointed from the same category as their predecessor in office. The members of the Board, before entering their duties, shall respectively take all oaths taken and prescribed for other State officers, in the manner provided by law, which oaths shall be filed in the office of the Secretary of State, and the Board shall have a common seal.

(b) The Board shall choose, at the first regular meeting and annually thereafter, one of its members to serve as president and one as secretary and treasurer. A majority of the Board shall constitute a quorum. The Board shall meet at least once a year, the time and place of the annual meeting and any special meetings to be designated by the president. The secretary and treasurer of the Board shall keep a full record of its proceedings, including a current list of all licensees, which shall at all reasonable times be open to public inspection. The Board is authorized to employ an executive secretary and to provide such assistance as may be required to enable said Board to properly perform its duties.

(c) The Board shall:

(1) Authorize all disbursements necessary to carry out the provisions of this Chapter;

(2) Supervise and administer qualifying examinations to test and determine the knowledge and proficiency of applicants for licenses;

(3) Issue licenses to qualified persons who apply to the Board;

(4) Obtain audiometric equipment and facilities necessary to carry out the examination of applicants for licenses;

(5) Suspend or revoke licenses pursuant to this Chapter;

(6) Make and publish rules, including a code of ethics, that are necessary and proper to regulate the fitting and selling of hearing aids and to carry out the provisions of this Chapter;

(7) Exercise jurisdiction over the hearing of complaints, charges of malpractice including corrupt or unprofessional conduct, and allegations of violations of the Board's rules that are made against any fitter and seller of hearing aids in North Carolina;

(8) Require the periodic inspection and calibration of audiometric testing equipment of persons who are fitting and selling hearing aids;

(9) In connection with any matter within the jurisdiction of the Board, summon and subpoena and examine witnesses under oath and to compel their attendance and the production of books, papers, or other

documents or writings deemed by the Board to be necessary or material to the inquiry. Each summons or subpoena shall be issued under the hand of the secretary and treasurer or the president of the Board and shall have the force and effect of a summons or subpoena issued by a court of record. Any witness who shall refuse or neglect to appear in obedience thereto or to testify or produce books, papers, or other documents or writings required shall be liable to contempt charges. The Board shall pay to any witness subpoenaed before it the fees and per diem as paid witnesses in civil actions in the superior court of the county where such hearing is held;

(10) Inform the Attorney General of any information or knowledge it acquires regarding any "price-fixing" activity whatsoever in connection with the sales and service of hearing aids;

(11) Establish and enforce rules to guarantee that a full refund will be made by the seller of a hearing aid to the purchaser when presented with a written medical opinion of an otolaryngologist that the purchaser's hearing cannot be improved by the use of a hearing aid;

(12) Fund, establish, conduct, approve and sponsor instructional programs for registered apprentices and for persons who hold a license as well as for persons interested in obtaining adequate instruction or programs of study to qualify them for registration to the extent that the Board deems such instructional programs to be beneficial or necessary;

(13) Register persons serving as apprentices as set forth in G.S. 93D-9;

(14) Have the power to set and collect fees in accordance with Chapter 150B of the General Statutes for the items listed in this subdivision and for other items for which this Chapter gives the Board the authority to set a fee:

a. For a continuing education make-up class provided by the Board, a fee not to exceed fifty dollars ($50.00) per person for each day of instruction. The Board may not offer a make-up class that is longer than two days;

b. For a license examination preparation course provided by the Board, a fee not to exceed fifty dollars ($50.00) per person for each day of instruction. The Board may not offer an examination preparation course that is longer than three days;

c. For approval of a continuing education program provider, a fee not to exceed forty dollars ($40.00);

d. For verifying and recording attendance at a continuing education program not provided by the Board, a fee not to exceed fifteen dollars ($15.00) per licensee per program;

e. For providing a voluntary two-day apprentice training workshop, a fee not to exceed one hundred dollars ($100.00) per person, and for providing a three-day voluntary apprentice training workshop, a fee not to exceed one hundred fifty dollars ($150.00) per person;

f. For administering an examination, a fee of three hundred dollars ($300.00); and

(15) Adopt annually a balanced budget prior to the beginning of its fiscal year, against which expenditures shall be reviewed throughout the fiscal year to ensure that expenditures during the year do not exceed receipts for that year plus amounts held by the Board in reserve. Except for monies from charges for photocopying and similar charges, the Board's receipts shall consist of and be limited to funds derived from fees expressly authorized by law.

(d) Members of the Board shall be entitled to travel, per diem, and other expenses authorized by G.S. 93B-5. The expenses shall be paid from the fees and assessments received by the Board under the provisions of this Chapter. No part of these expenses or any other expenses of the Board, in any manner whatsoever, shall be paid out of the State treasury. All moneys received in excess of expense allowance and mileage, as above provided, shall be held by the secretary-treasurer as a special fund for meeting other expenses of the Board and carrying out the provisions of this Chapter.

The Board shall make an annual report of its proceedings in accordance with G.S. 93B-2. (1969, c. 999; 1973, c. 1331, s. 3; c. 1345, ss. 1, 2; 1975, c. 550, s. 1; 1981, c. 601, ss. 2-5; 1987, c. 827, s. 80; 1991, c. 592, s. 1; 2007-406, ss. 1, 2.)

Effect of Amendments. — Session Laws 2007-406, ss. 1 and 2, effective August 21, 2007, substituted "of three hundred dollars ($300.00)" for "not to exceed seventy-five dollars ($75.00)" in subdivision (c)(14)f.; and rewrote subsection (d).

CASE NOTES

Filing of Falsified Equipment Calibration Document as Willful Deceit. — See In re Stuart, 59 N.C. App. 715, 297 S.E.2d 621 (1982).

§ 93D-4. Board may enjoin illegal practices.

The Board may, if it finds that any person is violating any of the provisions of this Chapter, apply to superior court for a temporary or permanent restraining order or injunction to restrain such persons from continuing such illegal practices. If upon application, it appears to the court that such person has violated or is violating the provisions of this Chapter, the court shall issue an order restraining the sale or fitting of hearing aids or other conduct in violation of this Chapter. All such actions by the Board for injunctive relief shall be governed by the Rules of Civil Procedure and Article 37, Chapter 1 of the General Statutes; provided, that injunctive relief may be granted regardless of whether criminal prosecution has been or may be instituted under the provisions of this Chapter. Actions under this section shall be commenced in the superior court district or set of districts as defined in G.S. 7A-41.1 in which the respondent resides or has his principal place of business. (1969, c. 999; 1981, c. 601, s. 6; 1987 (Reg. Sess., 1988), c. 1037, s. 105.)

Editor's Note. — The Rules of Civil Procedure, referred to above, are found in G.S. 1A-1.

§ 93D-5. Requirements for registration; examinations; apprentice licenses.

(a) No person shall begin the fitting and selling of hearing aids in this State unless the person has been issued a license by the Board or is an apprentice working under the supervision of a licensee. Except as hereinafter provided, each applicant for a license shall pay a fee set by the Board, not to exceed two hundred fifty dollars ($250.00), which fee may be prorated by the Board, and shall show to the satisfaction of the Board that the applicant:

(1) Is a person of good moral character.
(2) Is 18 years of age or older.
(3) Has an education equivalent to a four-year course in an accredited high school.
(4) Repealed by Session Laws 2007-406, s. 3, effective August 21, 2007.

(b) Except as hereinafter provided, no license shall be issued to a person until he has successfully passed a qualifying examination administered by the Board.

(c) No license shall be issued to any person until the person has served as an apprentice as set forth in G.S. 93D-9 for a period of at least one year; provided, that this subsection shall not apply to those persons qualified under G.S. 93D-6 nor to those persons holding a license in Audiology issued by the North Carolina Board of Examiners for Speech and Language Pathologist and Audiologist who have undergone 250 hours of supervised activity fitting and selling hearing aids under the direct supervision of a licensed hearing aid dispenser approved by the Board, or have met the licensure requirements under Article 22 of Chapter 90 of the General Statutes and have worked full time for one year fitting and selling hearing aids in the office of and under the direct supervision of an otolaryngologist and have participated in 250 hours of Board-supervised, continuing professional education in fitting hearing aids. (1969, c. 999; 1975, c. 550, s. 2; 1981, c. 601, ss. 7, 8; c. 990, s. 1; 1991, c. 592, s. 2; 2007-406, s. 3.)

Effect of Amendments. — Session Laws 2007-406, s. 3, effective August 21, 2007, substituted "two hundred fifty dollars ($250.00), which fee may be prorated by the Board" for "one hundred fifty dollars ($150.00)" in the last sentence of subsection (a); deleted former subdivision (a)(4) which read: "Is free of contagious or infectious disease."; in subsection (c), substituted "a license" for "masters degrees," preceding "in Audiology," inserted "issued by the North Carolina Board of Examiners for Speech and Language Pathologist and Audiologist" thereafter, substituted "dispenser" for "dealer" following "direct supervision of a licensed hearing aid," and made minor stylistic changes.

§ 93D-6. Persons selling in other jurisdictions.

Whenever the Board determines that another state or jurisdiction has requirements at least equivalent to those in effect pursuant to this Chapter for the fitting and selling of hearing aids, and that such state or jurisdiction has a program at least equivalent to the program for determining whether applicants pursuant to this Chapter are qualified to sell and fit hearing aids, the Board may issue, but is not compelled to issue, licenses to applicants therefor who hold current, unsuspended and unrevoked certificates or licenses to fit and sell hearing aids in such other state or jurisdiction. No such applicant shall be required to submit to any examination or other procedure required by G.S. 93D-5, but shall be required to pay an application fee to the Board in an amount set by the Board, not to exceed one hundred fifty dollars ($150.00). Such applicant must have one full year of experience satisfactory to the Board before issuance of the license. (1969, c. 999; 1971, c. 1093, s. 2; 1981, c. 990, s. 2; 1991, c. 592, s. 3; 1991 (Reg. Sess., 1992), c. 1030, s. 24.)

§ 93D-7. Statements of sale.

Every person fitting and selling a hearing aid, be it new or used, in the State of North Carolina, at the time of delivery of the hearing aid shall render to the user and/or purchaser a statement of sale to include the following:

(1) Date of delivery
(2) Condition of hearing aid; new, used, reconditioned
(3) Hearing aid identification number
(4) Name of manufacturer
(5) Price of hearing aid
(6) Charge for fitting and service
(7) Name of dealer and/or fitter
(8) Signature of customer. (1969, c. 999; 1973, c. 1345, s. 3.)

§ 93D-8. Examination of applicants; issue of license certificate.

(a) Every applicant for a license who is notified by the Board that he has fulfilled the requirements of G.S. 93D-5(a), except those making application pursuant to G.S. 93D-6, shall appear at a time, place and before such persons as the Board may designate, to be examined by written and practical tests in order to demonstrate that he is qualified for the fitting and selling of hearing aids. The Board shall give one examination of the type prescribed herein each year at a duly prescribed time and place, which shall be publicized for at least 90 days in advance. Additional examinations may be given at the discretion of the Board. The examination provided in this section shall not include questions requiring a medical or surgical education but shall consist of:

(1) Tests of knowledge in the following areas as they pertain to the fitting of hearing aids:
  a. The basic physics of sound,
  b. The human hearing mechanism, including the science of hearing and the cause and rehabilitation of abnormal hearing and hearing disorders, and
  c. The structure and function of hearing aids.

(2) Tests of proficiency in the following techniques as they pertain to the fitting of hearing aids:
  a. Pure tone audiometry, including air conduction testing and bone conduction testing,
  b. Live voice and recorded voice speech audiometry, including speech reception threshold testing and speech discrimination testing,
  c. Effective masking,
  d. Recording and evaluation of audiograms and speech audiometry to determine hearing aid candidacy,
  e. Selection and adaption of hearing aids and testing of hearing aids,
  f. Taking earmold impressions, and
  g. Such other skills as may be required for the fitting of hearing aids in the opinion of the Board.

(b) Upon payment of a fee set by the Board, not to exceed twenty-five dollars ($25.00), the Board shall issue a license certificate to each applicant who successfully passes the examination. (1969, c. 999; 1981, c. 601, s. 9; 1991, c. 592, s. 4.)

§ 93D-9. Registration of apprentices.

(a) Any person age 17 or older may apply to the Board for registration as an apprentice. Each applicant must be sponsored by a hearing aid dealer and fitter licensed by the Board.

(b) Upon receiving an application accompanied by a fee in an amount set by the Board, not to exceed one hundred dollars ($100.00), the Board may register the applicant as an apprentice, which shall entitle the applicant to fit and sell hearing aids under the supervision of a holder of a regular license.

(c) No applicant shall be registered as an apprentice by the Board under this section unless the applicant shows to the satisfaction of the Board that the applicant is or will be supervised and trained by a hearing aid fitter and seller who holds a license.

(d) If a person 18 years of age or older who is registered as an apprentice under this section does not take the next succeeding examination given after a minimum of one full year of apprenticeship, the person's apprentice registration shall not be renewed, except for good cause shown to the satisfaction of the Board.

(e) If a person who is registered as an apprentice takes and fails to pass the next succeeding examination given after one full year of apprenticeship, the Board may renew the apprenticeship license for a period of time to end 30 days after the results of the examination given next after the date of renewal of said registration. The fee for renewal of apprenticeship registration shall be set by the Board at an amount not to exceed one hundred fifty dollars ($150.00).

(f) The Board shall adopt rules implementing initial and renewal registration of apprentices. (1969, c. 999; 1973, c. 1345, s. 4; 1981, c. 601, ss. 10-15; c. 990, s. 3; 1991, c. 592, s. 5.)

§ 93D-10. Registration and notice.

The Board shall register each apprentice and each person to whom it grants a license. The secretary-treasurer of the Board shall keep a record of the place of business of all licensees and apprentices. Any notice required to be given by the Board to a person holding a license or apprenticeship registration may be given by mailing to him at the last address received by the Board from him. (1969, c. 999; 1981, c. 601, s. 16.)

§ 93D-11. Annual fees; failure to pay; expiration of license; occupational instruction courses.

Every licensed person who engages in the fitting and selling of hearing aids shall pay to the Board an annual license renewal fee in an amount set by the Board, not to exceed two hundred fifty dollars ($250.00). The payment shall be made prior to the first day of April in each year. In case of default in payment the license shall expire 30 days after notice by the secretary-treasurer to the last known address of the licensee by registered mail, certified mail, or in a manner provided by G.S. 1A-1, Rule 4(j)(1)d. The Board may reinstate an expired license upon the showing of good cause for late payment of fees, upon payment of said fees within 60 days after expiration of the license, and upon the further payment of a late penalty of twenty-five dollars ($25.00). After 60 days after the expiration date, the Board may reinstate the license for good cause shown upon application for reinstatement and payment of a late penalty of fifty dollars ($50.00) and the renewal fee. The Board may require all licensees to successfully attend and complete a course or courses of occupational instruction funded, conducted or approved or sponsored by the Board on an annual basis as a condition to any license renewal and evidence of satisfactory attendance and completion of any such course or courses shall be provided the Board by the licensee. (1969, c. 999; 1975, c. 550, s. 3; 1979, c. 848; 1981, c. 601, s. 17; c. 990, s. 4; 1991, c. 592, s. 6; 2007-406, s. 4.)

Effect of Amendments. — Session Laws 2007-406, s. 4, effective August 21, 2007, substituted “two hundred fifty dollars ($250.00)” for “one-hundred fifty dollars ($150.00)” in the first sentence, substituted “mail, certified mail, or in a manner provided by G.S. 1A-1, Rule 4(j)(1)d” for “mail” in the second sentence and made a minor stylistic change.

§ 93D-12. License to be displayed at office.

Every person to whom a license or apprenticeship registration is granted shall display the same in a conspicuous part of his office wherein the fitting and selling of hearing aids is conducted, or shall have a copy of such license or apprenticeship registration on his person and exhibit the same upon request when fitting or selling hearing aids outside of his office. (1969, c. 999; 1981, c. 601, s. 18.)

§ 93D-13. Discipline, suspension, revocation of licenses; records.

(a) The Board may in its discretion administer the punishment of private reprimand, suspension of license for a fixed period or revocation of license as the case may warrant in their judgment for any violation of the rules and regulations of the Board or for any of the following causes:

(1) Repealed by Session Laws 2007-406, s. 5, effective August 21, 2007.
(2) Gross incompetence.
(3) Inability to perform the functions for which the person is licensed or substantial impairment of the person's ability to perform the functions for which the person is licensed by reason of physical or mental disability.
(4) Commission of a criminal offense indicating professional unfitness.
(5) The use of a false name or alias in his or her business.
(6) Conduct involving willful deceit.
(7) Conduct involving fraud or any other business conduct involving moral turpitude.
(8) Advertising of a character or nature tending to deceive or mislead the public.
(9) Advertising declared to be unethical by the Board or prohibited by the code of ethics established by the Board.
(10) Permitting another person to use his or her license.
(10a) Failure by a licensee to properly supervise an apprentice under his or her supervision.
(11) For violating any of the provisions of this Chapter.

(b) Board action in revoking or suspending a license shall be in accordance with Chapter 150B of the General Statutes. Any person whose license has been suspended for any of the grounds or reasons herein set forth, may, after the expiration of 90 days but within two years, apply to the Board to have the same reissued; upon a showing satisfactory to the Board that reissuance will not endanger the public health and welfare, the Board may reissue a license to such person for a fee set by the Board, not to exceed two hundred dollars ($200.00). If application is made subsequent to two years from date of suspension, reissuance shall be in accordance with the provisions of G.S. 93D-8.

(c) Records, papers, and other documents containing information collected or compiled by or on behalf of the Board as a result of an investigation, inquiry, or interview conducted in connection with registration, licensure, or a disciplinary matter shall not be considered public records within the meaning of Chapter 132 of the General Statutes. Any notice or statement of charges, notice of hearing, or decision rendered by the Board in connection with a hearing is a public record. However, information that identifies a consumer who has not consented to the public disclosure of services rendered to the consumer by a person registered or licensed under this Chapter shall be deleted from the public record. All other records, papers, and documents containing information collected or compiled by or on behalf of the Board shall be public records, provided that any information that identifies a consumer who has not consented to the public disclosure of services rendered to the consumer is deleted. (1969, c. 999; 1973, c. 1331, s. 3; 1981, c. 601, s. 19; c. 990, s. 5; 1987, c. 827, s. 1; 1991, c. 592, s. 7; 2007-406, s. 5.)

Effect of Amendments. — Session Laws 2007-406, s. 5, effective August 21, 2007, substituted "licenses; records" for "licenses" at the end of the section catchline; repealed subdivision (a)(1) concerning habitual drunkenness; rewrote subdivision (a)(3); added subsection (c); made minor stylistic changes and gender neutral changes.

CASE NOTES

Gross Incompetence. — The term "gross incompetence" was intended by the legislature to mean a failure on the part of the individual hearing aid dealer to possess the minimum degree of technical expertise or ability required to adequately fit and service hearing aids. Faulkner v. North Carolina State Hearing Aid Dealers & Fitters Bd., 38 N.C. App. 222, 247 S.E.2d 668 (1978).

A hearing aid salesman's failure to make promised refunds, while reprehensible, failed to demonstrate any lack of competence on his part in selling and fitting hearing aids. Faulkner v. North Carolina State Hearing Aid Dealers & Fitters Bd., 38 N.C. App. 222, 247 S.E.2d 668 (1978).

Filing of Falsified Equipment Calibration Document as Willful Deceit. — See In re Stuart, 59 N.C. App. 715, 297 S.E.2d 621 (1982).

§ 93D-14. Persons not affected.

This Chapter shall not prevent any person from engaging in the measuring of human hearing for the purpose of selection of hearing aids, provided such person or organization employing such person does not sell hearing aids or accessories thereto, nor shall this Chapter apply to any physician licensed to practice medicine or surgery in the State of North Carolina. Nothing in this Chapter shall permit a licensee hereunder to perform any practices or services set forth in Article 17 of Chapter 90 of the General Statutes of North Carolina. (1969, c. 999.)

§ 93D-15. Violation of Chapter.

Any person who violates any of the provisions of this Chapter and any person who holds himself out to the public as a fitter and seller of hearing aids without having first obtained a license or apprenticeship registration as provided for herein shall be deemed guilty of a Class 2 misdemeanor. (1969, c. 999; 1981, c. 601, s. 20; 1993, c. 539, s. 660; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 93D-16. Severability.

If any provision of the Chapter shall be declared unconstitutional or invalid, such invalidity shall not affect other provisions or the application of the Chapter which can be given effect without the invalid provisions. To this end, the provisions of this Chapter are declared to be severable. (1969, c. 999.)

Chapter 93E.

North Carolina Appraisers Act.

Article 1.

Real Estate Appraiser.

Sec.

93E-1-1. Title.
93E-1-2. [Repealed.]
93E-1-2.1. Registration, license, or certificate required of real estate appraisers.
93E-1-3. When registration, license, or certificate not required.
93E-1-3.1. Prohibited use of title; permissible use of title.
93E-1-4. Definitions.
93E-1-5. Appraisal Board.
93E-1-6. Qualifications for registration and certification; applications; application fees; examinations.
93E-1-6.1. Trainee supervision.
93E-1-7. Registration, license and certificate renewal; renewal fees; continuing education; reinstatement; replacement registrations, licenses and certificates; registration, licensure, and certification history; address changes.
93E-1-8. Education program approval and fees.
93E-1-9. Nonresident registration, licensure, and certification.
93E-1-10. Rule-making authority.
93E-1-11. Register of applicants; roster of trainees, State-licensed and State-certified appraisers; financial report to Secretary of State; administrative expenses.
93E-1-12. Disciplinary action by Board.
93E-1-12.1. Investigations and complaints.
93E-1-13. Penalty for violation of this Chapter.
93E-1-14. Referral of cases by courts.

ARTICLE 1.

Real Estate Appraiser.

§ 93E-1-1. Title.

This Chapter shall be known and may be cited as the "North Carolina Appraisers Act". (1993, c. 419, s. 6.)

Editor's Note. — Session Laws 1989, c. 536 added Article 5, Real Estate Appraisers. The article was originally enacted as G.S. 93A-60 to 93A-71, but was renumbered as G.S. 93A-70 through 93A-81 at the direction of the Revisor of Statutes. Session Law 1993, c. 419, s. 7 repealed Chapter 93A, Article 5, effective July 1, 1994, and enacted this chapter.

As enacted by Session Laws 1993, c. 419, this Chapter contains an Article 1 but no Article 2.

§ 93E-1-2: Repealed by Session Laws 1995, c. 482, s. 12.

§ 93E-1-2.1. Registration, license, or certificate required of real estate appraisers.

It is unlawful for any person in this State to act as a real estate appraiser, to directly or indirectly engage or assume to engage in the business of real estate appraisal, or to advertise or hold himself or herself out as engaging in or conducting the business of real estate appraisal without first obtaining a registration, license, or certificate issued by the Appraisal Board under the provisions of this Chapter. It is also unlawful, with regard to any real property where any portion of that property is located within this State, for any person to perform any of the acts listed above without first being registered, licensed, or certified by the Appraisal Board under the provisions of this Chapter. (1995, c. 482, s. 1; 2001-399, s. 1; 2007-506, s. 1.)

Effect of Amendments. — Session Laws 2007-506, s. 1, effective October 1, 2007, and applicable to applicants for registration, licensure, or certification under this act and to persons whose registration, license, or certification is renewed under this act on or after that date, substituted "It is" for "Beginning October 1, 1995, it shall be" at the beginning of the paragraph and substituted "is also" for "it shall also be" near the middle of the paragraph.

§ 93E-1-3. When registration, license, or certificate not required.

(a) No trainee registration, license, or certificate shall be issued under the provisions of this Chapter to a partnership, association, corporation, firm, or group. However, nothing herein shall preclude a registered trainee or licensed or certified real estate appraiser from rendering appraisals for or on behalf of a partnership, association, corporation, firm, or group, provided the appraisal report is prepared by a licensed or certified real estate appraiser or by a registered trainee under the immediate personal direction of, the licensed or certified real estate appraiser and is reviewed and signed by that licensed or certified appraiser.

(b) Repealed by Session Laws 2001-399, s. 1, effective October 1, 2001.

(c) Nothing in this Chapter shall preclude a real estate broker licensed under Chapter 93A of the General Statutes from performing a comparative market analysis as defined in G.S. 93E-1-4, provided the person does not represent himself or herself as being a registered trainee or a licensed or certified real estate appraiser. A real estate broker may perform a comparative market analysis for compensation or other valuable consideration only for prospective or actual brokerage clients or for real property involved in an employee relocation program.

(d) Nothing in this Chapter shall abridge, infringe upon, or otherwise restrict the right to use the term "certified ad valorem tax appraiser" or any similar term by persons certified by the Department of Revenue to perform ad valorem tax appraisals, provided that the term is not used in a manner that creates the impression of certification by the State to perform real estate appraisals other than ad valorem tax appraisals.

(e) Nothing in this Chapter shall entitle a registered trainee or a licensed or certified real estate appraiser to appraise real estate for ad valorem tax purposes unless the person has first been certified by the Department of Revenue pursuant to G.S. 105-294.

(f) A trainee registration, license, or certificate is not required under this Chapter for:

(1) Any person, partnership, association, or corporation that performs appraisals of property owned by that person, partnership, association, or corporation for the sole use of that person, partnership, association, or corporation;

(2) Any court-appointed commissioner who conducts an appraisal pursuant to a judicially ordered evaluation of property;

(3) Any person to qualify as an expert witness for court or administrative agency testimony, if otherwise qualified;

(4) A person who appraises standing timber so long as the appraisal does not include a determination of value of any land;

(5) Any person employed by a lender in the performance of appraisals with respect to which federal regulations do not require a licensed or certified appraiser; and

(6) A person who performs ad valorem tax appraisals and is certified by the Department of Revenue under G.S. 105-294 or G.S. 105-296;

however, any person who is registered, licensed, or certified under this Chapter and who performs any of the activities set forth in subdivisions (1) through (5) of this subsection must comply with all of the provisions of this Chapter. (1993, c. 419, s. 6; 1995, c. 482, s. 2; 2001-399, s. 1; 2007-506, s. 2.)

Effect of Amendments. — Session Laws 2007-506, s. 2, effective October 1, 2007, and applicable to applicants for registration, licensure, or certification under this act and to persons whose registration, license, or certification is renewed under this act on or after that date, in subsection (a), substituted "trainee or licensed or certified" for "trainee, State-licensed or State-certified" and substituted "licensed or certified" for "State-licensed or State-certified" three times; in subsection (c), deleted "or salesman" following "real estate broker," substituted "licensed or certified" for "State-licensed or State-certified," and deleted "or salesperson" following "real estate broker"; substituted "licensed or certified" for "State-licensed or State-certified" in subsection (e).

§ 93E-1-3.1. Prohibited use of title; permissible use of title.

(a) It shall be unlawful for any person to assume or use the title "registered trainee", "licensed real estate appraiser", "certified real estate appraiser", or any title, designation, or abbreviation likely to create the impression of registration, licensure, or certification as a real estate appraiser, unless the person is registered, licensed, or certified by the Appraisal Board in accordance with the provisions of this Chapter. The Board may adopt for the exclusive use of persons licensed or certified under the provisions of this Chapter, a seal, symbol, or other mark identifying the user as a licensed or certified real estate appraiser.

(b) Any person certified as a real estate appraiser by an appraisal trade organization shall retain the right to use the term "certified" or any similar term in identifying the person to the public, provided that:

(1) In each instance wherein the term is used, the name of the certifying organization or body is prominently and conspicuously displayed immediately adjacent to the term; and

(2) The use of the term does not create the impression of certification by the State.

This subsection does not entitle any person certified only by a trade organization to conduct an appraisal that requires a State registration, license, or certification.

(c) The term "registered trainee", "licensed real estate appraiser", "certified real estate appraiser", or any similar term shall not be used following or immediately in connection with the name of a partnership, association, corporation, or other firm or group, or in a manner that might create the impression of registration, licensure, or certification as a real estate appraiser under this Chapter. (1995, c. 482, s. 3; 2001-399, s. 1; 2007-506, s. 3.)

Effect of Amendments. — Session Laws 2007-506, s. 3, effective October 1, 2007, and applicable to applicants for registration, licensure, or certification under this act and to persons whose registration, license, or certification is renewed under this act on or after that date, in subsection (a), substituted "licensed" for "State-licensed," substituted "certified" for "State-certified," and substituted "licensed or certified" for "State-licensed or State-certified"; substituted "licensed" for "State-licensed" and substituted "certified" for "State-certified" in subsection (c).

§ 93E-1-4. Definitions.

When used in this Chapter, unless the context otherwise requires, the term:

(1) "Appraisal" or "real estate appraisal" means an analysis, opinion, or conclusion as to the value of identified real estate or specified interests therein performed for compensation or other valuable consideration.

(2) "Appraisal assignment" means an engagement for which an appraiser is employed or retained to act, or would be perceived by third parties or the public as acting, as a disinterested third party in rendering an unbiased appraisal.

(3) "Appraisal Board" or "Board" means the North Carolina Appraisal Board established under G.S. 93E-1-5.

(4) "Appraisal Foundation" or "Foundation" means The Appraisal Foundation established on November 20, 1987, as a not-for-profit corporation under the laws of Illinois.

(5) "Appraisal report" means any communication, written or oral, of an appraisal.

(6) "Certificate" means that document issued by the North Carolina Appraisal Board evidencing that the person named therein has satisfied the requirements for certification as a certified real estate appraiser and bearing a certificate number assigned by the Board.

(7) "Certificate holder" means a person certified by the Board under the provisions of this Chapter.

(7a) "Certified general real estate appraiser" means a person who holds a current, valid certificate as a certified general real estate appraiser issued under the provisions of this Chapter.

(7b) "Certified residential real estate appraiser" means a person who holds a current, valid certificate as a certified residential real estate appraiser issued under the provisions of this Chapter.

(7c) "Comparative market analysis" means the analysis of sales of similar recently sold properties in order to derive an indication of the probable sales price of a particular property by a licensed real estate broker.

(8) "License" means that document issued by the North Carolina Appraisal Board evidencing that the person named therein has satisfied the requirements for licensure as a licensed real estate appraiser and bearing a license number assigned by the Board.

(8a) "Licensed residential real estate appraiser" means a person who holds a current, valid license as a licensed residential real estate appraiser issued under the provisions of this Chapter.

(9) "Licensee" means a person licensed by the Board under the provisions of this Chapter.

(10) "Real estate" or "real property" means land, including the air above and ground below and all appurtenances and improvements thereto, as well as any interest or right inherent in the ownership of land.

(11) "Real estate appraiser" or "appraiser" means a person who for a fee or valuable consideration develops and communicates real estate appraisals or otherwise gives an opinion of the value of real estate or any interest therein.

(12) "Real estate appraising" means the practice of developing and communicating real estate appraisals.

(13) "Residential real estate" means any parcel of real estate, improved or unimproved, that is exclusively residential in nature and that includes or is intended to include a residential structure containing not more than four dwelling units and no other improvements except those which are typical residential improvements that support the residential use for the location and property type. A residential unit in a condominium, town house, or cooperative complex, or planned unit development is considered to be residential real estate.

(14) through (16) Repealed by Session Laws 2007-506, s. 4, effective October 1, 2007.

(17) "Temporary appraiser licensure or certification" means the issuance of a temporary license or certificate by the Board to a person licensed

or certified in another state who enters this State for the purpose of completing a particular appraisal assignment.

(18) "Trainee", "registered trainee", or "trainee real estate appraiser" means a person who holds a current, valid registration as a trainee real estate appraiser issued under the provisions of this Chapter.

(19) "Trainee registration" or "registration as a trainee" means the document issued by the North Carolina Appraisal Board evidencing that the person named therein has satisfied the requirements of registration as a trainee real estate appraiser and bearing a registration number assigned by the Board. (1993, c. 419, s. 6; 1995, c. 482, s. 4; 2001-399, s. 1; 2007-506, s. 4.)

Effect of Amendments. — Session Laws 2007-506, s. 4, effective October 1, 2007, and applicable to applicants for registration, licensure, or certification under this act and to persons whose registration, license, or certification is renewed under this act on or after that date, substituted "certified" for "State-certified" in subdivision (6); added subdivisions (7a) and (7b); redesignated former subdivision (7a) as present subdivision (7c) and deleted "or salesperson" at the end; substituted "licensed" for "State-licensed" in subdivision (8); added subdivision (8a); deleted subdivisions (14) through (16) which defined a State-certified general real estate appraiser, state-certified residential real estate appraiser, and state-licensed residential real estate appraiser.

§ 93E-1-5. Appraisal Board.

(a) There is created the North Carolina Appraisal Board for the purposes set forth in this Chapter. The Board shall consist of seven members. The Governor shall appoint five members of the Board, and the General Assembly shall appoint two members in accordance with G.S. 120-121, one upon the recommendation of the President Pro Tempore of the Senate and one upon the recommendation of the Speaker of the House of Representatives. Members appointed by the Governor shall be appointed from geographically diverse areas of the State. The appointee recommended by the Speaker of the House of Representatives and the appointees of the Governor shall be persons who have been engaged in the business of real estate appraising in this State for at least five years immediately preceding their appointment and are also State-licensed or State-certified real estate appraisers. No more than three of the appointees may be members of the same appraiser trade organization at any one time. The appointee recommended by the President Pro Tempore of the Senate shall be a person not involved directly or indirectly in the real estate, real estate appraisal, or the real estate lending industry. Members of the Board shall serve three-year terms, so staggered that the terms of three members expire in one year, the terms of two members expire in the next year, and the terms of two members expire in the third year of each three-year period. The members of the Board shall elect one of their members to serve as chairman of the Board for a term of one year. The Governor may remove any member of the Board appointed by the Governor for misconduct, incompetency, or neglect of duty. The General Assembly may remove any member appointed by it for the same reasons. Successors shall be appointed by the appointing authority making the original appointment. All vacancies occurring on the Board shall be filled, for the unexpired term, by the appointing authority making the original appointment. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122. Initial terms of office commenced July 1, 1994.

(b) The Board is an occupational licensing agency governed by Chapter 150B of the General Statutes; its decisions are final agency decisions subject to judicial review under Article 4 of Chapter 150B of the General Statutes.

(c) Members of the Board shall be paid the per diem, subsistence, and travel allowances at the rates set forth in G.S. 93B-5; provided that none of the expenses of the Board or the compensation or expenses of any officer or employee thereof shall be payable out of the treasury of the State of North Carolina; the total expenses of the administration of this Chapter shall not exceed the total income therefrom; and neither the Board nor any officer or employee thereof shall have any power or authority to make or incur any expense, debt, or other financial obligation binding upon the State of North Carolina.

(d) The Board shall adopt a seal for its use, which shall bear thereon the words "North Carolina Appraisal Board". Copies of all papers in the office of the Board duly certified and authenticated by the seal of the Board shall be received in evidence in all courts and administrative bodies and with like effect as the originals.

(e) The Board may employ an Executive Director and professional and clerical staff as may be necessary to carry out the provisions of this Chapter and to put into effect the rules that the Board may promulgate. The Board shall fix salaries. The Board shall have the authority to issue to its employees credentials or other means of identification.

(f) The Board shall be entitled to the services of the Attorney General in connection with the affairs of the Board or may, in its discretion, employ an attorney to assist or represent it in the enforcement of this Chapter.

(g) The Board may prefer a complaint for violation of this Chapter before any court of competent jurisdiction, and it may take the necessary legal steps through the proper legal offices of the State to enforce the provisions of this Chapter.

(h) The Board shall have the power to acquire, hold, rent, encumber, alienate, and otherwise deal with real property in the same manner as a private person or corporation, subject only to the approval of the Governor and the Council of State. Collateral pledged by the Board for an encumbrance is limited to the assets, income, and revenues of the Board.

(i) The Board may purchase, rent, or lease equipment and supplies and purchase liability insurance or other insurance to cover the activities of the Board, its operations, or its employees. (1993, c. 419, s. 6; 1995, c. 482, s. 5; 1996, 2nd Ex. Sess., c. 15, s. 16; 2001-399, s. 1.)

§ 93E-1-6. Qualifications for registration and certification; applications; application fees; examinations.

(a) Any person desiring to be registered as a trainee or to obtain licensure as a licensed real estate appraiser or certification as a certified real estate appraiser shall make written application to the Board on the forms as are prescribed by the Board setting forth the applicant's qualifications for registration, licensure, or certification. Each applicant shall satisfy the following qualification requirements:

(1) Each applicant for registration as a trainee shall:
  a. Have obtained a high school diploma or its equivalent; and
  b. Demonstrate to the Board that the applicant possesses the knowledge and competence necessary to perform appraisals of real property, by: (i) having satisfactorily completed within the five-year period immediately preceding the date application is made, a course of instruction, approved by the Board, in real estate appraisal principles and practices consisting of at least 90 hours of classroom instruction in subjects determined by the Board; and (ii) satisfying any additional qualification the Board imposes by rule, not inconsistent with any requirements imposed by the Appraisal Foundation.

(2) Each applicant for certification as a certified residential real estate appraiser shall:
  a. Hold an associate's degree or higher from an accredited college, junior college, community college, or university; or have a high school diploma or its equivalent and have successfully completed at least 21 semester credit hours of college courses from an accredited college, junior college, community college, or university in English composition, principles of economics, finance, higher mathematics, such as geometry or algebra, statistics, introduction to computers, and business or real estate law;
  b. Demonstrate that the applicant possesses the knowledge and competence necessary to perform appraisals of real property as the Board may prescribe by having satisfactorily completed, within the five-year period immediately preceding the date the application is made, a course of instruction, approved by the Board, in real estate appraisal principles and practices consisting of at least 200 hours;
  c. Present evidence satisfactory to the Board of at least 2,500 hours or the minimum requirement as imposed by the Appraisal Foundation, whichever is greater, of experience in real estate appraising within the five-year period immediately preceding the date application is made, and over a period of at least two calendar years; and
  d. Satisfy the additional qualifications criteria as may be imposed by the Board by rule, not inconsistent with any requirements imposed by the Appraisal Foundation; or
  e. Possess education and experience which is found by the Board in its discretion to be equivalent to the above requirements.

(3) Each applicant for certification as a certified general real estate appraiser shall:
  a. Hold a bachelor's degree or higher from an accredited college or university; or have a high school diploma or its equivalent and have successfully completed at least 30 semester credit hours of college courses from an accredited college or university in English composition, macroeconomics and microeconomics, finance, higher mathematics, such as geometry or algebra, statistics, introduction to computers, and business or real estate law and two elective courses in accounting, geography, business management, or real estate;
  b. Demonstrate that the applicant possesses the knowledge and competence necessary to perform appraisals of all types of real property by having satisfactorily completed, within the five-year period immediately preceding the date application is made, a course of instruction, approved by the Board, in general real estate appraisal practices consisting of at least 300 hours;
  c. Present evidence satisfactory to the Board of at least 3,000 hours or the minimum requirement as imposed by the Appraisal Foundation, whichever is greater, of experience in real estate appraising within the five-year period immediately preceding the date application is made, and over a period of at least two and one-half calendar years, fifty percent (50%) of which must be in appraising nonresidential real estate; and
  d. Satisfy the additional qualifications criteria as may be imposed by the Board by rule, not inconsistent with any requirements imposed by the Appraisal Foundation; or
  e. Possess education or experience which is found by the Board in its discretion to be equivalent to the above requirements.

(4) Repealed by Session Laws 2001-399, s. 1.

(b) Each application for registration as a trainee or for certification as a real estate appraiser shall be accompanied by a fee of two hundred dollars ($200.00), plus any additional fee as may be necessary to defray the cost of any competency examination administered by a private testing service.

(c) Any person who files with the Board an application for registration or certification as a real estate appraiser shall be required to pass an examination to demonstrate the person's competence. The Board shall also make an investigation as it deems necessary into the background of the applicant to determine the applicant's qualifications with due regard to the paramount interest of the public as to the applicant's competency, honesty, truthfulness, and integrity. All applicants shall obtain criminal record reports from one or more reporting services designated by the Board to provide criminal record reports. Applicants are required to pay the designated reporting service for the cost of the reports. In addition, the Board may investigate and consider whether the applicant has had any disciplinary action taken against any other professional license in North Carolina or any other state, or if the applicant has committed or done any act which, if committed or done by any real estate trainee or appraiser, would be grounds under the provisions hereinafter set forth for disciplinary action including the suspension or revocation of registration, licensure, or certification, or whether the applicant has been convicted of or pleaded guilty to any criminal act. If the results of the investigation shall be satisfactory to the Board, and the applicant is otherwise qualified, then the Board shall issue to the applicant a trainee registration or certificate authorizing the applicant to act as a registered trainee real estate appraiser or certified real estate appraiser in this State.

(d) If the applicant has not affirmatively demonstrated that the applicant meets the requirements for registration or certification, action on the application will be deferred pending a hearing before the Board. (1993, c. 419, s. 6; 1995, c. 482, s. 6; 2001-399, s. 1; 2007-506, ss. 5, 6.)

Editor's Note. — Session Laws 2007-506, s. 12, provides: "After January 1, 2008, the North Carolina Appraisal Board will no longer issue a license for a licensed residential real estate appraiser. Any individual holding a license as a licensed residential real estate appraiser on that date shall be allowed to maintain the license so long as it is properly renewed in accordance with G.S. 93E-1-7."

Session Laws 2007-506, s. 13, provides: "Section 6 of this act becomes effective January 1, 2008, and applies to any person applying under this section on or after that date. The remainder of this act becomes effective October 1, 2007, and applies to applicants for registration, licensure, or certification under this act and to persons whose registration, license, or certification is renewed under this act on or after October 1, 2007."

Effect of Amendments. — Session Laws 2007-506, s. 5, effective October 1, 2007, throughout the section, substituted "certified" for "State-certified," substituted "licensed" for "State-licensed," substituted "Appraisal Foundation" for "federal government" and substituted "of instruction, approved by the board" for "approved by the Board of instruction"; in subdivision (1), deleted "or the minimum requirement as imposed by federal government, whichever is greater" following "90 hours"; in subdivision (1a), substituted "150 hours" for "90 hours or the minimum requirement as imposed by federal government, whichever is greater"; in subdivision (2), substituted "200 hours" for "120 hours"; in subdivision (a)(3), substituted "300 hours" for "180 hours"; in subsection (b), substituted "two hundred dollars ($200.00)" for "one hundred fifty hours ($150.00)"; and in subsection (c), added the third and fourth sentences. For applicability, see editor's note.

Session Laws 2007-506, s. 6, effective January 1, 2008, rewrote the section inserting sub-subdivision designations in subsection (a), adding sub-subdivisions (a)(1)a., (a)(2)a., (a)(3)a., deleting former subsection (1a), concerning qualifications for licensed residential real estate appraisers, deleting "licensure" before "or certification" throughout and making related changes.

§ 93E-1-6.1. Trainee supervision.

All trainees shall perform all real estate appraisal-related activities under the immediate, active, and personal supervision of a licensed or certified real estate appraiser. All appraisal reports must be signed by the appraiser who supervised the trainee. By signing the appraisal report, the appraiser accepts shared responsibility, with the trainee, for the content of and conclusions in the report. (2001-399, s. 1; 2007-506, s. 7.)

Effect of Amendments. — Session Laws 2007-506, s. 7, effective October 1, 2007, and applicable to applicants for registration, licensure, or certification under this act and to persons whose registration, license, or certification is renewed under this act on or after that date, deleted "State-licensed or State-certified" throughout the section and inserted "licensed or certified" preceding "real estate appraiser."

§ 93E-1-7. Registration, license and certificate renewal; renewal fees; continuing education; reinstatement; replacement registrations, licenses and certificates; registration, licensure, and certification history; address changes.

(a) Trainee registrations, licenses, and certificates issued under this Chapter shall expire on the 30th day of June of every year and shall become invalid after that date unless renewed prior to the expiration date by filing an application with and paying to the Executive Director of the Board the fee of two hundred dollars ($200.00). As a prerequisite to the renewal of a trainee registration or a real estate appraiser license or certificate, the trainee registration holder, the licensee, or the certificate holder must satisfy any continuing education requirements that may be prescribed by the Board under subsection (b) of this section. The members of the General Assembly are exempt from this requirement and any education program regarding trainee supervision during their term of office. The Board may adopt rules establishing a system of trainee registration, license, and certificate renewal in which trainee registrations, licenses, and certificates expire annually with varying expiration dates.

(b) The Board may by rule require, as a prerequisite to trainee registration, license, or certificate renewal, the completion of Board-approved education courses in subject matters determined by the Board, or courses determined by the Board to be equivalent to the instruction, not inconsistent with any requirements of federal authorities.

(b1) Course sponsors shall pay to the Board a fee of five dollars ($5.00) for each licensee completing an approved continuing education course conducted by the sponsor.

(b2) The Board shall not charge a course application fee, a course renewal fee, or any other fee for a continuing education course offered by a North Carolina college, university, junior college, or community or technical college accredited by the Southern Association of Colleges and Schools or an agency of the federal, State, or local government.

(c) All trainee registrations, licenses, and certificates reinstated after the expiration dates shall be subject to a late filing fee of ten dollars ($10.00) per month for each month or part thereof that the trainee registration, license, or certificate is lapsed, not to exceed one hundred twenty dollars ($120.00). The late filing fee shall be in addition to the required renewal fee. In the event a trainee, licensee, or certificate holder fails to reinstate the trainee registration, license, or certificate within 12 months after the expiration date thereof, the Board may, in its discretion, consider the person as not having been previously registered, licensed, or certified, and thereby subject to the provisions of this Chapter relating to the issuance of an original trainee registration, license, or certificate, including the examination requirements set forth herein. Applications to reinstate trainee registrations, licenses, or certificates expired for 12 or more months shall be accompanied by the fee required for an original trainee registration, license, or certificate.

(d) Replacement trainee registrations, licenses, and certificates may be issued by the Board upon payment of ten dollars ($10.00) by the trainee, licensee, or certificate holder. Certification by the Board of the trainee registration history or the licensure or certification history of a person registered, licensed, or certified under this Chapter shall be made only after the payment of a fee of ten dollars ($10.00) to the Board. (1993, c. 419, s. 6; 1995, c. 482, s. 7; 2001-399, s. 1; 2006-259, s. 17; 2007-506, s. 8.)

Editor's Note. — Session Laws 2007-506, s. 12, provides: "After January 1, 2008, the North Carolina Appraisal Board will no longer issue a license for a licensed residential real estate appraiser. Any individual holding a license as a licensed residential real estate appraiser on that date shall be allowed to maintain the license so long as it is properly renewed in accordance with G.S. 93E-1-7."

Effect of Amendments. — Session Laws 2006-259, s. 17, effective August 23, 2006, near the end of subsection (a), substituted "section. The members" for "section; provided, however, that members" and inserted "and any education program regarding trainee supervision".

Session Laws 2007-506, s. 8, effective October 1, 2007, and applicable to applicants for registration, licensure, or certification under this act and to persons whose registration, license, or certification is renewed under this act on or after that date, added subsections (b1) and (b2); in subsection (c), substituted "ten dollars ($10.00)" for "five dollars ($5.00)" and substituted "one hundred twenty dollars ($120.00)" for "sixty dollars ($60.00)"; and substituted "ten dollars ($10.00)" for "five dollars ($5.00)" in subsection (d).

§ 93E-1-8. Education program approval and fees.

(a) The Board may by rule prescribe minimum standards for the approval and renewal of approval of schools and other course sponsors and their instructors to conduct appraiser prelicensing and precertification courses required by G.S. 93E-1-6(a). Such standards may address subject matter, program structuring, instructional materials, requirements for satisfactory course completion, instructors' qualifications, and other related matters relevant to the provision of such courses in a manner that best serves the public interest. The standards may require that schools and course sponsors obtain approval for the content of prelicensing and precertification courses from the Appraiser Qualifications Board of the Appraisal Foundation as part of the application process with the Appraisal Board and pay any fees directly to the Appraiser Qualifications Board as required by the Appraiser Qualifications Board for the approval.

(b) The Board may by rule set nonrefundable fees chargeable to private real estate appraisal schools or course sponsors, including appraisal trade organizations, for the approval and annual renewal of approval of their prelicensing and precertification courses required by G.S. 93E-1-6(a), or equivalent courses. The fees shall be one hundred dollars ($100.00) per course for approval and fifty dollars ($50.00) per course for renewal of approval. No fees shall be charged for the approval or renewal of approval to conduct appraiser prelicensing or precertification courses where such courses are offered by a North Carolina college, university, junior college, or community or technical college accredited by the Southern Association of Colleges and Schools, or an agency of the federal, State, or local government.

(c) The Board may by rule prescribe minimum standards for the approval and annual renewal of approval of schools and other course sponsors and their instructors to conduct appraiser continuing education courses. Such standards may address subject matter, instructional materials, requirements for satisfactory course completion, minimum course length, instructors' qualifications, and other related matters relevant to the provision of such courses in a manner that best serves the public interest.

(d) Nonrefundable fees of one hundred dollars ($100.00) per course may be charged to schools and course sponsors for the approval to conduct appraiser continuing education courses and fifty dollars ($50.00) per course for renewal of approval. However, no fees shall be charged for the approval or renewal of approval to conduct appraiser continuing education courses where such courses are offered by a North Carolina college, university, junior college, or community or technical college accredited by the Southern Association of Colleges and Schools, or by an agency of the federal, State, or local government. A nonrefundable fee of fifty dollars ($50.00) per course may be charged to current or former licensees or certificate holders requesting approval by the Board of a course for continuing education credit when approval of such course has not been previously obtained by the offering school or course sponsor. (1993, c. 419, s. 6; 2007-506, s. 9.)

Effect of Amendments. — Session Laws 2007-506, s. 9, effective October 1, 2007, and applicable to applicants for registration, licensure, or certification under this act and to persons whose registration, license, or certification is renewed under this act on or after that date, added the third sentence in subsection (a); in subsection (b), in the second sentence, substituted "The" for "Such" at the beginning, substituted "one hundred dollars ($100.00)" for "forty dollars ($40.00)," deleted "twenty dollars ($20.00) per course for renewal of approval of private school courses, and three hundred dollars ($300.00) per course for approval and" before "fifty dollars" and deleted "for course sponsors, including appraisal trade organizations" at the end.

§ 93E-1-9. Nonresident registration, licensure, and certification.

(a) An applicant from another state which offers real estate trainee registration or the equivalent, appraiser licensing or certification privileges to residents of North Carolina may become registered, licensed, or certified in North Carolina by conforming to all of the provisions of this Chapter and, in the discretion of the Board, such other terms and conditions as are required of North Carolina residents applying for trainee registration, licensure, and certification in such other state.

(b) The Board, in its discretion, may undertake to register, license, or certify on a reciprocal basis, persons registered, licensed, or certified in other states who are deemed by the Board to possess qualifications equivalent to resident North Carolina trainees or State-licensed or State-certified real estate appraisers.

(c) The Board may by rule establish a procedure for granting temporary trainee registration, appraiser licensure or certification and may charge an application fee of one hundred fifty dollars ($150.00) for temporary trainee registration, appraiser licensure, or certification.

(d) Every applicant for trainee registration, State licensure, or certification under this Chapter who is not a resident of this State shall submit with his application an irrevocable consent that service of process in any action against the applicant arising out of the applicant's activities as a registered trainee or State-licensed or State-certified real estate appraiser may be made by delivery of the process on the Executive Director of the Board. (1993, c. 419, s. 6; 2001-399, s. 1.)

§ 93E-1-10. Rule-making authority.

The Board may adopt rules not inconsistent with the provisions of this Chapter and the General Statutes of North Carolina which may be reasonably necessary to implement, administer, and enforce the provisions of this Chapter, including, but not limited to, the authority to:

(1) Prescribe forms and procedures for submitting information to the Board;
(2) Prescribe standards of practice for persons registered as a trainee, licensed or certified under this Chapter; and
(3) Prescribe standards for the operation of real estate appraiser education programs. (1993, c. 419, s. 6; 2001-399, s. 1.)

§ 93E-1-11. Register of applicants; roster of trainees, State-licensed and State-certified appraisers; financial report to Secretary of State; administrative expenses.

(a) The Executive Director of the Board shall keep a register of all applicants for State trainee registration or for State licensure or certification as real estate appraisers, showing for each the date of application, name, business or residence address, and whether the registration, license or certificate was granted or refused. The register shall be prima facie evidence of all matters received therein.

(b) The Executive Director of the Board shall also keep a current roster showing the names and places of business of all registered trainees and State-licensed and State-certified real estate appraisers, which roster shall be kept on file in the office of the Board and be open to public inspection.

(c) On or before the first day of November of each year, the Board shall file with the Secretary of State a copy of the roster of registered trainees and real estate appraisers licensed or certified by the Board and a report containing a complete statement of income received by the Board in connection with the trainee registration and the licensure and certification of real estate trainees and appraisers for the preceding fiscal year ending June 30th, attested by the affidavit of the Executive Director of the Board.

(d) In addition to those fees prescribed in this Chapter for making application for and renewing trainee registrations, appraiser licenses, and certificates, the Board may collect from applicants and holders of the licenses and certificates and remit to the appropriate agency or instrumentality of the federal government any additional fees as may be required to render North Carolina State-licensed or State-certified appraisers eligible to perform appraisals in connection with federally related transactions as well as an additional fee of twenty dollars ($20.00) to cover the administrative costs associated therewith. (1993, c. 419, s. 6; 1995, c. 482, s. 8; 2001-399, s. 1.)

§ 93E-1-12. Disciplinary action by Board.

(a) The Board may take disciplinary action against registered trainees and State-licensed or State-certified real estate appraisers. Upon its own motion or the complaint of any person, the Board may investigate the actions of any person registered as a trainee or licensed or certified as a real estate appraiser under this Chapter, any person who performs appraisals without an appropriate registration, license, or certificate, or any person who holds himself or herself out to be registered as a trainee or licensed or certified as a real estate appraiser when the person holds no registration, license, or certificate. Under no circumstances shall the Board investigate any person registered as a trainee or licensed or certified as a real estate appraiser under this Chapter upon an anonymous complaint. If the Board finds probable cause to believe that a person registered as a trainee or licensed or certified as a real estate appraiser under this Chapter has violated any of the provisions of this Chapter, the Board may hold a hearing on the allegations of misconduct.

The Board may suspend or revoke the registration, license, or certificate granted to any person under the provisions of this Chapter or reprimand any registered trainee, licensee, or certificate holder if, following a hearing or by consent, the Board finds the registered trainee, licensee, or certificate holder to have:

(1) Procured registration, licensure, or certification pursuant to this Chapter by making a false or fraudulent representation;
(2) Made any willful or negligent misrepresentation or any willful or negligent omission of material fact;
(3) Accepted an appraisal assignment when the employment is contingent upon the appraiser reporting a predetermined result, analysis, or opinion, or when the fee to be paid for the performance of the appraisal assignment is contingent upon the opinion, conclusion, or valuation reached or upon consequences resulting from the appraisal assignment;
(4) Acted or held himself or herself out as a registered trainee or a licensed or certified real estate appraiser when not so registered, licensed, or certified;
(5) Failed as a licensed or certified real estate appraiser to actively and personally supervise any person not licensed or certified under this Chapter who assists the licensed or certified real estate appraiser in performing real estate appraisals;
(6) Failed to make available to the Board for its inspection without prior notice, originals or true copies of all written contracts engaging the person's services to appraise real property, and all reports and supporting data assembled and formulated by the appraiser in preparing the reports;
(7) Paid a fee or valuable consideration to any person for acts or services performed in violation of this Chapter;
(8) Acted as a real estate appraiser in an unworthy or incompetent manner as to endanger the interest of the public;
(9) Violated any of the standards of practice for real estate appraisers or any other rule promulgated by the Board;
(10) Performed any other act which constitutes improper, fraudulent, or other dishonest conduct; or
(11) Violated any of the provisions of this Chapter.

The Executive Director of the Board shall transmit a certified copy of all final orders of the Board suspending or revoking registrations, licenses, or certificates issued under this Chapter to the clerk of superior court of the county in which the licensee or certificate holder maintains the person's principal place of business. The clerk shall enter these orders upon the judgment docket of the county.

(b) Following a hearing, or by consent, the Appraisal Board may also suspend or revoke any registration, license, or certificate issued under the provisions of this Chapter or reprimand any registered trainee, licensee, or certificate holder when:

(1) The registered trainee, licensee, or certificate holder has been convicted of or has entered a plea of guilty or no contest upon which final judgment is entered by a court of competent jurisdiction in this State, or any other state, to an offense which involves moral turpitude, in which an essential element is dishonesty, fraud, or deceit, or which, in

the discretion of the Board, would reasonably affect the performance of the registered trainee, licensee, or certificate holder in the real estate appraisal business;

(2) A final civil judgment has been entered against the registered trainee, licensee, or certificate holder on grounds of fraud, misrepresentation, or deceit in the making of any appraisal of real estate;

(3) The trainee, licensee, or certificate holder has violated any of the provisions of G.S. 93E-1-13(a) when appraising his own property;

(4) The trainee, licensee, or certificate holder has had a real estate trainee registration or its equivalent, real estate appraiser license, or real estate appraiser certification suspended, revoked, or denied by a real estate licensing board in another state;

(5) The trainee, licensee, or certificate holder has had any disciplinary action taken against any other professional license in North Carolina or any other state;

(6) The trainee, licensee, or certificate holder has been adjudged mentally incompetent by a court; or

(7) The trainee, licensee, or certificate holder performs any of the duties of a real estate appraiser, including, but not limited to, site inspection and public records checks, while impaired by alcohol or drugs.

(b1) If any of the actions taken in subdivision (1), (2), or (4) through (6) of subsection (b) of this section are taken against a trainee, licensee, or certificate holder, the trainee, licensee, or certificate holder must report such actions within 60 days of the final judgment or final order in the case.

(c) When a person registered as a trainee or licensed or certified as a real estate appraiser under this Chapter is accused of any act, omission, or misconduct which would subject the person to disciplinary action, the registered trainee, licensee, or certificate holder, with the consent and approval of the Board, may surrender his or her registration, license, or certificate and all the rights and privileges pertaining to it for a period of time established by the Board of at least five years. A person who surrenders his or her registration, license, or certificate shall not thereafter be eligible for or submit any application for registration, licensure, or certification as a real estate appraiser during the period that the registration, license, or certificate is surrendered.

(c1) During the course of an investigation of a person registered as a trainee or licensed or certified as a real estate appraiser under this Chapter, the Board may send to the trainee or licensed or certified real estate appraiser a letter of inquiry asking the trainee or licensed or certified real estate appraiser to respond to the inquiry. The letter of inquiry shall state the subject matter being investigated. Upon receipt of the letter of inquiry, the trainee or licensed or certified real estate appraiser shall respond to the Board within 30 calendar days. A trainee or licensed or certified real estate appraiser shall include in the written response copies of all documents requested by the Board in the letter of inquiry.

(d) The Board shall have the power to issue subpoenas requiring the attendance of persons and the production of papers and records before the Board in any hearing, investigation, inquiry, or other proceeding conducted by it. Upon the production of any papers, records, or documents, the Board shall have the power to authorize true copies thereof to be substituted in the permanent record of the matter in which the books, records, or documents shall have been introduced in evidence. (1993, c. 419, s. 6; 1995, c. 482, s. 9; 2001-399, s. 1; 2007-447, ss. 1, 2; 2007-506, ss. 10, 11.)

Effect of Amendments. — Session Laws 2007-447, ss. 1-2, effective October 1, 2007, and applicable to complaints made and letters of inquiry sent on or after that date, in subsection (a), inserted the third sentence; and added subsection (c1).

Session Laws 2007-506, ss. 10 and 11, effective October 1, 2007, and applicable to applicants for registration, licensure, or certification under this act and to persons whose registration, license, or certification is renewed under this act on or after that date, substituted "licensed or certified" for "State-licensed or State-certified" in subdivisions (a)(4) and (a)(5); inserted "of at least five years" in subsection (c).

CASE NOTES

Revocation of Certification. — Trial court judgment affirming the North Carolina Appraisal Board's decision to revoke a real estate appraiser's certification was upheld on appeal where sufficient evidence existed to show that the appraiser knowingly made omissions and false statements concerning the identification of the property owner and the marketing and sales history of four properties, all of which made the property appear more favorable and provided artificial support for the inflated value placed on the subject. In re Nantz, 177 N.C. App. 33, 627 S.E.2d 665, 2006 N.C. App. LEXIS 718 (2006).

§ 93E-1-12.1. Investigations and complaints.

(a) The Board may dismiss a complaint, accept a consent order, or hold a hearing, or may accept a voluntary surrender of a registration, license, or certificate or of approval as a course sponsor.

(b) Records, papers, and other documents containing information received, collected, or compiled by the Board, its members, or its employees, as a result of a complaint or investigation, shall not be considered public records within the meaning of Chapter 132 of the General Statutes. Any statement of charges contained within a notice of a hearing to be held by the Board is a public record, even though it may contain information collected and compiled as a result of a complaint or investigation against a trainee, licensee, or certificate holder or an applicant. Any record, paper, or other document admitted into evidence in a hearing held by the Board, and any final decisions and orders by the Board, including consent orders, shall be public records within the meaning of Chapter 132 of the General Statutes.

(c) The Board may inspect records maintained pursuant to this Chapter periodically, without prior notice, and may also inspect these records whenever the Board determines that they are pertinent to an investigation of any specific complaint against a person registered, licensed, or certified by the Board. (2001-399, s. 1.)

§ 93E-1-13. Penalty for violation of this Chapter.

(a) Any person who acts as, or holds himself or herself out to be, a registered trainee or a State-licensed or State-certified real estate appraiser without first obtaining a registration, license, or certificate as provided in this Chapter, or who willfully performs the acts specified in G.S. 93E-1-12(a) shall be guilty of a Class 1 misdemeanor.

(b) The Board may appear in its own name in superior court in actions for injunctive relief to prevent any person from violating the provisions of this Chapter or the rules promulgated by the Board. The superior court shall have the power to grant these injunctions whether or not criminal prosecution has been or may be instituted as a result of the violations, and whether or not the person is the holder of a registration, license, or certificate issued by the Board under this Chapter. (1993, c. 419, s. 6; 1994, Ex. Sess., c. 14, s. 49; 1995, c. 482, s. 10; 2001-399, s. 1.)

§ 93E-1-14. Referral of cases by courts.

Whenever any registered trainee, licensee, or certificate holder is adjudged by a civil or criminal court to have injured or damaged any person, partnership, association, or corporation through gross negligence, incompetency, fraud, dishonesty, or other civil or criminal misconduct, the court may, as part of its judgment or decree, order a written copy of the transcript of the record in said case to be forwarded by the clerk of court to the Board with a recommendation that the registration, license, or certificate of the registered trainee, licensee, or certificate holder be revoked or otherwise subject to disciplinary action. (1993, c. 419, s. 6; 1995, c. 482, s. 11.)

Chapter 94.

Apprenticeship.

Sec.
94-1. Purpose.
94-2. Apprenticeship Council.
94-3. Director of Apprenticeship.
94-4. Powers and duties of Director of Apprenticeship.
94-5. Apprenticeship committees and program sponsors.

Sec.
94-6. Definition of an apprentice.
94-7. Contents of agreement.
94-8. Approval of apprentice agreements; signatures.
94-9. Rotation of employment.
94-10. [Repealed.]
94-11. Limitation.

§ 94-1. Purpose.

The purposes of this Chapter are: to open to young people the opportunity to obtain training that will equip them for profitable employment and citizenship; to set up, as a means to this end, a program of voluntary apprenticeship under approved apprentice agreements providing facilities for their training and guidance in the arts and crafts of industry and trade, with parallel instruction in related and supplementary education; to promote employment opportunities for young people under conditions providing adequate training and reasonable earnings; to relate the supply of skilled workers to employment demands; to establish standards for apprentice training; to establish an Apprenticeship Council and apprenticeship committees and sponsors to assist in effectuating the purposes of this Chapter; to provide for a Director of Apprenticeship within the Department of Labor; to provide for reports to the legislature and to the public regarding the status of apprentice training in the State; to establish a procedure for the determination of apprentice agreement controversies; and to accomplish related ends. (1939, c. 229, s. 1; 1979, c. 673, s. 1.)

Legal Periodicals. — For comment on this Chapter, see 17 N.C.L. Rev. 327 (1939).

§ 94-2. Apprenticeship Council.

The Commissioner of Labor shall appoint an Apprenticeship Council composed of four representatives each from employer and employee organizations respectively and three representatives from the public at large. One State official designated by the Department of Public Instruction and one State official designated by the Department of Community Colleges shall be a member ex officio of said council, without vote. The terms of office of the members of the Apprenticeship Council first appointed by the Commissioner of Labor shall expire as designated by the Commissioner at the time of making the appointment: two representatives each of employers and employees, being appointed for one year and one representative of the public at large being appointed for two years; and one representative each of employers, employees, and the public at large being appointed for a term of three years. Any member appointed to fill a vacancy occurring prior to the expiration of the term of his predecessor shall be appointed for the remainder of said term. Each member of the Council not otherwise compensated by public moneys, shall be reimbursed for transportation and shall receive such per diem compensation as is provided generally for boards and commissions under the biennial maintenance appropriation acts for each day spent in attendance at meetings of the Apprenticeship Council. The Commissioner of Labor shall annually appoint one member of the Council to act as its chairman.

The Apprenticeship Council shall meet at the call of the Commissioner of Labor and shall aid him in formulating policies for the effective administration of this Chapter. Subject to the approval of the Commissioner, the Apprenticeship Council shall establish standards for apprentice agreement which in no case shall be lower than those prescribed by this Chapter, shall issue such rules and regulations as may be necessary to carry out the intent and purposes of said Chapter, and shall perform such other functions as the Commissioner may direct. Not less than once a year the Apprenticeship Council shall make a report through the Commissioner of Labor of its activities and findings to the legislature and to the public. (1939, c. 229, s. 2; 1973, c. 476, s. 138; 1977, c. 896.)

§ 94-3. Director of Apprenticeship.

The Commissioner of Labor is hereby directed to appoint a Director of Apprenticeship which appointment shall be subject to the confirmation of the State Apprenticeship Council by a majority vote. The Commissioner of Labor is further authorized to appoint and employ such clerical, technical, and professional help as shall be necessary to effectuate the purposes of this Chapter. (1939, c. 229, s. 3.)

§ 94-4. Powers and duties of Director of Apprenticeship.

The Director, under the supervision of the Commissioner of Labor and with the advice and guidance of the Apprenticeship Council is authorized to administer the provisions of this Chapter; in cooperation with the Apprenticeship Council and apprenticeship committees and sponsors, to set up conditions and training standards for apprentice agreements, which conditions or standards shall in no case be lower than those prescribed by this Chapter; to act as secretary of the Apprenticeship Council; to approve for the Council if in his opinion approval is for the best interest of the apprenticeship any apprentice agreement which meets the standards established under this Chapter; to terminate or cancel any apprentice agreement in accordance with the provisions of such agreement; to keep a record of apprentice agreements and their disposition; to issue certificates of completion of apprenticeship; and to perform such other duties as are necessary to carry out the intent of this Chapter, including other on-job training necessary for emergency and critical civilian production: Provided, that the administration and supervision of related and supplemental instruction for apprentices, coordination of instruction with job experiences, and the selection and training of teachers and coordinators for such instruction shall be the responsibility of State and local boards responsible for vocational education. (1939, c. 229, s. 4; 1951, c. 1031, s. 1; 1979, c. 673, s. 2.)

§ 94-5. Apprenticeship committees and program sponsors.

(a) As used in this Chapter:

(1) "Apprenticeship program" means a plan containing all terms and conditions for the qualification, recruitment, selection, employment, and training of apprentices, including such matters as the requirement for a written apprenticeship agreement.

(2) "Apprenticeship agreement" means a written agreement between an apprentice and either his employer or an apprenticeship committee or sponsor acting as agent for employer(s), which agreement satisfies the requirements of G.S. 94-7.

(3) "Sponsor" means any person, firm, corporation, organization, association or committee operating an apprenticeship program and in whose name the apprenticeship program is approved.

(4) "Employer" means any person, firm, corporation or organization employing an apprentice whether or not such person, firm, corporation or organization is a party to an apprenticeship agreement with the apprentice.

(5) "Apprenticeship committee" means those persons designated by the sponsor, and approved by the Apprenticeship Council, to act for it in the administration of the apprenticeship program. A committee may be "joint," i.e., it is composed of an equal number of representatives of the employer(s) and of the employees represented by a bona fide collective bargaining agent(s) and has been established to conduct, operate or administer an apprenticeship program and enter into apprenticeship agreements with apprentices. A committee may be "unilateral" or "nonjoint" which shall mean a program sponsor in which employees or a bona fide collective bargaining agent is not a party.

(b) An apprenticeship committee may be appointed by the Apprenticeship Council in any trade or group of trades in a city or trade area, whenever the apprentice training needs of such trade or group of trades justifies such establishment.

(c) The function of the apprenticeship committee, or sponsor when there is no apprenticeship committee, shall be: to cooperate with school authorities in regard to the education of apprentices; in accordance with the standards set up by the apprenticeship committee for the same trade or group of trades, where such committee has been appointed, to work in an advisory capacity with employers and employees in matters regarding schedule of operations, application of wage rates, and working conditions for apprentices and to specify the number of apprentices which shall be employed locally in the trade under the apprenticeship agreements under this Chapter; and to adjust apprenticeship disputes, subject to the approval of the director; to ascertain the prevailing rate for journeymen in the city or trade area and specify the graduated scale of wages applicable to apprentices in such trade in such area; to ascertain employment needs in such trade or group of trades and specify the appropriate current ratio of apprentices to journeymen; and to make recommendations for the general good of apprentices engaged in the trade or trades represented by the committee. An apprenticeship committee may appoint a representative and delegate to such representative the authority for implementation and performance of any standards adopted by the committee pursuant to any of the aforementioned functions. (1939, c. 229, s. 5; 1979, c. 673, s. 3.)

§ 94-6. Definition of an apprentice.

The term "apprentice," as used herein, shall mean a person at least 16 years of age who is covered by a written apprenticeship agreement approved by the Apprenticeship Council, which apprenticeship agreement provides for not less than 2,000 hours of reasonably continuous employment for such person for his participation in an approved schedule of work experience and for organized, related supplemental instruction in technical subjects related to the trade. A minimum of 144 hours of related supplemental instruction for each year of apprenticeship is recommended. The required hours for apprenticeship agreements and the recommended hours for related supplemental instruction may be decreased or increased in accordance with standards adopted by the apprenticeship committee or sponsor, subject to approval of the Commissioner of Labor. (1939, c. 229, s. 6; 1979, c. 479, ss. 1, 2; c. 673, s. 4.)

CASE NOTES

Cited in Varnell v. Henry M. Milgrom, Inc., 78 N.C. App. 451, 337 S.E.2d 616 (1985).

§ 94-7. Contents of agreement.

Every apprentice agreement entered into under this Chapter shall contain:

(1) The names of the contracting parties.

(2) The date of birth of the apprentice.

(3) A statement of the trade, craft, or business which the apprentice is to be taught, and the time at which the apprenticeship will begin and end.

(4) A statement showing (i) the number of hours to be spent by the apprentice in work on the job, and (ii) the number of hours to be spent in related and supplemental instruction, which is recommended to be not less than 144 hours per year: Provided, that in no case shall the combined weekly hours of work and of required related and supplemental instruction of the apprentice exceed the maximum number of hours of work prescribed by law for a person of the age of the apprentice.

(5) A statement setting forth a schedule of the processes in the trade or industry division in which the apprentice is to be taught and the approximate time to be spent at each process.

(6) A statement of the graduated scale of wages to be paid the apprentice and whether the required school time shall be compensated.

(7) A statement providing for a period of probation of not more than 500 hours of employment and instruction extending over not more than four months, during which time the apprentice agreement shall be terminated by the Director at the request in writing of either party, and providing that after such probationary period the apprentice agreement may be terminated by the Director by mutual agreement of all parties thereto, or canceled by the Director for good and sufficient reason. The Council at the request of a joint apprentice committee may lengthen the period of probation.

(8) A provision that all controversies or differences concerning the apprentice agreement which cannot be adjusted locally in accordance with G.S. 94-5 shall be submitted to the Director for determination.

(9) A provision that an employer who is unable to fulfill his obligation under the apprentice agreement may with the approval of the Director transfer such contract to any other employer: Provided, that the apprentice consents and that such other employer agrees to assume the obligations of said apprentice agreement.

(10) Such additional terms and conditions as may be prescribed or approved by the Director not inconsistent with the provisions of this Chapter. (1939, c. 229, s. 7; 1945, c. 729, s. 1; 1977, c. 550, s. 1; 1979, c. 673, s. 5.)

§ 94-8. Approval of apprentice agreements; signatures.

No apprentice agreement under this Chapter shall be effective until approved by the Director. Every apprentice agreement shall be signed by the employer, or by an association of employers or an organization of employees as provided in G.S. 94-9, and by the apprentice, and if the apprentice is a minor, by either of the minor's lawful parents, or by any person, agency, organization or institution standing in loco parentis. Where a minor enters into an apprentice agreement under this Chapter for a period of training extending into his majority, the apprentice agreement shall likewise be binding for such a period as may be covered during the apprentice's majority. (1939, c. 229, s. 8; 1977, c. 550, s. 2.)

§ 94-9. Rotation of employment.

For the purpose of providing greater diversity of training or continuity of employment, any apprentice agreement made under this Chapter may in the discretion of the Director of Apprenticeship be signed by an association of employers or an organization of employees instead of by an individual employer. In such a case, the apprentice agreement shall expressly provide that the association of employers or organization of employees does not assume the obligation of an employer but agrees to use its best endeavors to procure employment and training for such apprentice with one or more employers who will accept full responsibility, as herein provided, for all the terms and conditions of employment and training set forth in said agreement between the apprentice and employer association or employee organization during the period of each such employment. The apprentice agreement in such a case shall also expressly provide for the transfer of the apprentice, subject to the approval of the Director, to such employer or employers who shall sign in written agreement with the apprentice, and if the apprentice is a minor with his parent or guardian, as specified in G.S. 94-8, contracting to employ said apprentice for the whole or a definite part of the total period of apprenticeship under the terms and conditions of employment and training set forth in the said agreement entered into between the apprentice and employer association or employee organization. (1939, c. 229, s. 9.)

§ 94-10: Repealed by Session Laws 1945, c. 729, s. 2.

§ 94-11. Limitation.

Nothing in this Chapter or in any apprentice agreement approved under this Chapter shall operate to invalidate any apprenticeship provision in any collective agreement between employers and employees, setting up higher apprenticeship standards; provided, that none of the terms or provisions of this Chapter shall apply to any person, firm, corporation or crafts unless, until, and only so long as such person, firm, corporation or crafts voluntarily elects that the terms and provisions of this Chapter shall apply. Any person, firm, corporation or crafts terminating an apprenticeship agreement shall notify the Director of Apprenticeship. (1939, c. 229, s. 11; 1945, c. 729, s. 3.)

Chapter 95.

Department of Labor and Labor Regulations.

Article 1.

Department of Labor.

Sec.
95-1. Department of Labor established.
95-2. Election of Commissioner; term; salary; vacancy.
95-3. Divisions of Department; Commissioner; administrative officers.
95-4. Authority, powers and duties of Commissioner.
95-5. Annual report to Governor; recommendation as to legislation needed.
95-6. Statistical report to Governor; publication of information given by employers.
95-7. Power of Commissioner to compel the giving of such information; refusal as contempt.
95-8. Employers required to make statistical report to Commissioner; refusal as contempt.
95-9. Employers to post notice of laws.
95-10. [Repealed.]
95-11. Division of Standards and Inspection.
95-12. Division of Statistics.
95-13. Enforcement of rules and regulations.
95-14. Agreements with certain federal agencies for enforcement of Fair Labor Standards Act.

Article 2.

Maximum Working Hours.

95-15 through 95-25. [Recodified.]

Article 2A.

Wage and Hour Act.

95-25.1. Short title and legislative purpose.
95-25.2. Definitions.
95-25.3. Minimum wage.
95-25.3A. [Repealed.]
95-25.4. Overtime.
95-25.5. Youth employment.
95-25.6. Wage payment.
95-25.7. Payment to separated employees.
95-25.7A. Wages in dispute.
95-25.8. Withholding of wages.
95-25.9, 95-25.10. [Repealed.]
95-25.11. Employers' remedies preserved.
95-25.12. Vacation pay plans.
95-25.13. Notification, posting, and records.
95-25.14. Exemptions.
95-25.15. Investigations and inspection of records; notice of law.
95-25.16. Enforcement.
95-25.17. Wage and Hour Division established.
Sec.
95-25.18. Legal representation.
95-25.19. Rules.
95-25.20. Records.
95-25.21. Illegal acts.
95-25.22. Recovery of unpaid wages.
95-25.23. Violation of youth employment; civil penalty.
95-25.23A. Violation of record-keeping requirement; civil penalty.
95-25.23B. Civil penalty collection.
95-25.24. Restraint of violations.
95-25.25. Construction of Article and severability.

Article 3.

Various Regulations.

95-26 through 95-28. [Repealed.]
95-28.1. Discrimination against any person possessing sickle cell trait or hemoglobin C trait prohibited.
95-28.1A. Discrimination against persons based on genetic testing or genetic information prohibited.
95-28.2. Discrimination against persons for lawful use of lawful products during nonworking hours prohibited.
95-28.3. Leave for parent involvement in schools.
95-29, 95-30. [Repealed.]
95-31. Acceptance by employer of assignment of wages.

Article 4.

Conciliation Service and Mediation of Labor Disputes.

95-32. Declaration of policy.
95-33. Scope of Article.
95-34. Administration of Article.
95-35. Conciliation service established; personnel; removal; compensation.
95-36. Powers and duties of Commissioner and conciliator.

Article 4A.

Voluntary Arbitration of Labor Disputes.

95-36.1. Declaration of policy.
95-36.2. Scope of Article.
95-36.3. Administration of Article.
95-36.4. Voluntary arbitrators.
95-36.5. Fees and expenses.
95-36.6. Appointment of arbitrators.
95-36.7. Arbitration procedure.
95-36.8. Enforcement of arbitration agreement and award.

Sec.
95-36.9. Stay of proceedings.

Article 5.

Regulation of Employment Agencies.

95-37 through 95-47. [Recodified.]

Article 5A.

Regulation of Private Personnel Services.

95-47.1. Definitions.
95-47.2. Licensing procedures.
95-47.3. Fees and contracts; filing with Commissioner.
95-47.3A. Fee reimbursement from employers due to overstated earnings expectations.
95-47.4. Contracts; contents; approval; tying contracts forbidden.
95-47.5. Records.
95-47.6. Prohibited acts.
95-47.7, 95-47.8. [Repealed.]
95-47.9. Enforcement of Article; rules; hearing; penalty; criminal penalties.
95-47.10. Power of Commissioner to seek injunction.
95-47.11. Government employment agencies unaffected.
95-47.12. License taxes placed upon agencies not affected.
95-47.13. Severability.
95-47.14. Notification requirement.
95-47.15. Certification requirement.
95-47.16 through 95-47.18. [Reserved.]

Article 5B.

Regulation of Job Listing Services.

95-47.19. Definitions.
95-47.20. License required.
95-47.21. Violation of this Article; criminal and civil penalty.
95-47.22. Licensing procedure.
95-47.23. Enforcement.
95-47.24. Certain practices prohibited.
95-47.25. Contracts; contents; approval.
95-47.26. Advertising and publication.
95-47.27. Fee receipts.
95-47.28. Prohibited job listings.
95-47.29. Records of the job listing service.
95-47.30. Administration of this Article.
95-47.31. Review of job listing services.
95-47.32. Severability.

Article 6.

Separate Toilets for Sexes.

95-48 through 95-53. [Repealed.]

Article 7.

Board of Boiler Rules and Bureau of Boiler Inspection.

95-54 through 95-69.7. [Repealed.]

Article 7A.

Uniform Boiler and Pressure Vessel Act.

Sec.
95-69.8. Short title.
95-69.9. Definitions.
95-69.10. Application of Article; exemptions.
95-69.11. Powers and duties of Commissioner.
95-69.12. Boiler Safety Bureau established.
95-69.13. Board of Boiler and Pressure Vessels Rules created; appointment, terms, compensation and duties.
95-69.14. Rules and regulations governing the construction, operation and use of boilers and pressure vessels.
95-69.15. Classification of inspectors; qualifications; examinations; inspector's commission.
95-69.16. Inspection certificate required.
95-69.17. Noncomplying devices; appeal.
95-69.18. Operation without inspection certificate; operation not in compliance with this Article; operation after nonissuance or revocation of certificate.
95-69.19. Violations; civil penalties; appeals.
95-69.20. Violations; criminal penalties.

Article 8.

Bureau of Labor for the Deaf.

95-70 through 95-72. [Repealed.]

Article 9.

Earnings of Employees in Interstate Commerce.

95-73. Collections out of State to avoid exemptions forbidden.
95-74. Resident not to abet collection out of State.
95-75. Remedies for violation of § 95-73 or 95-74; damages; indictment.
95-76. Institution of foreign suit, etc., evidence of intent to violate.
95-77. Construction of Article.

Article 10.

Declaration of Policy as to Labor Organizations.

95-78. Declaration of public policy.
95-79. Certain agreements declared illegal.
95-80. Membership in labor organization as condition of employment prohibited.
95-81. Nonmembership as condition of employment prohibited.
95-82. Payment of dues as condition of employment prohibited.
95-83. Recovery of damages by persons denied employment.
95-84. Application of Article.

Article 11.

Minimum Wage Act.

Sec.
95-85 through 95-96. [Repealed.]

Article 12.

Units of Government and Labor Unions, Trade Unions, and Labor Organizations, and Public Employee Strikes.

95-97. [Repealed.]
95-98. Contracts between units of government and labor unions, trade unions or labor organizations concerning public employees declared to be illegal.
95-98.1. Strikes by public employees prohibited.
95-98.2. Strike defined.
95-99. Penalty for violation of Article.
95-100. No provisions of Article 10 of Chapter 95 applicable to units of government or their employees.

Article 13.

Payments to or for Benefit of Labor Organizations.

95-101. Definition.
95-102. Certain payments to and agreements to pay labor organizations unlawful.
95-103. Acceptance of such payments unlawful.
95-104. Penalty.

Article 14.

Inspection Service Fees.

95-105, 95-106. [Repealed.]
95-107. Assessment and collection of fees; certificates of safe operation.
95-108. Disposition of fees.
95-109. [Repealed.]
95-110. [Reserved.]

Article 14A.

Elevator Safety Act of North Carolina.

95-110.1. Short title and legislative purpose.
95-110.2. Scope.
95-110.3. Definitions.
95-110.4. Elevator and Amusement Device Division established.
95-110.5. Powers and duties of Commissioner.
95-110.6. Noncomplying devices and equipment; appeal.
95-110.7. Operation without certificate; operation not in accordance with Article or rules and regulations; operation after refusal to issue or after revocation of certificate.

Sec.
95-110.8. Operation of unsafe device or equipment.
95-110.9. Reports required.
95-110.10. Violations; civil penalties; appeals.
95-110.11. Violations; criminal penalties.
95-110.12. Legal representation.
95-110.13. Authorization for similar safety and health federal-State programs.
95-110.14. Confidentiality of trade secrets.
95-110.15. Construction of Article and rules and regulations and severability.
95-111. [Reserved.]

Article 14B.

Amusement Device Safety Act of North Carolina.

95-111.1. Short title and legislative purpose.
95-111.2. Scope.
95-111.3. Definitions.
95-111.4. Powers and duties of Commissioner.
95-111.5. Pre-opening inspection and test; records; revocation of certificate of operation.
95-111.6. Noncomplying devices; appeal.
95-111.7. Operation without certificate; operation not in accordance with Article or rules and regulations; operation after refusal to issue or after revocation of certificate.
95-111.8. Location notice.
95-111.9. Operation of unsafe device.
95-111.10. Reports required.
95-111.11. Operators.
95-111.12. Liability insurance.
95-111.13. Violations; civil penalties; appeal; criminal penalties.
95-111.14. Denial of permission to enter amusement device.
95-111.15. Legal representation.
95-111.16. Authorization for similar safety and health federal-State programs.
95-111.17. Confidentiality of trade secrets.
95-111.18. Construction of Article and rules and regulations and severability.
95-112 through 95-115. [Reserved.]

Article 15.

Passenger Tramway Safety.

95-116. Declaration of policy.
95-117. Definitions.
95-118. Registration required; application procedures.
95-119. Certification criteria; procedures; display of certificate.
95-120. Powers and duties of the Commissioner.
95-120.1. Liability insurance.
95-121. Inspections and reports.

Sec.
95-122. Emergency shutdown.
95-123. Orders.
95-124. Suspension of registration.
95-125. Effective date of initial applications.

Article 16.

Occupational Safety and Health Act of North Carolina.

95-126. Short title and legislative purpose.
95-127. Definitions.
95-128. Coverage.
95-129. Rights and duties of employers.
95-130. Rights and duties of employees.
95-131. Development and promulgation of standards; adoption of federal standards and regulations.
95-132. Variances.
95-133. Office of Director of Occupational Safety and Health; powers and duties of the Director.
95-134. Advisory Council.
95-135. North Carolina Occupational Safety and Health Review Commission.
95-136. Inspections.
95-136.1. Special emphasis inspection program.
95-137. Issuance of citations.
95-138. Civil penalties.
95-139. Criminal penalties.
95-140. Procedures to counteract imminent dangers.
95-141. Judicial review.
95-142. Legal representation of the Department of Labor.
95-143. Record keeping and reporting.
95-144. Statistics.
95-145. Reports to the Secretary.
95-146. Continuation and effectiveness of this Article.
95-147. Training and employee education.
95-148. Safety and health programs of State agencies and local governments.
95-149. Authority to enter into contracts with other State agencies and subdivisions of government.
95-150. Assurance of adequate funds to enforce Article.
95-151. Discrimination.
95-152. Confidentiality of trade secrets.
95-153. [Reserved.]
95-154. Authorization for similar safety and health federal-state programs.
95-155. Construction of Article and severability.
95-156 through 95-160. [Reserved.]

Article 17.

The Uniform Wage Payment Law of North Carolina.

95-161 through 95-172. [Repealed.]

Article 18.

Identification of Toxic or Hazardous Substances.

Part 1. General Provisions.

Sec.
95-173. Short title.
95-174. Definitions.
95-175 through 95-190. [Reserved.]

Part 2. Public Safety and Emergency Response Right to Know.

95-191. Hazardous Substance List.
95-192. Material safety data sheets.
95-193. Labels.
95-194. Emergency information.
95-195. Complaints, investigations, penalties.
95-196. Employee rights.
95-197. Withholding hazardous substance trade secret information.
95-198. Medical emergency and nonemergency situations.
95-199 through 95-207. [Reserved.]

Part 3. Community Right to Know.

95-208. Community information on hazardous chemicals.
95-209 through 95-215. [Reserved.]

Part 4. Implementation.

95-216. Exemptions.
95-217. Preemption of local regulations.
95-218. Severability.
95-219 through 95-221. [Reserved.]

Article 19.

Migrant Housing Act of North Carolina.

95-222. Short title; legislative purpose.
95-223. Definitions.
95-224. Scope; powers and duties.
95-225. Adoption of standards and interpretations.
95-226. Application for inspection.
95-227. Enforcement.
95-228. Waiver of rights.
95-229. Construction of Article; severability.
95-229.1. Actions upon finding uninhabitable migrant housing.

Article 19A.

Overhead High-Voltage Line Safety Act.

95-229.5. Purpose; scope.
95-229.6. Definitions.
95-229.7. Prohibited activities.
95-229.8. Warning signs.
95-229.9. Notification.
95-229.10. Precautionary safety arrangements.
95-229.11. Exemptions.

Sec.
95-229.12. Application.
95-229.13. Severability.

Article 20.

Controlled Substance Examination Regulation.

95-230. Purpose.
95-231. Definitions.
95-232. Procedural requirements for the administration of controlled substance examinations.
95-233. No duty to examine.
95-234. Violation of controlled substance examination regulations; civil penalty.
95-235. Certain federal agencies exempted.
95-236 through 95-239. [Reserved.]

Article 21.

Retaliatory Employment Discrimination.

95-240. Definitions.
95-241. Discrimination prohibited.
95-242. Complaint; investigation; conciliation.
95-243. Civil action.
95-244. Effect of Article on other rights.
95-245. Rules.
95-246 through 95-249. [Reserved.]

Article 22.

Safety and Health Programs and Committees.

Sec.
95-250. Definitions.
95-251. Safety and health programs.
95-252. Safety and health committees required.
95-253. Additional rights.
95-254. Rules.
95-255. Reports.
95-255.1. Technical assistance.
95-256. Penalties.
95-257 through 95-259.

Article 23.

Workplace Violence Prevention.

95-260. Definitions.
95-261. Civil no-contact orders; persons protected.
95-262. Commencement of action; venue.
95-263. Process for action for no-contact order.
95-264. Civil no-contact order; remedy.
95-265. Temporary civil no-contact order; court holidays and evenings.
95-266. Permanent civil no-contact order.
95-267. Duration; extension of orders.
95-268. Notice of orders.
95-269. Violation of valid order.
95-270. Employment discrimination unlawful.
95-271. Scope of Article; other remedies available.

Article 1.

Department of Labor.

§ 95-1. Department of Labor established.

A Department of Labor is hereby created and established. The duties of said Department shall be exercised and discharged under the supervision and direction of a commissioner, to be known as the Commissioner of Labor. (Rev., s. 3909; 1919, c. 314, s. 4; C.S., s. 7309; 1931, c. 312, s. 1.)

Legal Periodicals. — For comment on the 1931 act, see 9 N.C.L. Rev. 413 (1931).

CASE NOTES

Unfair or Deceptive Trade Practices. — Although this Chapter is regulatory in nature, this fact does not prevent the finding of an unfair or deceptive trade practice (see Chapter 75) based on the conduct proscribed by this Chapter. Winston Realty Co. v. G.H.G., Inc., 314 N.C. 90, 331 S.E.2d 677 (1985).

Cited in Commissioner of Labor v. Dillard's, Inc., 83 F. Supp. 2d 622 (M.D.N.C. 2000).

§ 95-2. Election of Commissioner; term; salary; vacancy.

The Commissioner of Labor shall be elected by the people in the same manner as is provided for the election of the Secretary of State. The term of office of the Commissioner of Labor shall be four years, and the salary of the Commissioner of Labor shall be set by the General Assembly in the Current Operations Appropriations Act. Any vacancy in the office shall be filled by the Governor, until the next general election. The office of the Department of Labor shall be kept in the City of Raleigh and shall be provided for as are other public offices of the State. In addition to the salary set by the General Assembly in the Current Operations Appropriations Act, longevity pay shall be paid on the same basis as is provided to employees of the State who are subject to the State Personnel Act. (Rev., ss. 3909, 3910; 1919, c. 314, s. 4; C.S., s. 7310; 1931, c. 312, s. 2; 1933, c. 282, s. 5; 1935, c. 293; 1937, c. 415; 1939, c. 349; 1943, c. 499, s. 2; 1947, c. 1041; 1949, c. 1278; 1953, c. 1, s. 2; 1957, c. 1; 1963, c. 1178, s. 5; 1967, c. 1130; c. 1237, s. 5; 1969, c. 1214, s. 5; 1971, c. 912, s. 5; 1973, c. 778, s. 5; 1975, 2nd Sess., c. 983, s. 20; 1977, c. 802, s. 42.11; 1983, c. 761, s. 207; 1983 (Reg. Sess., 1984), c. 1034, s. 164; 1987, c. 738, s. 32(b).)

CASE NOTES

Cited in Commissioner of Labor v. Dillard's, Inc., 83 F. Supp. 2d 622 (M.D.N.C. 2000).

§ 95-3. Divisions of Department; Commissioner; administrative officers.

The Department of Labor shall consist of the following officers, divisions and sections:

A Commissioner of Labor.

A Division of Standards and Inspections.

A Division of Statistics.

Each division shall be in the charge of a chief administrative officer and shall be organized under such rules and regulations as the Commissioner of Labor and the head of the division concerned, with the approval of the Governor, shall prescribe and promulgate. The Commissioner of Labor, with the approval of the Governor, may make provision for one person to act as chief administrative officer of two or more divisions, when such is deemed advisable. The chief administrative officers of the several divisions shall be appointed by the Commissioner of Labor with the approval of the Governor. The Commissioner of Labor, with the approval of the Governor may combine or consolidate the activities of two or more of the divisions of the Department, or provide for the setting up of other divisions when such action shall be deemed advisable for the more efficient and economical administration of the work and duties of the Department. (1931, c. 277; c. 312, s. 4; 1933, c. 46; 1963, c. 313, s. 2.)

Editor's Note. — The State Employment Standards Division within the North Carolina Department of Labor was renamed the Wage and Hour Division by G.S. 95-25.17.

§ 95-4. Authority, powers and duties of Commissioner.

The Commissioner of Labor shall be the executive and administrative head of the Department of Labor. In addition to the other powers and duties conferred upon the Commissioner of Labor by this Article, the said Commissioner shall have authority and be charged with the duty:

(1) To appoint and assign to duty such clerks, stenographers, and other employees in the various divisions of the Department, with approval of said director of division, as may be necessary to perform the work of the Department, and fix their compensation, subject to the approval of the Department of Administration. The Commissioner of Labor

may assign or transfer stenographers, or clerks, from one division to another, or inspectors from one division to another, or combine the clerical force of two or more divisions, or require from one division assistance in the work of another division, as he may consider necessary and advisable: Provided, however, the provisions of this subdivision shall not apply to the Industrial Commission, or the Division of Workers' Compensation.

(2) To make such rules and regulations with reference to the work of the Department and of the several divisions thereof as shall be necessary to properly carry out the duties imposed upon the said Commissioner and the work of the Department; such rules and regulations to be made subject to the approval of the Governor.

(3) To take and preserve testimony, examine witnesses, administer oaths, and under proper restriction enter any public institution of the State, any factory, store, workshop, laundry, public eating house or mine, and interrogate any person employed therein or connected therewith, or the proper officer of a corporation, or file a written or printed list of interrogatories and require full and complete answers to the same, to be returned under oath within 30 days of the receipt of said list of questions.

(4) To secure the enforcement of all laws relating to the inspection of factories, mercantile establishments, mills, workshops, public eating places, and commercial institutions in the State. To aid him in the work, he shall have power to appoint factory inspectors and other assistants. The duties of such inspectors and other assistants shall be prescribed by the Commissioner of Labor.

(5) To visit and inspect, personally or through his assistants and factory inspectors, at reasonable hours, as often as practicable, the factories, mercantile establishments, mills, workshops, public eating places, and commercial institutions in the State, where goods, wares, or merchandise are manufactured, purchased, or sold, at wholesale or retail.

(6) To enforce the provisions of this section and to prosecute all violations of laws relating to the inspection of factories, mercantile establishments, mills, workshops, public eating houses, and commercial institutions in this State before any court of competent jurisdiction. It shall be the duty of the district attorney of the proper district upon the request of the Commissioner of Labor, or any of his assistants or deputies, to prosecute any violation of a law, which it is made the duty of the said Commissioner of Labor to enforce. (1925, c. 288; 1931, c. 277; c. 312, ss. 5, 6; 1933, cc. 46, 244; 1945, c. 723, s. 2; 1957, c. 269, s. 1; 1973, c. 47, s. 2; c. 108, s. 41; 1991, c. 636, s. 3.)

CASE NOTES

The public duty doctrine, by barring negligence actions against a governmental entity absent a "special relationship" or a "special duty" to a particular individual applies to claims brought under the Tort Claims Act. Stone v. North Carolina Dep't of Labor, 347 N.C. 473, 495 S.E.2d 711 (1998).

Duty for the Benefit of Public. — Although this section imposes a duty upon defendant (N.C. Dept. of Labor), that duty is for the benefit of the public, not individual claimants. Stone v. North Carolina Dep't of Labor, 347 N.C. 473, 495 S.E.2d 711 (1998).

Cited in Commissioner of Labor v. Dillard's, Inc., 83 F. Supp. 2d 622 (M.D.N.C. 2000); Multiple Claimants v. N.C. HHS, Div. of Facility & Detention Servs., 176 N.C. App. 278, 626 S.E.2d 666, 2006 N.C. App. LEXIS 530 (2006); Multiple Claimants v. N.C. HHS, Div. of Facility Servs., 361 N.C. 372, 646 S.E.2d 356, 2007 N.C. LEXIS 599 (2007).

§ 95-5. Annual report to Governor; recommendation as to legislation needed.

The Commissioner of Labor shall annually, on or before the first day of January, file with the Governor a report covering the activities of the Department, and the report so made on or before January 1 of the years in which the General Assembly shall be in session shall be accompanied by recommendations of the Commissioner with reference to such changes in the law applying to or affecting industrial and labor conditions as the Commissioner may deem advisable. The report of the Commissioner of Labor shall be printed and distributed in such manner and form as the Director of the Budget shall authorize. (1931, c. 312, s. 7.)

§ 95-6. Statistical report to Governor; publication of information given by employers.

It shall be the duty of the Commissioner of Labor to collect in the manner herein provided for, and to assort, systematize, and present to the Governor as a part of the report provided for in G.S. 95-5, statistical details relating to all divisions of labor in the State, and particularly concerning the following: the extent of unemployment, the hours of labor, the number of employees and sex thereof, and the daily wages earned; the conditions with respect to labor in all manufacturing establishments, hotels, stores, and workshops; and the industrial, social, educational, moral, and sanitary conditions of the labor classes, in the productive industries of the State. Such statistical details shall include the names of firms, companies, or corporations, where the same are located, the kind of goods produced or manufactured, the period of operation of each year, the number of employees, male or female, the number engaged in clerical work and the number engaged in manual labor, with the classification of the number of each sex engaged in such occupation and the average daily wage paid each: Provided, that the Commissioner shall not, nor shall anyone connected with his office, publish or give or permit to be published or given to any person the individual statistics obtained from any employer, and all such statistics, when published, shall be published in connection with other similar statistics and be set forth in aggregates and averages. (1931, c. 312, s. 8.)

§ 95-7. Power of Commissioner to compel the giving of such information; refusal as contempt.

The Commissioner of Labor, or his authorized representative, for the purpose of securing the statistical details referred to in G.S. 95-6, shall have power to examine witnesses on oath, to compel the attendance of witnesses and the giving of such testimony and production of such papers as shall be necessary to enable him to gain the necessary information. Upon the refusal of any witness to comply with the requirements of the Commissioner of Labor or his representative in this respect, it shall be the duty of any judge of the superior court, upon the application of the Commissioner of Labor, or his representative, to order the witness to show cause why he should not comply with the requirements of the said Commissioner, or his representative, if in the discretion of the judge such requirement is reasonable and proper. Refusal to comply with the order of the judge of the superior court shall be dealt with as for contempt of court. (1931, c. 312, s. 9.)

§ 95-8. Employers required to make statistical report to Commissioner; refusal as contempt.

It shall be the duty of every owner, operator, or manager of every factory, workshop, mill, mine, or other establishment, where labor is employed, to make to the Department, upon blanks furnished by said Department, such reports and returns as the said Department may require, for the purpose of compiling such labor statistics as are authorized by this Article, and the owner or business manager shall make such reports and returns within the time prescribed therefor by said Commissioner, and shall certify to the correctness of the same. Upon the refusal of any person, firm, or corporation to comply with the provisions of this section, it shall be the duty of any judge of the superior court, upon application by the Commissioner or by any representative of the Department authorized by him, to order the person, firm, or corporation to show cause why he or it should not comply with the provisions of this section. Refusal to comply with the order of the judge of the superior court shall be dealt with as for contempt of court. (1931, c. 312, s. 10.)

§ 95-9. Employers to post notice of laws.

It shall be the duty of every employer to keep posted in a conspicuous place in every room where five or more persons are employed a printed notice stating the provisions of the law relative to the employment of adult persons and children and the regulation of hours and working conditions. The Commissioner of Labor shall furnish the printed form of such notice upon request. (1933, c. 244, s. 6.)

§ 95-10: Repealed by Session Laws 1963, c. 313, s. 1.

§ 95-11. Division of Standards and Inspection.

(a) The chief administrative officer of the Division of Standards and Inspection shall be known as the Director of the Division. It shall be his duty, under the direction and supervision of the Commissioner of Labor, and under rules and regulations to be adopted by the Department as herein provided, to make or cause to be made all necessary inspections to see that all laws, rules and regulations concerning the safety and well-being of labor are promptly and effectively carried out.

(b) The Division shall make studies and investigations of special problems connected with the labor of women and children, and create the necessary organization, and appoint an adequate number of investigators, with the consent of the Commissioner of Labor and the approval of the Governor; and the Director of said Division, under the supervision and direction of the Commissioner of Labor and under such rules and regulations as shall be prescribed by said Commissioner, with the approval of the Governor, shall perform all duties devolving upon the Department of Labor, or the Commissioner of Labor with relation to the enforcement of laws, rules, and regulations governing the employment of women and children.

(c) The Director shall report annually to the Commissioner of Labor the activities of the Division, with such recommendations as may be considered advisable for the improvement of the working conditions for women and children.

(d) The Division shall collect and collate information and statistics concerning the location, estimated and actual horsepower and condition of valuable water powers, developed and undeveloped, in this State; also concerning farmlands and farming, the kinds, character, and quantity of the annual farm products in this State; also of timber lands and timbers, truck gardening, dairying, and such other information and statistics concerning the agricultural and industrial welfare of the citizens of this State as may be deemed to be of interest and benefit to the public. The Director shall also perform the duties of mine inspector as prescribed in the Chapter on Mines and Quarries.

(e) The Division shall conduct such research and carry out such studies as will contribute to the health, safety, and general well-being of the working classes of the State. The finding of such investigations, with the approval of the Commissioner of Labor and the Governor and the cooperation of the chief administrative officer of the Division or Divisions directly concerned, shall be promulgated as rules and regulations governing work places and working conditions. All recommendations and suggestions pertaining to health, safety, and well-being of employees shall be transmitted to the Commissioner of Labor in an annual report which shall cover the work of the Division of Standards and Inspection.

(f) The Division shall make, promulgate and enforce rules and regulations for the protection of employees from accident and from occupational disease; and shall upon request, and after such investigation as it deems proper, issue certificates of compliance to such employers as are found by it to be in compliance with the rules and regulations made and promulgated in accordance with the provisions of this paragraph. (1931, c. 312, s. 12; c. 426; 1935, c. 131.)

Editor's Note. — The State Employment Standards Division within the North Carolina Department of Labor was renamed the Wage and Hour Division by G.S. 95-25.17.

CASE NOTES

Section Does Not Create Criterion for Negligence. — Neither the legislature, when it authorized the division to promulgate rules and regulations to protect the health, safety and general well-being of the working classes of the State, nor the division when it wrote the rules, intended to create a criterion for negligence in civil damages suits; hence, violation of those rules cannot be asserted as contributory negligence. Swaney v. Peden Steel Co., 259 N.C. 531, 131 S.E.2d 601 (1963).

§ 95-12. Division of Statistics.

The Division of Statistics shall be in charge of a Chief Statistician. It shall be his duty, under the direction and supervision of the Commissioner of Labor, to collect, assort, systematize, and print all statistical details relating to all divisions of labor in this State as is provided in G.S. 95-6. (1931, c. 312, s. 13.)

§ 95-13. Enforcement of rules and regulations.

In the event any person, firm or corporation shall, after notice by the Commissioner of Labor, violate any of the rules or regulations promulgated under the authority of this Article or any laws amendatory hereof relating to safety devices, or measures, the Attorney General of the State, upon the request of the Commissioner of Labor, may take appropriate action in the civil courts of the State to enforce such rules and regulations. Upon request of the Attorney General, any district attorney of the State of North Carolina in whose district such rule or regulation is violated may perform the duties hereinabove required of the Attorney General. (1939, c. 398; 1973, c. 47, s. 2.)

CASE NOTES

Cited in Swaney v. Peden Steel Co., 259 N.C. 531, 131 S.E.2d 601 (1963).

§ 95-14. Agreements with certain federal agencies for enforcement of Fair Labor Standards Act.

The North Carolina State Department of Labor may and it is hereby authorized to enter into agreements with the Wage and Hour Division, and the Children's Bureau, United States Department of Labor, for assistance and cooperation in the enforcement within this State of the act of Congress known as the Fair Labor Standards Act of 1938, approved June 25, 1938, and is further authorized to accept payment and/or reimbursement for its services as provided by said act of Congress. Any such agreement may be subject to the regulations of the administrator of the Wage and Hour Division, or the chief of the Children's Bureau of the United States Department of Labor, as the case may be, and shall be subject to the approval of the Director of the State Budget. Nothing in this section shall be construed as authorizing the State Department of Labor to spend in excess of its appropriation from State funds, except to the extent that such excess may be paid and/or reimbursed to it by the United States Department of Labor. All payments received by the State Department of Labor under this section shall be deposited in the State treasury and are hereby appropriated to the State Department of Labor to enable it to carry out the agreements entered into under this section. (1939, c. 245.)

Article 2.

Maximum Working Hours.

§§ 95-15 through 95-25: Recodified as §§ 95-25.1 to 95-25.25.

Editor's Note. — This Article was rewritten by Session Laws 1979, c. 839, s. 1, and has been recodified as G.S. 95-25.1 through 95-25.25.

Article 2A.

Wage and Hour Act.

§ 95-25.1. Short title and legislative purpose.

(a) This Article shall be known and may be cited as the "Wage and Hour Act."

(b) The public policy of this State is declared as follows: The wage levels of employees, hours of labor, payment of earned wages, and the well-being of minors are subjects of concern requiring legislation to promote the general welfare of the people of the State without jeopardizing the competitive position of North Carolina business and industry. The General Assembly declares that the general welfare of the State requires the enactment of this law under the police power of the State. (1937, c. 409, s. 2; 1979, c. 839, s. 1.)

Editor's Note. — This Article is Article 2, G.S. 95-15 to 95-25 of this Chapter, as rewritten by Session Laws 1979, c. 839, s. 1, and recodified. The 1979 act also repealed Article 11, G.S. 95-85 to 95-96, and Article 17, G.S. 95-161 to 95-172, of this Chapter, and Article 1, G.S. 110-1 to 110-20 of Chapter 110, and incorporated the subject matter of those articles in Article 2A of this Chapter as rewritten. Where appropriate, the historical citations to sections from the rewritten and repealed articles have been added to corresponding sections in the Article as recodified.

Legal Periodicals. — For note on workers' compensation and retaliatory discharge, see 58 N.C.L. Rev. 629 (1980).

CASE NOTES

North Carolina Wage and Hour Act is modeled after the Federal Fair Labor Standards Act, 29 U.S.C.S. § 201 et seq. North Carolina Wage and Hour Act is modeled after the Federal Fair Labor Standards Act, 29 U.S.C.S. § 201 et seq. Whitehead v. Sparrow Enter., 167 N.C. App. 178, 605 S.E.2d 234 (2004), cert. denied, 359 N.C. 856, 618 S.E.2d 240 (2005).

Public Policy. — Without question, payment of the minimum wage is the public policy of North Carolina. Amos v. Oakdale Knitting Co., 102 N.C. App. 782, 403 S.E.2d 565, rev'd on other grounds, 331 N.C. 348, 416 S.E.2d 166 (1992).

The General Assembly in enacting the Wage and Hour Act expressly recognized that the general welfare of the people necessitated a balancing of the employee's right to earn acceptable wages and the competitive position of North Carolina business and industry. The statutory remedy making the employer potentially liable for up to twice the amount due plus the costs and expenses incurred by the employee in pursuing the claim reflects this balancing. Amos v. Oakdale Knitting Co., 102 N.C. App. 782, 403 S.E.2d 565, rev'd on other grounds, 331 N.C. 348, 416 S.E.2d 166 (1992).

This Article requires an employer to notify an employee in advance of the wages and hours which he will earn and the conditions which must be met to earn them, and to pay such wages and benefits as are due when the employee has actually performed the work required to earn them. Once the employee has earned wages and benefits under this statutory scheme, the employer is prevented from rescinding them, with the exception that for certain benefits such as commissions, bonuses and vacation pay, an employer may cause a loss or forfeiture of such pay if he has notified the employee of the conditions for loss or forfeiture in advance of the time when the pay is earned. Narron v. Hardee's Food Sys., 75 N.C. App. 579, 331 S.E.2d 205, cert. denied, 314 N.C. 542, 335 S.E.2d 316 (1985).

Businesses covered by the federal Fair Labor Standards Act are exempt, from the state Wage and Hour Act. Amos v. Oakdale Knitting Co., 331 N.C. 348, 416 S.E.2d 166 (1992).

Where employer-employee relationship at issue was covered by the Fair Labor Standards Act, it was exempt from the provisions of the North Carolina Wage and Hour Act. Spencer v. Hyde County, 959 F. Supp. 721 (E.D.N.C. 1997).

A claim for vacation pay pursuant to this Article is not preempted by federal law, the United States Supreme Court having recently held that an employer's policy of paying discharged employees vacation pay for unused vacation time does not constitute an "employee welfare benefit plan" within the meaning of the Employment Retirement Income and Security Act of 1974 (ERISA), as amended, 29 U.S.C. sec. 1001 et seq. Rucker v. First Union Nat'l Bank, 98 N.C. App. 100, 389 S.E.2d 622, cert. denied, 326 N.C. 801, 393 S.E.2d 899 (1990).

Claim for Unpaid Bonus. — Plaintiff's state claims presented complex and unsettled issues of North Carolina law which would be more appropriately resolved by a North Carolina court including the proper definition of "handicapped person" under G.S. 143-422.2, part of the North Carolina Equal Employment Practices Act; and the proper analysis of this act, with its accompanying administrative regulations in the North Carolina Administrative Code, in the context of the plaintiff's claim for an unpaid bonus. McCullough v. Branch Banking & Trust Co., 844 F. Supp. 258 (E.D.N.C. 1993), aff'd, 35 F.3d 127 (4th Cir. 1994), cert. denied, 513 U.S. 1151, 115 S. Ct. 1101, 130 L. Ed. 2d 1069 (1995).

Liquidated Damages. — The employer bears the burden of demonstrating that liquidated damages should not be imposed; however, even if an employer shows that it acted in good faith, and with the belief that its action did not constitute a violation of the Wage and Hour Act, the trial court may still, in its discretion, award liquidated damages in any amount up to the amount due for unpaid wages. Hamilton v. Memorex Telex Corp., 118 N.C. App. 1, 454 S.E.2d 278 (1995).

Preemption by ERISA. — Employer was entitled to summary judgment on the employee's state law claims concerning the denial of short-term and long-term disability benefits because the state claims were preempted by 29 U.S.C.S. § 1144(a). Bursell v. GE, 243 F. Supp. 2d 460 (E.D.N.C. 2003).

Where employee sued under the North Carolina Wage and Hour Act, G.S. 95-25.1 et seq. to recover severance pay, which was also provided for by 29 U.S.C.S. § 1132(a), the civil enforcement provision of the Employee Retirement Income Security Act (ERISA), 29 U.S.C.S. § 1001 et seq, 29 U.S.C.S. § 1132(a), preempted the state law claim; however, the state law claim was not dismissed but was treated as an ERISA claim, subject to amendment of the complaint to assert the ERISA claim, since the requested relief was not allowed under ERISA and a finding that the employer's severance plan was an ERISA plan could give rise to claims other than that for benefits. Mullaly v. Ins. Servs. Office, Inc., 395 F. Supp. 2d 290, 2005 U.S. Dist. LEXIS 25556 (M.D.N.C. 2005).

Where former employee sought severance pay under the North Carolina Wage and Hour Act, G.S. 95-25.1 et seq., the employer's severance plan was an employee welfare benefit plan subject to the Employee Retirement Income Security Act (ERISA), 29 U.S.C.S. § 1001 et seq. and preempted the state law claim; the federal district court had federal question subject matter jurisdiction, and it denied the employee's post-removal motion to remand to state court. Mullaly v. Ins. Servs. Office, Inc., 395 F. Supp. 2d 290, 2005 U.S. Dist. LEXIS 25556 (M.D.N.C. 2005).

Federal Court Supplemental Jurisdiction Declined. — Where plaintiff H-2A visa certification program workers filed a class action for minimum wage law violations under the Fair Labor Standards Act (FLSA), and under the North Carolina Wage and Hour Act alleging defendant employers failed to reimburse transportation, visa, and border crossing fees, the workers' FLSA action could proceed as a collective action, but supplemental jurisdiction under 28 U.S.C.S. § 1367(a), (c), was declined as to the state law claim due to resulting confusion between state claim "opt-out" procedures under Fed. R. Civ. P. 23, "opt-in" procedures under 29 U.S.C.S. § 216(b) of the FLSA, and the multiple notifications as to separate classes and claims. De Jesus De Luna-Guerrero v. North Carolina Grower's Ass'n, 338 F. Supp. 2d 649 (E.D.N.C. 2004).

Pharmacy Board Lacked Authority to Regulate Pharmacist Hours. — Pharmacy board's authority to regulate pharmacies did not extend to regulating pharmacist working hours as set out in its proposed rule; the North Carolina Department of Labor was the only entity with authority to regulate working hours of pharmacists in pharmacies, and such regulation was solely through the Wage and Hour Act, G.S. 95-25.1. N.C. Bd. of Pharm. v. Rules Review Comm'n, 174 N.C. App. 301, 620 S.E.2d 893, 2005 N.C. App. LEXIS 2362 (2005), rev'd, in part, remanded, 360 N.C. 638, 637 S.E.2d 515 (2006) (rev'd as to pharmacy board's authority to regulate hours).

Applied in Martin v. Pomeroy Computer Resources, Inc., 87 F. Supp. 2d 496 (W.D.N.C. 1999); Beltran-Benitez v. Sea Safari, Ltd., 180 F. Supp. 2d 772 (E.D.N.C. 2001).

Cited in Johnson v. North Carolina DOT, 107 N.C. App. 63, 418 S.E.2d 700 (1992); Moses H. Cone Mem'l Health Servs. Corp. v. Triplett, 167 N.C. App. 267, 605 S.E.2d 492 (2004); Maglione v. Aegis Family Health Ctrs., 168 N.C. App. 49, 607 S.E.2d 286 (2005); Arndt v. First Union Nat'l Bank, 170 N.C. App. 518, 613 S.E.2d 274, 2005 N.C. App. LEXIS 1080 (2005); Youse v. Duke Energy Corp., 171 N.C. App. 187, 614 S.E.2d 396, 2005 N.C. App. LEXIS 1209 (2005); Abreo v. N.C. Growers' Ass'n, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 30535 (M.D.N.C. Nov. 25, 2005).

§ 95-25.2. Definitions.

In this Article, unless the context otherwise requires:

(1) "Agriculture" includes farming in all its branches performed by a farmer or on a farm as an incident to or in conjunction with farming operations.
(2) "Commissioner" means the Commissioner of Labor.
(3) "Employ" means to suffer or permit to work.
(4) "Employee" includes any individual employed by an employer.
(5) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee.
(6) "Establishment" means a physical location where business is conducted.
(7) "The Fair Labor Standards Act" means the Fair Labor Standards Act of 1938, as amended and as the same may be amended from time to time by the United States Congress.
(8) "Hours worked" includes all time an employee is employed.
(9) "Payday" means that day designated for payment of wages due by virtue of the employment relationship.
(10) "Pay periods" may be daily, weekly, biweekly, semimonthly, or monthly.
(11) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons. For the purposes of G.S. 95-25.2, G.S. 95-25.3, G.S. 95-25.14, and G.S. 95-25.20, it also means the State of North Carolina, any city, town, county, or municipality, or any State or local agency or instrumentality of government. The Government of the United States and

any agency of the United States (including the United States Postal Service and Postal Rate Commission) are not included as persons for any purpose under this Article.

(12) "Seasonal food service establishment" means a restaurant, food and drink stand or other establishment generally recognized as a commercial food service establishment, preparing and serving food to the public but operating 180 days or less per year.

(13) "Seasonal religious or nonprofit educational conference center or a seasonal amusement or recreational establishment" means an establishment which does not operate for more than seven months in any calendar year, or during the preceding calendar year had average receipts for any six months of such year of not more than thirty-three and one-third percent (33⅓%) of its average receipts for the other six months of that year.

(14) "Tipped employee" means any employee who customarily receives more than twenty dollars ($20.00) a month in tips.

(15) "Tip" shall mean any money or part thereof over and above the actual amount due a business for goods, food, drink, services or articles sold which is paid in cash or by credit card, or is given to or left for an employee by a patron or patrons of the business where the employee is employed.

(16) "Wage" paid to an employee means compensation for labor or services rendered by an employee whether determined on a time, task, piece, job, day, commission, or other basis of calculation, and the reasonable cost as determined by the Commissioner of furnishing employees with board, lodging, or other facilities. For the purposes of G.S. 95-25.6 through G.S. 95-25.13 "wage" includes sick pay, vacation pay, severance pay, commissions, bonuses, and other amounts promised when the employer has a policy or a practice of making such payments.

(17) "Workweek" means any period of 168 consecutive hours.

(18) "Enterprise" means the related activities performed either through unified operations or common control by any person or persons for a common business purpose and includes all such activities whether performed in one or more establishments or by one or more corporate units but shall not include the related activities performed for such enterprise by an independent contractor or franchisee. (1959, c. 475; 1961, c. 652; 1969, c. 34, s. 2; c. 218; 1971, c. 1231, s. 1; 1975, c. 413, s. 1; c. 605; 1977, c. 653; c. 672, s. 1; c. 826, s. 1; 1979, c. 839, s. 1; 1981, c. 663, ss. 10, 11; 1983, c. 708, s. 3; 1991, c. 330, s. 1.)

Legal Periodicals. — For article, "An Analysis of the Retaliatory Employment Discrimination Act and Protected Activity under the Occupational Safety and Health Act of North Carolina," see 15 Campbell L. Rev. 29 (1992).

CASE NOTES

The definition of "employer" in subdivision (5) of this section is identical to the definition in the Equal Pay Act. In construing this definition, the court should keep in mind the remedial purposes of Title VII (42 U.S.C. § 2000) and the Equal Pay Act (29 U.S.C. § 203(d)). Crowder v. Fieldcrest Mills, Inc., 569 F. Supp. 825 (M.D.N.C. 1983).

"Hours Worked." — Pursuant to G.S. 95-25.2(3) and (8), and 29 U.S.C.S. § 203(g), a trial court properly held that the day laborers' waiting and transportation time was excluded from their hours worked where the laborers received assignments only if work was available, they were not required to ride the company van to the jobsite, they were able to use the wait time for their own personal activities, and they were not required to don or doff specialized protective gear and clothing, but safety equipment was made available to them for certain job sites, which could be rented on an as needed basis. Leverette v. Labor Works Int'l, LLC, —

N.C. App. —, 636 S.E.2d 258, 2006 N.C. App. LEXIS 2250 (2006).

Time that day laborers spent taking and waiting for the results of a breathalyzer test was not compensable where the test was a pre-condition to employment. Leverette v. Labor Works Int'l, LLC, — N.C. App. —, 636 S.E.2d 258, 2006 N.C. App. LEXIS 2250 (2006).

It is dependence that indicates employee status. Poole v. Local 305 Nat'l Post Office Mail Handlers, 69 N.C. App. 675, 318 S.E.2d 105 (1984).

Employee Status Not Shown. — A directed verdict on a wage and hour claim would be affirmed where there was no evidence that real estate broker was an "employee"; the parties had entered into a separate agreement regarding a commission after the broker had resigned, and at most, broker was an independent contractor. Horack v. S. Real Estate Co. of Charlotte, Inc., 150 N.C. App. 305, 563 S.E.2d 47 (2002).

"Enterprise." — Trial court found that three temporary employment agencies were not enterprises under G.S. 95-25.2(18) where the day laborers who brought the action had been employed at only one location, and deposition testimony that each of the limited liability companies ultimately deposited their funds into an account maintained by one of the temporary agencies did not give rise to an issue of fact as to whether the agencies engaged in related activities performed through a unified operation. Leverette v. Labor Works Int'l, LLC, — N.C. App. —, 636 S.E.2d 258, 2006 N.C. App. LEXIS 2250 (2006).

Defendants who had taken an active role in management and the closing of factory business were "employers" for purposes of federal worker protection and notification statutes; therefore, they were denied summary judgment on liability claims. Sigmon v. Recovery Equity Partners, L.P. (In re Shelby Yarn Co.), 306 B.R. 523 (W.D.N.C. 2004).

Amendment of Annual Bonus Without Notice. — Employee was entitled to an award under the North Carolina Wage and Hour Act, G.S. 95-25.1 et seq., because: (1) the employers' representative orally agreed to pay the employee an annual bonus as part of a contract; (2) the employers modified the employee's bonus formula without his consent; and (3) the employers also failed to give the employee notice of the change in the bonus formula. Arndt v. First Union Nat'l Bank, 170 N.C. App. 518, 613 S.E.2d 274, 2005 N.C. App. LEXIS 1080 (2005).

Cited in Narron v. Hardee's Food Sys., 75 N.C. App. 579, 331 S.E.2d 205 (1985); Hamilton v. Memorex Telex Corp., 118 N.C. App. 1, 454 S.E.2d 278 (1995).

§ 95-25.3. Minimum wage.

(a) Every employer shall pay to each employee who in any workweek performs any work, wages of at least six dollars and fifteen cents ($6.15) per hour or the minimum wage set forth in paragraph 1 of section 6(a) of the Fair Labor Standards Act, 29 U.S.C. 206(a)(1), as that wage may change from time to time, whichever is higher, except as otherwise provided in this section.

(b) In order to prevent curtailment of opportunities for employment, the wage rate for full-time students, learners, apprentices, and messengers, as defined under the Fair Labor Standards Act, shall be ninety percent (90%) of the rate in effect under subsection (a) above, rounded to the lowest nickel.

(c) The Commissioner, in order to prevent curtailment of opportunities for employment, may, by regulation, establish a wage rate less than the wage rate in effect under section (a) which may apply to persons whose earning or productive capacity is impaired by age or physical or mental deficiency or injury, as such persons are defined under the Fair Labor Standards Act.

(d) The Commissioner, in order to prevent curtailment of opportunities for employment of the economically disadvantaged and the unemployed, may, by regulation, establish a wage rate not less than eighty-five percent (85%) of the otherwise applicable wage rate in effect under subsection (a) which shall apply to all persons (i) who have been unemployed for at least 15 weeks and who are economically disadvantaged, or (ii) who are, or whose families are, receiving Work First Family Assistance or who are receiving supplemental security benefits under Title XVI of the Social Security Act.

Pursuant to regulations issued by the Commissioner, certificates establishing eligibility for such subminimum wage shall be issued by the Employment Security Commission.

The regulation issued by the Commissioner shall not permit employment at the subminimum rate for a period in excess of 52 weeks.

(e) The Commissioner, in order to prevent curtailment of opportunities for employment, and to not adversely affect the viability of seasonal establishments, may, by regulation, establish a wage rate not less than eighty-five percent (85%) of the otherwise applicable wage rate in effect under subsection (a) which shall apply to any employee employed by an establishment which is a seasonal amusement or recreational establishment, or a seasonal food service establishment.

(f) Tips earned by a tipped employee may be counted as wages only up to the amount permitted in section 3(m) of the Fair Labor Standards Act, 29 U.S.C. 203(m), if the tipped employee is notified in advance, is permitted to retain all tips and the employer maintains accurate and complete records of tips received by each employee as such tips are certified by the employee monthly or for each pay period. Even if the employee refuses to certify tips accurately, tips may still be counted as wages when the employer complies with the other requirements of this section and can demonstrate by monitoring tips that the employee regularly receives tips in the amount for which the credit is taken. Tip pooling shall also be permissible among employees who customarily and regularly receive tips; however, no employee's tips may be reduced by more than fifteen percent (15%) under a tip pooling arrangement.

(g) Repealed by Session Laws 2006-259, s. 18, effective August 23, 2006. (1959, c. 475; 1963, c. 816; 1965, c. 229; 1969, c. 34, s. 1; 1971, c. 138; 1973, c. 802; 1975, c. 256, s. 1; 1977, c. 519; 1979, c. 839, s. 1; 1981, c. 493, s. 1; c. 663, s. 13; 1983, c. 708, s. 1; 1985, c. 97; 1987, c. 79; 1991, c. 270, ss. 1, 2; c. 330, s. 5; 1997-146, s. 1; 1997-443, s. 12.25; 2006-114, s. 1; 2006-259, s. 18.)

Cross References. — As to exemptions from the provisions of this section, see G.S. 95-25.14.

Editor's Note. — G.S. 95-25.3A, referred to in subsection (g), was repealed by Session laws 2003-308, s. 8, effective July 1, 2003.

Effect of Amendments. — Session Laws 2006-114, s. 1, effective January 1, 2007, in subsection (a), inserted "six dollars and fifteen cents ($6.15) per hour or" following "wages of at least" and inserted "whichever is higher" following "from time to time."

Session Laws 2006-259, s. 18, effective August 23, 2006, repealed subsection (g) which read: "In order to prevent curtailment of opportunities for employment, an employer may, in lieu of the minimum wage prescribed by this section, pay a training wage to eligible persons in accordance with G.S.95-25.3A."

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 389.

CASE NOTES

Cited in Narron v. Hardee's Food Sys., 75 N.C. App. 579, 331 S.E.2d 205 (1985); Amos v. Oakdale Knitting Co., 331 N.C. 348, 416 S.E.2d 166 (1992); Zelaya v. J.M. Macias, Inc., 999 F. Supp. 778 (E.D.N.C. 1998).

Action Not Preempted by Fair Labor Standards Act. — Plaintiffs' class action alleging violations of the North Carolina Wage and Hour Act was remanded to state court because the employer failed to establish federal question jurisdiction because the Fair Labor Standards Act (FLSA) did not completely preempt state law and the employee specifically denied that the claims implicated the requirement in G.S. 95-25.3(f) that no employee's tips could be reduced by more than 15 percent under a tip-pooling arrangement. Chandler v. Cheesecake Factory Rests., Inc., 239 F.R.D. 432, 2006 U.S. Dist. LEXIS 45649 (M.D.N.C. 2006).

§ 95-25.3A: Repealed by Session Laws 2003-308, s. 8, effective July 1, 2003.

§ 95-25.4. Overtime.

(a) Every employer shall pay each employee who works longer than 40 hours in any workweek at a rate of not less than time and one half of the regular rate of pay of the employee for those hours in excess of 40 per week;

provided that employers of seasonal amusement or recreational establishment employees are required to pay those employees the overtime rate only for hours in excess of 45 per workweek.

(b) Repealed by Session Laws 1991, c. 330, s. 2, effective June 19, 1991. (1973, c. 685, s. 1; 1979, c. 839, s. 1; 1991, c. 330, s. 2; c. 492, s. 1.)

Cross References. — As to exemptions from the provisions of this section, see G.S. 95-25.14.

CASE NOTES

Construction With Federal Law. — Summary judgment was denied to both plaintiff welding instructor and defendant college, as material issues of fact remained as to whether the instructor was entitled to overtime pay under the Fair Labor Standards Act, 29 U.S.C.S. § 201, et seq., and the North Carolina Wage Act, G.S. 95-85, et seq., or was exempted as a professional employee. Massie v. Bd. of Trs., 357 F. Supp. 2d 878 (W.D.N.C. 2005).

Cited in Narron v. Hardee's Food Sys., 75 N.C. App. 579, 331 S.E.2d 205 (1985); Zelaya v. J.M. Macias, Inc., 999 F. Supp. 778 (E.D.N.C. 1998); Chandler v. Cheesecake Factory Rests., Inc., 239 F.R.D. 432, 2006 U.S. Dist. LEXIS 45649 (M.D.N.C. 2006).

§ 95-25.5. Youth employment.

(a) No youth under 18 years of age shall be employed by any employer in any occupation without a youth employment certificate unless specifically exempted. The Commissioner of Labor shall prescribe regulations for youths and employers concerning the issuance, maintenance and revocation of certificates. Certificates will be issued, subject to review by the Department of Labor, by county directors of social services and such of their designees as are approved by the Commissioner; provided, the Commissioner may also issue certificates, both directly and electronically.

(a1) During the regular school term, no youth under 18 years of age who is enrolled in school in grade 12 or lower may be employed between 11 P.M. and 5 A.M. when there is school for the youth the next day. This restriction does not apply to youths 16 and 17 years of age if the employer receives written approval for the youth to work beyond the stated hours from the youth's parent or guardian and from the youth's principal or the principal's designee.

(b) No youth under 18 years of age may be employed by an employer in any occupation which the United States Department of Labor shall find and by order declare to be hazardous and without exemption under the Fair Labor Standards Act, or in any occupation which the Commissioner of Labor after public hearing shall find and declare to be detrimental to the health and well-being of youths.

(c) No youth 14 or 15 years of age may be employed by an employer in any occupation except those determined by the United States Department of Labor to be permitted occupations under the Fair Labor Standards Act; provided, such youths may be employed by employers:

(1) No more than three hours on a day when school is in session for the youth;
(2) No more than eight hours on a day when school is not in session for the youth;
(3) Only between 7 A.M. and 7 P.M., except to 9 P.M. during the summer (when school is not in session);
(4) No more than 40 hours in any one week when school is not in session for the youth;
(5) No more than 18 hours in any one week when school is in session for the youth; and
(6) Only outside school hours.

Notwithstanding the above, enrollees in high school apprenticeships or in work experience and career exploration programs as defined under the Fair Labor Standards Act may work up to 23 hours in any one week when school is in session, any portion of which may be during school hours.

(d) No youth 13 years of age or less may be employed by an employer, except youths 12 and 13 years of age may be employed outside school hours in the distribution of newspapers to the consumer but not more than three hours per day. An employment certificate shall not be required for any youth under 18 years of age engaged in the distribution of newspapers to the consumer outside of school hours.

(e) No youth under 16 years of age shall be employed for more than five consecutive hours without an interval of at least 30 minutes for rest. No period of less than 30 minutes shall be deemed to interrupt a continuous period of work.

(f) For any youth 13 years of age or older, the Commissioner may waive any provision of this section and authorize the issuance of an employment certificate when:

(1) He receives a letter from a social worker, court, probation officer, county department of social services, a letter from the North Carolina Alcohol Beverage Control Commission or school official stating those factors which create a hardship situation and how the best interest of the youth is served by allowing a waiver; and

(2) He determines that the health or safety of the youth would not be adversely affected; and

(3) The parent, guardian, or other person standing in loco parentis consents in writing to the proposed employment.

(g) Youths employed as models, or as actors or performers in motion pictures or theatrical productions, or in radio or television productions are exempt from all provisions of this section except the certificate requirements of subsection (a).

(h) Youths employed by an outdoor drama directly in production-related positions such as stagehands, lighting, costumes, properties and special effects are exempt from all provisions of this section except the certificate requirements of subsection (a). Positions such as office workers, ticket takers, ushers and parking lot attendants have no exemption and are subject to all provisions of this section.

(i) Youth under 18 years of age employed by their parent, guardian, or other person standing in loco parentis are exempt from all provisions of this section, except for all of the following:

(1) The certificate requirements of subsection (a) of this section.

(2) The prohibition from hazardous or detrimental occupations of subsection (b) of this section.

(3) The prohibitions of subsection (j)(2) of this section if the youths only work at the establishment when another employee at least 21 years of age is in charge of and present at the licensed premises.

(j) No person who holds any ABC permit issued pursuant to the provisions of Chapter 18B of the General Statutes for the on-premises sale or consumption of alcoholic beverages, including any mixed beverages, shall employ a youth:

(1) Under 16 years of age on the premises for any purpose, unless the youth is at least 14 years of age and each of the following conditions is met:

a. The person obtains the written consent of a parent or guardian of the youth.

b. The youth is employed to work on the outside grounds of the premises for a purpose that does not involve the preparation, serving, dispensing, or sale of alcoholic beverages.

(2) Under 18 years of age to prepare, serve, dispense or sell any alcoholic beverages, including mixed beverages.

(k) Persons and establishments required to comply with or subject to regulation of child labor under the Fair Labor Standards Act are exempt from all provisions of this section, except the certificate requirements of subsection (a), the provisions of subsection (a1), the prohibition from occupations found and declared to be detrimental by the Commissioner of Labor pursuant to subsection (b), and the prohibitions of subsection (j). In addition, employment certificates will not be issued if such person's employment will be in violation of the applicable child labor provisions of the Fair Labor Standards Act. Such employers may also be assessed civil penalties pursuant to G.S. 95-25.23 for each violation of the provisions of this section or any regulation issued hereunder from which there is no exemption.

(*l*) Notwithstanding any other provision of this section, any youth who holds a North Carolina driver's license valid for the type of driving involved may be assigned as part of his employment to drive an automobile or truck not exceeding 6,000 pounds gross vehicle weight within a 25-mile radius of the principal place of employment, provided that the youth has completed a State-approved driver-education course, and provided that the assignment does not involve the towing of vehicles. "Gross vehicle weight" includes the truck chassis with lubricants, water and full tank or tanks of fuel, plus the weight of the cab or driver's compartment, body and special chassis and body equipment, and payload.

(m) Notwithstanding any other provision of this section, youths who are enrolled at an institution of higher education may be employed by the institution provided the employment is not hazardous. As used in this subsection, "institution of higher education" means any constituent institution of The University of North Carolina, any North Carolina community college, or any college or university that awards postsecondary degrees. (1937, c. 317, ss. 1-3, 6, 9, 18; 1943, c. 670; 1951, c. 1187, s. 1; 1967, cc. 173, 764; 1969, c. 962; 1973, c. 649, s. 1; c. 758, s. 1; 1977, c. 551, ss. 1-4; 1979, c. 839, s. 1; 1981, c. 412, ss. 3, 4; c. 489, ss. 1-7; c. 747, s. 66; 1985, c. 97, s. 1; 1987, c. 154; 1991, c. 492, s. 2; 1991 (Reg. Sess., 1992), c. 991, s. 1; 1993, c. 239, s. 1; 1995, c. 214, s. 1; 1999-237, s. 14.1; 2001-312, s. 3; 2001-515, s. 5; 2005-453, s. 15.)

Cross References. — As to exemptions from the provisions of this section, see G.S. 95-25.14.

Legal Periodicals. — For article, "A History of Liquor-By-The Drink Legislation in North Carolina," see 1 Campbell L. Rev. 61 (1979).

For note on workers' compensation and retaliatory discharge, see 58 N.C.L. Rev. 629 (1980).

CASE NOTES

Prior Law. — As to employment of children before the Child Labor Act of 1903, see Ward v. Allen, 126 N.C. 946, 36 S.E. 194 (1900); Fitzgerald v. Alma Furn. Co., 131 N.C. 636, 42 S.E. 946 (1902); Hendrix v. Cotton Mills, 138 N.C. 169, 50 S.E. 561 (1905).

As to employment since the act, see Rolin v. R.J. Reynolds Tobacco Co., 141 N.C. 300, 53 S.E. 891 (1906); Leathers v. Blackwell Durham Tobacco Co., 144 N.C. 330, 57 S.E. 11 (1907); Starnes v. Albion Mfg. Co., 147 N.C. 556, 61 S.E. 525 (1908); Pettit v. Atlantic C.L. Ry., 156 N.C. 119, 72 S.E. 195 (1911); McGowan v. Ivanhoe Mfg. Co., 167 N.C. 192, 82 S.E. 1028 (1914); Evans v. Dare Lumber Co., 174 N.C. 31, 93 S.E. 430 (1917).

As to employment in messenger or delivery service, see Pettit v. Atlantic C.L. Ry., 186 N.C. 9, 118 S.E. 840 (1923).

As to mere volunteer injured in performance of simple and ordinary task, see Reaves v. Catawba Mfg. & Elec. Power Co., 206 N.C. 523, 174 S.E. 413 (1934).

Corporate Officer Held Personally Liable for Unpaid Wages. — An individual Chapter 13 debtor who served as Vice President, Secretary, Treasurer, and Director of a Chapter 7 debtor corporation, and who was also a 50% owner of the corporation and managed the office, supervised cash flow, maintained payroll records, signed and distributed payroll checks and kept employees working when there was insufficient cash flow to pay employees, was held personally liable for unpaid wages as an "employer" under this section. In re Halperin, 87 Bankr. 399 (Bankr. W.D.N.C. 1987).

Cited in Golden v. Register, 50 N.C. App. 650, 274 S.E.2d 892 (1981); Lemmerman v. A.T. Williams Oil Co., 318 N.C. 577, 350 S.E.2d 83 (1986); In re Schrimpsher, 143 N.C. App. 461, 546 S.E.2d 407 (2001); Chandler v. Cheesecake Factory Rests., Inc., 239 F.R.D. 432, 2006 U.S. Dist. LEXIS 45649 (M.D.N.C. 2006).

§ 95-25.6. Wage payment.

Every employer shall pay every employee all wages and tips accruing to the employee on the regular payday. Pay periods may be daily, weekly, bi-weekly, semi-monthly, or monthly. Wages based upon bonuses, commissions, or other forms of calculation may be paid as infrequently as annually if prescribed in advance. (1975, c. 413, s. 3; 1977, c. 826, s. 3; 1979, c. 839, s. 1.)

CASE NOTES

Defendants' motion to dismiss, for failure to state a claim, plaintiffs' suit alleging that the defendants failed to pay them all of the weekly wages due at the time due or at the correct rate, and that their claims were typical of at least 100 similarly situated employees, was premature; plaintiffs had not yet filed a motion for class certification, and the propriety of specifics regarding class certification would be addressed at such time. Zelaya v. J.M. Macias, Inc., 175 F.R.D. 625 (E.D.N.C. 1997).

The trial court did not err in allowing the plaintiff to amend his complaint to state a violation of the Act where the defendants clearly failed to pay him commissions earned as required by this section and G.S. 95-25.7; and where the plaintiff raised the violation in the pretrial order which defendants signed and, thereby, put them on notice of the claims against them, negating a claim of prejudice as a result of the amendment. Fulk v. Piedmont Music Ctr., 138 N.C. App. 425, 531 S.E.2d 476 (2000).

Exemption Did Not Apply to Wage Payment Claim. — Temporary employment agency was not exempt from the North Carolina Wage and Hour Laws Act (NCWHA) pursuant to G.S. 95-25.14(a), because that section, which provided exemptions to employers from the NCWHA in limited circumstances, did not apply to G.S. 95-25.6 and G.S. 95-25.8, the sections of the NCWHA covering wage payment and withholding of wages, and those were the sections of the NCWHA under which plaintiffs' claims arose. Whitehead v. Sparrow Enter., 167 N.C. App. 178, 605 S.E.2d 234 (2004), cert. denied, 359 N.C. 856, 618 S.E.2d 240 (2005).

Action Not Preempted by Fair Labor Standards Act. — Plaintiffs' class action alleging violations of the North Carolina Wage and Hour Act was remanded to state court because the employer failed to establish federal question jurisdiction because the Fair Labor Standards Act (FLSA) did not completely preempt state law and the employee specifically denied that the claims implicated the requirement in G.S. 95-25.3(f) that no employee's tips could be reduced by more than 15 percent under a tip-pooling arrangement. Chandler v. Cheesecake Factory Rests., Inc., 239 F.R.D. 432, 2006 U.S. Dist. LEXIS 45649 (M.D.N.C. 2006).

Failure to Pay for Waiting and Travel Time. — Temporary agency did not violate G.S. 95-25.6, even though its employees were not paid for the time spent waiting for and traveling to work sites as the employees' contracts provided that they would be paid for time spent working at the job site. Hyman v. Efficiency, Inc., 167 N.C. App. 134, 605 S.E.2d 254 (2004), cert. denied, 359 N.C. 851, 618 S.E.2d 239 (2005).

Temporary employment agency did not violate G.S. 95.25.6 by not compensating employees for time spent waiting for work assignments and time spent traveling to a job site; the agency's "house rules," which all employees signed, specifically stated that arriving early to wait to be assigned a job, which would improve a worker's chances of employment, was completely optional and that waiting time and travel time was not compensable work time. Whitehead v. Sparrow Enter., 167 N.C. App. 178, 605 S.E.2d 234 (2004), cert. denied, 359 N.C. 856, 618 S.E.2d 240 (2005).

Cited in Zelaya v. J.M. Macias, Inc., 999 F. Supp. 778 (E.D.N.C. 1998); Arndt v. First Union Nat'l Bank, 170 N.C. App. 518, 613 S.E.2d 274, 2005 N.C. App. LEXIS 1080 (2005).

§ 95-25.7. Payment to separated employees.

Employees whose employment is discontinued for any reason shall be paid all wages due on or before the next regular payday either through the regular pay channels or by mail if requested by the employee. Wages based on bonuses, commissions or other forms of calculation shall be paid on the first regular payday after the amount becomes calculable when a separation occurs. Such wages may not be forfeited unless the employee has been notified in accordance with G.S. 95-25.13 of the employer's policy or practice which results in forfeiture. Employees not so notified are not subject to such loss or forfeiture. (1975, c. 413, s. 4; 1979, c. 839, s. 1; 1981, c. 663, s. 1; 1993, c. 214, s. 1.)

CASE NOTES

Section Preempted by ERISA. — Regulation of severance pay under ERISA, the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq., preempts this section and any state cause of action under common law insofar as such claim "relates to" an employee benefit plan covered by ERISA. Holland v. Burlington Indus., Inc., 772 F.2d 1140 (4th Cir. 1985), aff'd sub nom. Brooks v. Burlington Indus., Inc., 477 U.S. 901, 106 S. Ct. 3267, 91 L. Ed. 2d 559, cert. denied, 477 U.S. 903, 106 S. Ct. 3271, 91 L. Ed. 2d 562 (1986).

Forfeiture of Bonus upon Termination of Employment. — Where plaintiff's employment was terminated before the end of the plan year and Defendant refused to pay any bonus, although there was no notification to plaintiff that termination of his employment could result in forfeiture of his bonus, the decision to require forfeiture of the bonus did not constitute a change in the plan; therefore, no notice was required. McCullough v. Branch Banking & Trust Co., 136 N.C. App. 340, 524 S.E.2d 569 (2000).

The trial court did not err in allowing the plaintiff to amend his complaint to state a violation of the Act where the defendants clearly failed to pay him commissions earned as required by G.S. 95-25.6 and this section; and where the plaintiff raised the violation in the pretrial order which defendants signed and, thereby, put them on notice of the claims against them, negating a claim of prejudice as a result of the amendment. Fulk v. Piedmont Music Ctr., 138 N.C. App. 425, 531 S.E.2d 476 (2000).

Applied in Rucker v. First Union Nat'l Bank, 98 N.C. App. 100, 389 S.E.2d 622 (1990).

Cited in Hamilton v. Memorex Telex Corp., 118 N.C. App. 1, 454 S.E.2d 278 (1995); Buchanan v. Fairfield Resorts, Inc., — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 30532 (M.D.N.C. Nov. 25, 2005).

§ 95-25.7A. Wages in dispute.

(a) If the amount of wages is in dispute, the employer shall pay the wages, or that part of the wages, which the employer concedes to be due without condition, within the time set by this Article. The employee retains all remedies that the employee might otherwise be entitled to regarding any balance of wages claimed by the employee, including those remedies provided under this Article.

(b) Acceptance of a partial payment of wages under this section by an employee does not constitute a release of the balance of the claim. Further, any release of the claim required by an employer as a condition of partial payment is void. (1989, c. 687, s. 1.)

§ 95-25.8. Withholding of wages.

(a) An employer may withhold or divert any portion of an employee's wages when:

(1) The employer is required or empowered to do so by State or federal law;

(2) When the amount or rate of the proposed deduction is known and agreed upon in advance, the employer must have written authorization from the employee which (i) is signed on or before the payday(s)

for the pay period(s) from which the deduction is to be made; (ii) indicates the reason for the deduction; and (iii) states the actual dollar amount or percentage of wages which shall be deducted from one or more paychecks. Provided, that if the deduction is for the convenience of the employee, the employee shall be given a reasonable opportunity to withdraw the authorization; or

(3) When the amount of the proposed deduction is not known and agreed upon in advance, the employer must have written authorization from the employee which (i) is signed on or before the payday(s) for the pay period(s) from which the deduction is to be made; and (ii) indicates the reason for the deduction. Prior to any deductions being made under this section, the employee must (i) receive advance written notice of the actual amount to be deducted; (ii) receive written notice of their right to withdraw the authorization; and (iii) be given a reasonable opportunity to withdraw the authorization in writing.

(b) The withholding or diversion of wages owed for the employer's benefit must comply with the following requirements:

(1) In nonovertime workweeks, an employer may reduce wages to the minimum wage level.

(2) In overtime workweeks, employers may reduce wages to the minimum wage level for nonovertime hours.

(3) No reductions may be made to overtime wages owed.

(c) In addition to complying with the requirements in subsections (a) and (b) of this section, an employer may withhold or divert a portion of an employee's wages for cash shortages, inventory shortages, or loss or damage to an employer's property after giving the employee written notice of the amount to be deducted seven days prior to the payday on which the deduction is to be made, except that when a separation occurs the seven-day notice is not required.

(d) Notwithstanding subsections (a) and (b), above, an overpayment of wages to an employee as a result of a miscalculation or other bona fide error, advances of wages to an employee or to a third party at the employee's request, and the principal amount of loans made by an employer to an employee are considered prepayment of wages and may be withheld or deducted from an employee's wages. Deductions for interest and other charges related to loans by an employer to an employee shall require written authorization in accordance with subsection (a), above.

(e) Notwithstanding subsections (a) and (c), above, if criminal process has issued against an employee, an employee has been indicted, or an employee has been arrested pursuant to Articles 17, 20, and 32 of Chapter 15A of the General Statutes for a charge incident to a cash shortage, inventory shortage, or damage to an employer's property, an employer may withhold or divert a portion of the employee's wages in order to recoup the amount of the cash shortage, inventory shortage, or damage to the employer's property, without the written authorization required by this section, but the amount of such withholdings shall comply with the provisions of subsection (b) of this section. If the employee is not found guilty, then the amount deducted shall be reimbursed to the employee by the employer.

(f) For purposes of this section, a written authorization or written notice may be in the form of an electronic record in compliance with Article 40 of Chapter 66 (the Uniform Electronic Transactions Act).

(g) Nothing in this Article shall preclude an employer from bringing a civil action in the General Court of Justice to collect any amounts due the employer from the employee. (1975, c. 413, s. 6; 1979, c. 839, s. 1; 1981, c. 663, s. 2; 2005-453, s. 16.)

CASE NOTES

Exemption Did Not Apply to Withholding of Wages Claim. — Temporary employment agency was not exempt from the North Carolina Wage and Hour Laws Act (NCWHA) pursuant to G.S. 95-25.14(a), because that section, which provided exemptions to employers from the NCWHA in limited circumstances, did not apply to G.S. 95-25.6 and G.S. 95-25.8, the sections of the NCWHA covering wage payment and withholding of wages, and those were the sections of the NCWHA under which plaintiffs' claims arose. Whitehead v. Sparrow Enter., 167 N.C. App. 178, 605 S.E.2d 234 (2004), cert. denied, 359 N.C. 856, 618 S.E.2d 240 (2005).

Optional transportation service offered by a temporary employment agency fell within the category of "other facilities" and could be counted towards wages; therefore, the agency properly deducted the associated transportation cost from the class members' paychecks in compliance with G.S. 95-25.8 and N.C. Admin. Code tit. 13, r. 12.0305. Whitehead v. Sparrow Enter., 167 N.C. App. 178, 605 S.E.2d 234 (2004), cert. denied, 359 N.C. 856, 618 S.E.2d 240 (2005).

Wage deductions for van transportation and safety equipment were permissible under G.S. 95-25.8 where the authorization forms were in writing, signed prior to the deductions, dated, and stated the reason for and amounts of the deductions, the deductions were not taken if the day laborers did not use the temporary agencies' van transportation, and an increase in the equipment rental fees was clearly posted. Leverette v. Labor Works Int'l, LLC, — N.C. App. —, 636 S.E.2d 258, 2006 N.C. App. LEXIS 2250 (2006).

Specific Authorization for Deduction of Transportation Expenses. — Daily log of a temporary agency giving the agency authorization to deduct an optional transportation expense from its employees' wages, which stated the specific amount of the deduction, was a specific authorization under G.S. 95-25.8(2)(a) where the daily log was written, signed by the employees on or before the payday for the pay period for which the deduction was made, included the date signed, and stated the reason for the deduction. Hyman v. Efficiency, Inc., 167 N.C. App. 134, 605 S.E.2d 254 (2004), cert. denied, 359 N.C. 851, 618 S.E.2d 239 (2005).

Temporary employment agency's form, entitled "House Rules," which all employees had to read and sign and that provided that anyone choosing to accept transportation from the agency to a job site would be charged $1.00 and that such amount would be deducted from the employees' pay if he elected transportation, qualified as a specific authorization for deductions under G.S. 95-25.8(2)(a). Whitehead v. Sparrow Enter., 167 N.C. App. 178, 605 S.E.2d 234 (2004), cert. denied, 359 N.C. 856, 618 S.E.2d 240 (2005).

Preempted By ERISA. — Because plaintiff's claim under G.S. 95-25.8 sought benefits allegedly due under a severance pay plan, the claim was exclusively governed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C.S. § 1001 et seq., and ERISA completely preempted the claim. Buchanan v. Fairfield Resorts, Inc., — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 30532 (M.D.N.C. Nov. 25, 2005).

Applied in Strickland v. MICA Info. Sys., 800 F. Supp. 1320 (M.D.N.C. 1992).

§§ 95-25.9, 95-25.10: Repealed by Session Laws 2005-453, ss. 17 and 18, effective October 1, 2005.

§ 95-25.11. Employers' remedies preserved.

(a) Repealed by Session Laws 2005-453, s. 19.

(b) Nothing in this Article shall preclude an employer from bringing a civil action in the General Court of Justice to collect any amounts due the employer from the employee. (1979, c. 839, s. 1; 1981, c. 663, s. 5; 2005-453, s. 19.)

CASE NOTES

Cited in Clark v. B.H. Holland Co., 852 F. Supp. 1268 (E.D.N.C. 1994).

§ 95-25.12. Vacation pay plans.

No employer is required to provide vacation pay plans for employees. However, if an employer provides these promised benefits for employees, the employer shall give all vacation time off or payment in lieu of time off in accordance with the company policy or practice. Employees shall be notified in accordance with G.S. 95-25.13 of any policy or practice which requires or results in loss or forfeiture of vacation time or pay. Employees not so notified are not subject to such loss or forfeiture. (1979, c. 839, s. 1; 1981, c. 663, s. 6; 2005-453, s. 20.)

Legal Periodicals. — For article, "North Carolina Employment Case Law: Contract Principles Abandoned," 25 N.C. Cent. L.J. 163 (2003).

CASE NOTES

This Article requires an employer to notify an employee in advance of the wages and hours which he will earn and the conditions which must be met to earn them, and to pay such wages and benefits as are due when the employee has actually performed the work required to earn them. Once the employee has earned the wages and benefits under this statutory scheme, the employer is prevented from rescinding them, with the exception that for certain benefits such as commissions, bonuses and vacation pay, an employer may cause a loss or forfeiture of such pay if he has notified the employee of the conditions for loss or forfeiture in advance of the time when the pay is earned. Narron v. Hardee's Food Systems, 75 N.C. App. 579, 331 S.E.2d 205, cert. denied, 314 N.C. 542, 335 S.E.2d 316 (1985).

The vacation pay due an employee at the termination of his employment is not controlled solely by the employer's vacation policy in effect at the time of termination. If the employee earned and accumulated vacation under a vacation policy which did not provide for forfeiture of unused vacation, this Article would dictate that he receive all vacation pay earned prior to the employer's change of personnel policy with regard thereto. Narron v. Hardee's Food Sys., 75 N.C. App. 579, 331 S.E.2d 205, cert. denied, 314 N.C. 542, 335 S.E.2d 316 (1985).

A claim for vacation pay pursuant to this Article is not preempted by federal law, the United States Supreme Court having recently held that an employer's policy of paying discharged employees vacation pay for unused vacation time does not constitute an "employee welfare benefit plan" within the meaning of the Employment Retirement Income and Security Act of 1974 (ERISA), as amended, 29 U.S.C. sec. 1001 et seq. Rucker v. First Union Nat'l Bank, 98 N.C. App. 100, 389 S.E.2d 622, cert. denied, 324 N.C. 138, 394 S.E.2d 454 (1990).

Cited in Peoples Sec. Life Ins. Co. v. Hooks, 320 N.C. App. 794, 357 S.E.2d 411 (1987); Hamilton v. Memorex Telex Corp., 118 N.C. App. 1, 454 S.E.2d 278 (1995).

§ 95-25.13. Notification, posting, and records.

Every employer shall:

(1) Notify its employees, orally or in writing at the time of hiring, of the promised wages and the day and place for payment;

(2) Make available to its employees, in writing or through a posted notice maintained in a place accessible to its employees, employment practices and policies with regard to promised wages;

(3) Notify employees, in writing or through a posted notice maintained in a place accessible to its employees, at least 24 hours prior to any changes in promised wages. Wages may be retroactively increased without the prior notice required by this subsection; and

(4) Furnish each employee with an itemized statement of deductions made from that employee's wages under G.S. 95-25.8 for each pay period such deductions are made. (1975, c. 413, s. 7; 1979, c. 839, s. 1; 1981, c. 663, s. 12; 1993, c. 203, s. 1; 2005-453, s. 21.)

Legal Periodicals. — For article, "North Carolina Employment Case Law: Contract Principles Abandoned," 25 N.C. Cent. L.J. 163 (2003).

CASE NOTES

Forfeiture of Bonus upon Termination of Employment. — Where plaintiff's employment was terminated before the end of the plan year and Defendant refused to pay any bonus, although there was no notification to plaintiff that termination of his employment could result in forfeiture of his bonus, the decision to require forfeiture of the bonus did not constitute a change in the plan; therefore, no notice was required. McCullough v. Branch Banking & Trust Co., 136 N.C. App. 340, 524 S.E.2d 569 (2000).

Amendment of Annual Bonus That Had Not Yet Accrued. — Employee's North Carolina Wage and Hour Act claim was denied because the employee's annual bonus had not accrued at the time of a change in the employer's allocation plan and, thus, there was no violation of G.S. 95-25.13(3), because, under the employee's contract, the amount to which any member of the division of her employer in which she worked was entitled to as a bonus was not calculable until the end of the plan year; thus, no definite sum had accrued to the employee at the time the change was made. Moses H. Cone Mem'l Health Servs. Corp. v. Triplett, 167 N.C. App. 267, 605 S.E.2d 492 (2004).

Amendment of Annual Bonus Without Notice. — Employee was entitled to an award under the North Carolina Wage and Hour Act, G.S. 95-25.1 et seq., because: (1) the employers' representative orally agreed to pay the employee an annual bonus as part of a contract; (2) the employers modified the employee's bonus formula without his consent; and (3) the employers also failed to give the employee notice of the change in the bonus formula. Arndt v. First Union Nat'l Bank, 170 N.C. App. 518, 613 S.E.2d 274, 2005 N.C. App. LEXIS 1080 (2005).

Cited in Narron v. Hardee's Food Sys., 75 N.C. App. 579, 331 S.E.2d 205 (1985).

§ 95-25.14. Exemptions.

(a) The provisions of G.S. 95-25.3 (Minimum Wage), G.S. 95-25.4 (Overtime), and G.S. 95-25.5 (Youth Employment), and the provisions of G.S. 95-25.15(b) (Record Keeping) as they relate to these exemptions, do not apply to:

(1) Any person employed in an enterprise engaged in commerce or in the production of goods for commerce as defined in the Fair Labor Standards Act:

a. Except as otherwise specifically provided in G.S. 95-25.5;

b. Notwithstanding the above, any employee other than a learner, apprentice, student, or handicapped worker as defined in the Fair Labor Standards Act who is not otherwise exempt under the other provisions of this section, and for whom the applicable minimum wage under the Fair Labor Standards Act is less than the minimum wage provided in G.S. 95-25.3, is not exempt from the provisions of G.S. 95-25.3 or G.S. 95-25.4;

c. Notwithstanding the above, any employer or employee exempt from the minimum wage, overtime, or child labor requirements of the Fair Labor Standards Act for whom there is no comparable exemption under this Article shall not be exempt under this subsection except that where an exemption in the Fair Labor Standards Act provides a method of computing overtime which is an alternative to the method required in 29 U.S.C.S. § 207(a), the employer or employee subject to that alternate method shall be exempt from the provisions of G.S. 95-25.4(a); provided that, persons not employed at an enterprise described in subdivision (1) of this subsection shall also be subject to the same alternative methods of overtime calculation in the circumstances described in the Fair Labor Standards Act exemptions providing those alternative methods;

(2) Any person employed in agriculture, as defined under the Fair Labor Standards Act;

(3) Any person employed as a domestic, including baby sitters and companions, as defined under the Fair Labor Standards Act;

(4) Any person employed as a page in the North Carolina General Assembly or in the Governor's Office;

(5) Bona fide volunteers in medical, educational, religious, or nonprofit organizations where an employer-employee relationship does not exist;

(6) Persons confined in and working for any penal, correctional or mental institution of the State or local government;

(7) Any person employed as a model, or as an actor or performer in motion pictures or theatrical, radio or television productions, as defined under the Fair Labor Standards Act, except as otherwise specifically provided in G.S. 95-25.5;

(8) Any person employed by an outdoor drama in a production role, including lighting, costumes, properties and special effects, except as otherwise specifically provided in G.S. 95-25.5; but this exemption does not include such positions as office workers, ticket takers, ushers and parking lot attendants.

(b) The provisions of G.S. 95-25.3 (Minimum Wage) and G.S. 95-25.4 (Overtime), and the provisions of G.S. 95-25.15(b) (Record Keeping) as they relate to these exemptions, do not apply to:

(1) Any employee of a boys' or girls' summer camp or of a seasonal religious or nonprofit educational conference center;

(2) Any person employed in the catching, processing or first sale of seafood, as defined under the Fair Labor Standards Act;

(3) The spouse, child, or parent of the employer or any person qualifying as a dependent of the employer under the income tax laws of North Carolina;

(4) Any person employed in a bona fide executive, administrative, professional or outside sales capacity, as defined under the Fair Labor Standards Act;

(5) Repealed by Session Laws 1989, c. 687, s. 2.

(6) Any person while participating in a ridesharing arrangement as defined in G.S. 136-44.21;

(7) Any person who is employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, as defined in the Fair Labor Standards Act.

(b1) The provisions of G.S. 95-25.3 (Minimum Wage) and G.S. 95-25.4 (Overtime), and the provisions of G.S. 95- 25.15(b) (Record Keeping) as they relate to the exemptions provided for in this subsection, do not apply to any of the following:

(1) Hours worked as a bona fide volunteer firefighter in an incorporated, nonprofit volunteer or community fire department.

(2) Hours worked as a bona fide volunteer rescue and emergency medical services personnel in an incorporated, nonprofit volunteer or community fire department, or an incorporated, nonprofit rescue squad.

Hours worked in accordance with this subsection shall not be considered hours worked for purposes of G.S. 95-25.3 or G.S. 95-25.4.

(c) The provisions of G.S. 95-25.4 (Overtime), and the provisions of G.S. 95-25.15(b) (Record Keeping) as they relate to this exemption, do not apply to:

(1) Drivers, drivers' helpers, loaders and mechanics, as defined under the Fair Labor Standards Act;

(2) Taxicab drivers;

(3) Seamen, employees of railroads, and employees of air carriers, as defined under the Fair Labor Standards Act;

(4) Salespersons, mechanics and partsmen employed by automotive, truck, and farm implement dealers, as defined under the Fair Labor Standards Act;

(5) Salespersons employed by trailer, boat, and aircraft dealers, as defined under the Fair Labor Standards Act;
(6) Live-in child care workers or other live-in employees in homes for dependent children;
(7) Radio and television announcers, news editors, and chief engineers, as defined under the Fair Labor Standards Act.

(d) The provisions of this Article do not apply to the State of North Carolina, any city, town, county, or municipality, or any State or local agency or instrumentality of government, except for the following provisions, which do apply:
(1) The minimum wage provisions of G.S. 95-25.3;
(2) The definition provisions of G.S. 95-25.2 necessary to interpret the applicable provisions;
(3) The exemptions of subsections (a) and (b) of this section;
(4) The complainant protection provisions of G.S. 95-25.20.

(e) Employment in a seasonal recreation program by the State of North Carolina, any city, town, county, or municipality, or any State or local agency or instrumentality of government, is exempt from all provisions of this Article, including G.S. 95-25.3 (Minimum Wage). (1937, c. 406; c. 409, s. 3; 1939, c. 312, s. 1; 1943, c. 59; 1947, c. 825; 1949, c. 1057; 1959, cc. 475, 629; 1961, cc. 602, 1070; 1963, c. 1123; 1965, c. 724; 1967, c. 998; 1973, c. 600, s. 1; 1975, c. 19, s. 26; c. 413, s. 2; 1977, c. 146; 1979, c. 839, s. 1; 1981, c. 493, s. 2; c. 606, s. 2; c. 663, s. 7; 1983, c. 708, s. 2; 1989, c. 687, s. 2; 1991, c. 330, s. 3; 1993, c. 214, s. 2; 1995, c. 509, s. 47; 1997-146, s. 2; 2002-113, s. 2.)

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 389.

CASE NOTES

No Recovery of Attorneys' Fees from City. — In view of this section, which explicitly exempts this State and any city, town or municipality from the application of Article 2A of this Chapter, G.S. 95-25.22(d), relating to the recovery of attorneys' fees, had no application to plaintiff who sought to compel city to pay him for stand-by duty worked for the city police department, and the trial court was in error in awarding such fees. Newber v. City of Wilmington, 83 N.C. App. 327, 350 S.E.2d 125 (1986), cert. denied and appeal dismissed, 319 N.C. 225, 353 S.E.2d 402 (1987).

Construction with Federal Law. — Where employer-employee relationship at issue was covered by the Fair Labor Standards Act, it was exempt from the provisions of the North Carolina Wage and Hour Act. Spencer v. Hyde County, 959 F. Supp. 721 (E.D.N.C. 1997).

Summary judgment was denied to both plaintiff welding instructor and defendant college, as material issues of fact remained as to whether the instructor was entitled to overtime pay under the Fair Labor Standards Act, 29 U.S.C.S. § 201, et seq., or was exempted as a professional employee under 29 U.S.C.S. § 213 and G.S. 95-25.14(b)(4). Massie v. Bd. of Trs., 357 F. Supp. 2d 878 (W.D.N.C. 2005).

Exemption of Employers Engaged in Production of Goods for Commerce. — Under G.S. 95-25.14(a)(1) of the North Carolina Wage and Hour Act, an employee was not entitled to compensation for time that he alleged he worked as overtime because his employer was exempt from the overtime requirement under the Act as an enterprise engaged in the production of goods for commerce. Jones v. Philip Morris USA, Inc., — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 6224 (M.D.N.C. Apr. 8, 2004).

Exemption Did Not Apply to Wage Payment and Withholding of Wages Claims. — Temporary employment agency was not exempt from the North Carolina Wage and Hour Laws Act (NCWHA) pursuant to G.S. 95-25.14(a), because that section, which provided exemptions to employers from the NCWHA in limited circumstances, did not apply to G.S. 95-25.6 and G.S. 95-25.8, the sections of the NCWHA covering wage payment and withholding of wages, and those were the sections of the NCWHA under which plaintiffs' claims arose. Whitehead v. Sparrow Enter., 167 N.C. App. 178, 605 S.E.2d 234 (2004), cert. denied, 359 N.C. 856, 618 S.E.2d 240 (2005).

Cited in Thornton v. Thornton, 45 N.C. App. 25, 262 S.E.2d 326 (1980); Golden v. Register, 50 N.C. App. 650, 274 S.E.2d 892 (1981); Amos v. Oakdale Knitting Co., 331 N.C. 348, 416

S.E.2d 166 (1992); State v. Frazier, 142 N.C. App. 207, 541 S.E.2d 800 (2001); Chandler v. Cheesecake Factory Rests., Inc., 239 F.R.D. 432, 2006 U.S. Dist. LEXIS 45649 (M.D.N.C. 2006).

§ 95-25.15. Investigations and inspection of records; notice of law.

(a) The Commissioner or his designated representative shall have the power and authority to enter any place of employment and gather such facts as are essential to determine whether or not the employer is covered by any provision of this Article.

With respect to any provision of this Article under which the employer is covered, the Commissioner or the Commissioner's designated representative may inspect such places and such records, make transcriptions of any and all such records, question employees and investigate such facts, conditions, practices, or matters as are necessary to determine whether the employer has violated said provision of this Article.

With respect to the provisions of G.S. 95-25.6 through 95-25.12 (Wage Payment) as those provisions apply to persons covered by the Fair Labor Standards Act, the Commissioner or his designated representative shall have no authority under this subsection unless the Commissioner or his designated representative has received a complaint from an employee of the covered establishment.

(b) Except as otherwise provided in this Article, every employer subject to any provision of this Article shall make, keep, and preserve such records of the persons employed by the employer and of the wages, hours, and other conditions and practices of employment which are essential to the enforcement of this Article and are prescribed by regulation of the Commissioner, except that the Commissioner shall have no authority to prescribe records for the State of North Carolina, a city, town, county or other municipality or agency or instrumentality of government.

(c) A poster summarizing the major provisions of this Article shall be displayed in every establishment subject to this Article. (1937, c. 317, ss. 5, 19; 1959, c. 475; 1971, c. 1231, s. 2; 1973, c. 649, s. 4; 1975, c. 413, ss. 7, 9; 1979, c. 839, s. 1; 2005-453, s. 22.)

Cross References. — As to exemptions from subsection (b) of this section, see G.S. 95-25.14.

CASE NOTES

Cited in Chandler v. Cheesecake Factory Rests., Inc., 239 F.R.D. 432, 2006 U.S. Dist. LEXIS 45649 (M.D.N.C. 2006).

§ 95-25.16. Enforcement.

(a) The Commissioner shall enforce and administer the provisions of this Article, and the Commissioner or his authorized representative is empowered to hold hearings and to institute criminal and civil proceedings hereunder.

(b) The Commissioner or his authorized representative shall have power to administer oaths and examine witnesses, issue subpoenas, compel the attendance of witnesses and the production of papers, books, accounts, records, payrolls, documents, and take depositions and affidavits in any proceeding hereunder.

(c) The Commissioner is empowered to enter into reciprocal agreements with the labor department or corresponding agency of any other state or with the person, board, officer, or commission authorized to act on behalf of the department or agency, for the collection in the other state of claims and judgments for wages based upon investigations and findings made by the Commissioner or his authorized representative.

The Commissioner may, to the extent provided for by any reciprocal agreement entered into by law or with an agency of another state, as provided in this section, maintain actions in the courts of any other state for the collection of claims or judgments for wages and may assign the claims and judgments to the labor department or agency of the other state for collection to the extent that such an assignment may be permitted or provided for by the law of that state or by reciprocal agreement.

Except as provided in subsection (d) of this section, the Commissioner may, upon the written consent of the labor department or corresponding agency of any other state or of any person, board, officer, or commission authorized to act on behalf of the department or agency, maintain actions in the courts of this State upon assigned claims and judgments for wages arising in the other state in the same manner and to the same extent that these actions by the Commissioner are authorized when arising in this State.

(d) Subsection (c) of this section applies only to those states that extend comity to this State. (1937, c. 317, s. 19; c. 409, s. 7; 1971, c. 1231, s. 2; 1973, c. 649, s. 4; 1975, c. 473, s. 9; c. 475; 1979, c. 839, s. 1; 1989, c. 687, s. 3.)

§ 95-25.17. Wage and Hour Division established.

The Commissioner of Labor is charged with enforcement of this Article. The Commissioner shall appoint a Wage and Hour Director and any other employees the Commissioner deems necessary for enforcement of this Article. The Commissioner shall continue to prescribe the powers, duties, and responsibilities of the Director and employees engaged in the administration of this Article. (1979, c. 839, s. 1; 2005-453, s. 23.)

§ 95-25.18. Legal representation.

It shall be the duty of the Attorney General of North Carolina, when requested, to represent the Department of Labor in actions or proceedings in connection with this Article. (1979, c. 839, s. 1.)

§ 95-25.19. Rules.

The Commissioner may adopt rules needed to implement this Article. (1937, c. 317, s. 18; 1975, c. 413, s. 12; 1979, c. 839, s. 1; 1987, c. 827, s. 262.)

§ 95-25.20. Records.

Files and other records relating to investigations and enforcement proceedings pursuant to this Article, or pursuant to Article 21 of this Chapter with respect to Wage and Hour Act violations, shall not be subject to inspection and examination as authorized by G.S. 132-6 while such investigations and proceedings are pending. Nothing under this section shall impede the right to discovery under G.S. 1A-1, Rules of Civil Procedure. (1979, c. 839, s. 1; 1981, c. 663, s. 8; 1991 (Reg. Sess., 1992), c. 1021, s. 3.)

Legal Periodicals. — For article, "North Carolina Employment Law After *Coman*: Reaffirming Basic Rights in the Workplace," see 24 Wake Forest L. Rev. 905 (1989).

CASE NOTES

Cited in Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 340 S.E.2d 116 (1986); Coman v. Thomas Mfg. Co., 91 N.C. App. 327, 371 S.E.2d 731 (1988); Iturbe v. Wandel & Goltermann Technologies, Inc., 774 F. Supp. 959 (M.D.N.C. 1991); Amos v. Oakdale Knitting Co., 331 N.C. 348, 416 S.E.2d 166 (1992).

§ 95-25.21. Illegal acts.

(a) It shall be unlawful for any person to interfere unduly with, hinder, or delay the Commissioner or any authorized representative in the performance of official duties or refuse to give the Commissioner or his authorized representative any information required for the enforcement of this Article.

(b) It shall be unlawful for any person to make any statement or report, or keep or file any record pursuant to this Article or regulations issued thereunder, knowing such statement, report, or record to be false in a material respect.

(c) Any person who violates this section shall be guilty of a Class 2 misdemeanor. (1937, c. 409, ss. 6, 8; 1979, c. 839, s. 1; 1993, c. 539, s. 661; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 95-25.22. Recovery of unpaid wages.

(a) Any employer who violates the provisions of G.S. 95-25.3 (Minimum Wage), G.S. 95-25.4 (Overtime), or G.S. 95-25.6 through 95-25.12 (Wage Payment) shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, their unpaid overtime compensation, or their unpaid amounts due under G.S. 95-25.6 through 95-25.12, as the case may be, plus interest at the legal rate set forth in G.S. 24-1, from the date each amount first came due.

(a1) In addition to the amounts awarded pursuant to subsection (a) of this section, the court shall award liquidated damages in an amount equal to the amount found to be due as provided in subsection (a) of this section, provided that if the employer shows to the satisfaction of the court that the act or omission constituting the violation was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this Article, the court may, in its discretion, award no liquidated damages or may award any amount of liquidated damages not exceeding the amount found due as provided in subsection (a) of this section.

(b) Action to recover such liability may be maintained in the General Court of Justice by any one or more employees.

(c) Action to recover such liability may also be maintained in the General Court of Justice by the Commissioner at the request of the employees affected. Any sums thus recovered by the Commissioner on behalf of an employee shall be held in a special deposit account and shall be paid directly to the employee or employees affected.

(d) The court, in any action brought under this Article may, in addition to any judgment awarded plaintiff, order costs and fees of the action and reasonable attorneys' fees to be paid by the defendant. In an action brought by the Commissioner in which a default judgment is entered, the clerk shall order attorneys' fees of three hundred dollars ($300.00) to be paid by the defendant.

The court may order costs and fees of the action and reasonable attorneys' fees to be paid by the plaintiff if the court determines that the action was frivolous.

(e) The Commissioner is authorized to determine and supervise the payment of the amounts due under this section, including interest at the legal rate set forth in G.S. 24-1, from the date each amount first came due, and the agreement to accept such amounts by the employee shall constitute a waiver of the employee's right to bring an action under subsection (b) of this section.

(f) Actions under this section must be brought within two years pursuant to G.S. 1-53.

(g) Prior to initiating any action under this section, the Commissioner shall exhaust all administrative remedies, including giving the employer the opportunity to be heard on the matters at issue and giving the employer notice of the pending action. (1959, c. 475; 1975, c. 413, s. 11; 1979, c. 839, s. 1; 1989, c. 687, s. 4; 1991, c. 298, s. 1.)

CASE NOTES

Several factors used by federal jurisdictions to determine employee status under the FLSA are equally useful in the context of the Wage and Hour Act: (1) whether the alleged employee performs services for the employer; (2) the degree of control exerted by the alleged employer over the individual or entity; and (3) the alleged employee's opportunity for profit or loss derived from its relationship with the employer. Laborers' Int'l Union v. Case Farms, Inc., 127 N.C. App. 312, 488 S.E.2d 632 (1997).

Accrual of Cause of Action. — As defendant's policy did not require it to pay cash for any unused vacation days until the employment was terminated, no individual plaintiff had a cause of action until the next pay day after termination; thus the trial court correctly found that only those plaintiffs whose pay date next following termination preceded two years prior to the filing of the action were barred by this section. Hamilton v. Memorex Telex Corp., 118 N.C. App. 1, 454 S.E.2d 278 (1995).

Class Action not Appropriate. — Wage and Hour Act claims would require individual determinations, including which putative class members were subject to the alleged violations and why those putative class members who worked off-the-clock did so, i.e., whether they, for example, missed breaks in order to leave work early; thus, it was not a proper claim for a class action suit. Harrison v. Wal-Mart Stores, Inc., 170 N.C. App. 545, 613 S.E.2d 322, 2005 N.C. App. LEXIS 1082 (2005).

No Recovery of Attorneys' Fees from City. — In view of G.S. 95-25.14, which explicitly exempts this State and any city, town or municipality from the application of Article 2A of this Chapter, subsection (d) of this section, relating to the recovery of attorneys' fees, had no application to plaintiff who sought to compel city to pay him for stand-by duty worked for the city police department, and the trial court was in error in awarding such fees. Newber v. City of Wilmington, 83 N.C. App. 327, 350 S.E.2d 125 (1986), cert. denied and appeal dismissed, 319 N.C. 225, 353 S.E.2d 402 (1987).

Because the Act does not require a finding that defendants acted in bad faith in order for attorney's fees to be awarded to plaintiff, the court acted within its discretion by awarding the plaintiff/piano salesman attorney's fees. Fulk v. Piedmont Music Ctr., 138 N.C. App. 425, 531 S.E.2d 476 (2000).

Action Not Frivolous. — A former employee's action for unpaid wages and attorney fees was not frivolous, and thus, the employer was not entitled to attorney fees, even though employer prevailed in the action, where the employer's motions for summary judgment and directed verdict were rejected, and all claims were submitted to the jury. Rice v. Danas, Inc., 132 N.C. App. 736, 514 S.E.2d 97 (1999).

Liquidated Damages Mandated. — Where defendant pointed to no evidence to show that the failure to pay plaintiffs for their vacation days was done in good faith or in the belief that it was not a violation of the Wage and Hour Act, this section mandated that the trial court award liquidated damages. Hamilton v. Memorex Telex Corp., 118 N.C. App. 1, 454 S.E.2d 278 (1995).

Liquidated Damages was Issue for Factfinder. — Whether liquidated damages were available under G.S. 95-25.22(a1) was an issue for the trier of fact, depending upon whether the employer acted in good faith. Mason v. ILS Tech., LLC, — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 26950 (W.D.N.C. Apr. 11, 2007).

Trial court did not abuse its discretion in awarding an employee liquidated damages under G.S. 95-25.22, when the employers unilaterally modified the employee's agreed to bonus formula without notice, because the employers neither offered evidence showing nor argued how the trial court's decision to award liquidated damages was so arbitrary that it could not have been the result of a reasoned decision. Further, review of the record did not indicate the trial court's decision to impose liquidated damages on the employers was manifestly unsupported by reason. Arndt v. First Union Nat'l Bank, 170 N.C. App. 518, 613 S.E.2d 274, 2005 N.C. App. LEXIS 1080 (2005).

While this section states that interest may be recovered on the unpaid wages, it does not provide that interest is payable

on liquidated damages. Hamilton v. Memorex Telex Corp., 118 N.C. App. 1, 454 S.E.2d 278 (1995).

Defendants' motion to dismiss, for failure to state a claim, plaintiffs' suit alleging that the defendants failed to pay them all of the weekly wages due at the time due or at the correct rate, and that their claims were typical of at least 100 similarly situated employees, was premature; plaintiffs had not yet filed a motion for class certification, and the propriety of specifics regarding class certification would be addressed at such time. Zelaya v. J.M. Macias, Inc., 175 F.R.D. 625 (E.D.N.C. 1997).

Plaintiff unions lacked standing to bring suit on behalf of employees under the Wage and Hour Act in that: (1) no services were performed by the unions for defendant; (2) defendant did not exercise nay control over the unions; and (3) any opportunity for profit or loss from the union's relationship with defendant was indirect and not a product of an employer-employee relationship. Laborers' Int'l Union v. Case Farms, Inc., 127 N.C. App. 312, 488 S.E.2d 632 (1997).

Action Not Preempted by Fair Labor Standards Act. — Plaintiffs' class action alleging violations of the North Carolina Wage and Hour Act was remanded to state court because the employer failed to establish federal question jurisdiction because the Fair Labor Standards Act (FLSA) did not completely preempt state law and the employee specifically denied that the claims implicated the requirement in G.S. 95-25.3(f) that no employee's tips could be reduced by more than 15 percent under a tip-pooling arrangement. Chandler v. Cheesecake Factory Rests., Inc., 239 F.R.D. 432, 2006 U.S. Dist. LEXIS 45649 (M.D.N.C. 2006).

Applied in Poole v. Local 305 Nat'l Post Office Mail Handlers, 69 N.C. App. 675, 318 S.E.2d 105 (1984).

Cited in Zelaya v. J.M. Macias, Inc., 999 F. Supp. 778 (E.D.N.C. 1998); Aerial Images, Inc. v. Anderson, — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 3777 (E.D.N.C. Feb. 21, 2000); Moses H. Cone Mem'l Health Servs. Corp. v. Triplett, 167 N.C. App. 267, 605 S.E.2d 492 (2004); Seven Seventeen HB Charlotte Corp. v. Shrine Bowl of the Carolinas, Inc., — N.C. App. —, 641 S.E.2d 711, 2007 N.C. App. LEXIS 499 (2007).

§ 95-25.23. Violation of youth employment; civil penalty.

(a) Any employer who violates the provisions of G.S. 95-25.5 (Youth Employment) or any regulation issued thereunder, shall be subject to a civil penalty not to exceed two hundred fifty dollars ($250.00) for each violation. In determining the amount of such penalty, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The determination by the Commissioner shall be final, unless within 15 days after receipt of notice thereof by certified mail with return receipt, by signature confirmation as provided by the U.S. Postal Service, by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) with delivery receipt, or via hand delivery, the person charged with the violation takes exception to the determination, in which event final determination of the penalty shall be made in an administrative proceeding pursuant to Article 3 of Chapter 150B and in a judicial proceeding pursuant to Article 4 of Chapter 150B.

(b) The amount of such penalty when finally determined may be recovered in the manner set forth in G.S. 95-25.23B.

(c) The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(d) Assessment of penalties under this section shall be subject to a two-year statute of limitations commencing at the time of the occurrence of the violation. (1979, c. 839, s. 1; 1981, c. 663, s. 9; 1989, c. 687, s. 6; 1993, c. 225, s. 1; 1998-215, s. 107; 2003-308, s. 1; 2007-231, s. 4.)

Effect of Amendments. — Session Laws 2007-231, s. 4, effective July 18, 2007, in the last sentence of subsection (a), substituted "with return receipt, by signature confirmation as provided by the U.S. Postal Service" for "or" and inserted "or via hand delivery."

CASE NOTES

Violation of Former Section as Proximate Cause of Injury. — In order to make an employer liable in damages for an injury sustained by an employee being required to work more than eight hours a day in violation of former section, it had to be shown that the violation of the statute was a proximate cause of the injury complained of. Williamson v. Old Dominion Box Co., 205 N.C. 350, 171 S.E. 335 (1933), decided under prior law.

Newsboy Not Employee. — A newsboy engaged in selling papers was not an employee of the newspaper within the meaning of that term as used in the Workers' Compensation Act, the newsboy not being on the newspaper's payroll and being without authority to solicit subscriptions and being free to select his own methods of effecting sales, although some degree of supervision was exercised by the newspaper. Creswell v. Charlotte News Publishing Co., 204 N.C. 380, 168 S.E. 408 (1933), decided under prior law.

Cited in Golden v. Register, 50 N.C. App. 650, 274 S.E.2d 892 (1981).

§ 95-25.23A. Violation of record-keeping requirement; civil penalty.

(a) Any employer who violates the provisions of G.S. 95-25.15(b) or any regulation issued pursuant to G.S. 95-25.15(b), shall be subject to a civil penalty of up to two hundred fifty dollars ($250.00) per employee with the maximum not to exceed one thousand dollars ($1,000) per investigation by the Commissioner or his authorized representative. In determining the amount of the penalty, the Commissioner shall consider:

(1) The appropriateness of the penalty for the size of the business of the employer charged; and

(2) The gravity of the violation.

The determination by the Commissioner shall be final, unless within 15 days after receipt of notice thereof by certified mail with return receipt, by signature confirmation as provided by the U.S. Postal Service, by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) with delivery receipt, or via hand delivery, the person charged with the violation takes exception to the determination, in which event final determination of the penalty shall be made in an administrative proceeding pursuant to Article 3 of Chapter 150B and in a judicial proceeding pursuant to Article 4 of Chapter 150B.

(b) The amount of the penalty when finally determined may be recovered in the manner set forth in G.S. 95-25.23B.

(c) The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(d) Assessment of penalties under this section shall be subject to a two-year statute of limitations commencing at the time of the occurrence of the violation. (1989, c. 687, s. 5; 1993, c. 225, s. 2; 1998-215, s. 108; 2003-308, s. 2; 2007-231, s. 5.)

Effect of Amendments. — Session Laws 2007-231, s. 5, effective July 18, 2007, in the second paragraph of subsection (a), substituted "with return receipt, by signature confirmation as provided by the U.S. Postal Service" for "or" and inserted "or via hand delivery."

§ 95-25.23B. Civil penalty collection.

The Commissioner may file in the office of the clerk of the superior court of any county a certified copy of an assessment, either unappealed from or affirmed in whole or in part upon appeal, of a civil money penalty under G.S. 95-25.23 or G.S. 95-25.23A. Upon such filing, the clerk shall enter judgment in accordance with the unappealed or affirmed portion of the assessment and shall notify the parties. Such judgment shall have the same effect, and all proceedings in relation to the judgment shall thereafter be the same, as though the judgment had been rendered in a suit duly heard and determined by the superior court of the General Court of Justice. (1993, c. 225, s. 3.)

§ 95-25.24. Restraint of violations.

The General Court of Justice has jurisdiction and authority upon application of the Commissioner to enjoin or restrain violations of this Article, including the restraint of any withholding of payment of unpaid wages, minimum wages, or overtime compensation found by the court to be due to employees under this Article (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the applicable statute of limitations). (1979, c. 839, s. 1; 1991, c. 330, s. 4.)

§ 95-25.25. Construction of Article and severability.

This Article shall receive a liberal construction to the end that the welfare of adult and minor workers may be protected. If any provisions of this Article or the application thereof to any person or circumstance is held to be invalid, such invalidity shall not affect the provisions or application of the Article which can be given effect without the invalid provision or application, and to this end the provisions of this Article are severable. (1979, c. 839, s. 1.)

CASE NOTES

Cited in Youse v. Duke Energy Corp., 171 N.C. App. 187, 614 S.E.2d 396, 2005 N.C. App. LEXIS 1209 (2005).

Article 3.

Various Regulations.

§ 95-26: Repealed by Session Laws 1971, c. 56.

§ 95-27: Repealed by Session Laws 1973, c. 660, s. 3.

§ 95-28: Repealed by Session Laws 1997-443, s. 19.14.

§ 95-28.1. Discrimination against any person possessing sickle cell trait or hemoglobin C trait prohibited.

No person, firm, corporation, unincorporated association, State agency, unit of local government or any public or private entity shall deny or refuse employment to any person or discharge any person from employment on account of the fact such person possesses sickle cell trait or hemoglobin C trait. The term "sickle cell trait" is defined as the condition wherein the major natural hemoglobin components present in the blood of the individual are hemoglobin A (normal) and hemoglobin S (sickle hemoglobin) as defined by standard chemical and physical analytic techniques, including electrophoresis; and the proportion of hemoglobin A is greater than the proportion of hemoglobin S or one natural parent of the individual is shown to have only normal hemoglobin components (hemoglobin A, hemoglobin A2, hemoglobin F) in the normal proportions by standard chemical and physical analytic tests. The term "hemoglobin C trait" is defined as the condition wherein the major natural hemoglobin components present in the blood of the individual are hemoglobin A (normal) and hemoglobin C as defined by standard chemical and physical analytic techniques, including electrophoresis; and the proportion of hemoglobin A is greater than the proportion of hemoglobin C or one natural parent of the individual is shown to have only normal hemoglobin components (hemoglobin A, hemoglobin A2, hemoglobin F) in the normal proportions by standard chemical and physical analytic tests, provided, however, that this section shall not be construed to give employment, promotion, or layoff preference to persons who possess the above traits, or to prevent such persons being discharged for cause. (1975, c. 463, s. 1.)

Legal Periodicals. — For article, "North Carolina Employment Law After *Coman*: Reaffirming Basic Rights in the Workplace," see 24 Wake Forest L. Rev. 905 (1989).

§ 95-28.1A. Discrimination against persons based on genetic testing or genetic information prohibited.

(a) No person, firm, corporation, unincorporated association, State agency, unit of local government, or any public or private entity shall deny or refuse employment to any person or discharge any person from employment on account of the person's having requested genetic testing or counseling services, or on the basis of genetic information obtained concerning the person or a member of the person's family. This section shall not be construed to prevent the person from being discharged for cause.

(b) As used in this section, the term "genetic test" means a test for determining the presence or absence of genetic characteristics in an individual or a member of the individual's family in order to diagnose a genetic condition or characteristic or ascertain susceptibility to a genetic condition. The term "genetic characteristic" means any scientifically or medically identifiable genes or chromosomes, or alterations or products thereof, which are known individually or in combination with other characteristics to be a cause of a disease or disorder, or determined to be associated with a statistically increased risk of development of a disease or disorder, and which are asymptomatic of any disease or disorder. The term "genetic information" means information about genes, gene products, or inherited characteristics that may derive from an individual or a family member. (1997-350, s. 2.)

§ 95-28.2. Discrimination against persons for lawful use of lawful products during nonworking hours prohibited.

(a) As used in this section, "employer" means the State and all political subdivisions of the State, public and quasi-public corporations, boards, bureaus, commissions, councils, and private employers with three or more regularly employed employees.

(b) It is an unlawful employment practice for an employer to fail or refuse to hire a prospective employee, or discharge or otherwise discriminate against any employee with respect to compensation, terms, conditions, or privileges of employment because the prospective employee or the employee engages in or has engaged in the lawful use of lawful products if the activity occurs off the premises of the employer during nonworking hours and does not adversely affect the employee's job performance or the person's ability to properly fulfill the responsibilities of the position in question or the safety of other employees.

(c) It is not a violation of this section for an employer to do any of the following:

(1) Restrict the lawful use of lawful products by employees during nonworking hours if the restriction relates to a bona fide occupational requirement and is reasonably related to the employment activities. If the restriction reasonably relates to only a particular employee or group of employees, then the restriction may only lawfully apply to them.

(2) Restrict the lawful use of lawful products by employees during nonworking hours if the restriction relates to the fundamental objectives of the organization.

(3) Discharge, discipline, or take any action against an employee because of the employee's failure to comply with the requirements of the employer's substance abuse prevention program or the recommendations of substance abuse prevention counselors employed or retained by the employer.

(d) This section shall not prohibit an employer from offering, imposing, or having in effect a health, disability, or life insurance policy distinguishing between employees for the type or price of coverage based on the use or nonuse of lawful products if each of the following is met:

(1) Differential rates assessed employees reflect actuarially justified differences in the provision of employee benefits.

(2) The employer provides written notice to employees setting forth the differential rates imposed by insurance carriers.

(3) The employer contributes an equal amount to the insurance carrier on behalf of each employee of the employer.

(e) An employee who is discharged or otherwise discriminated against, or a prospective employee who is denied employment in violation of this section, may bring a civil action within one year from the date of the alleged violation against the employer who violates the provisions of subsection (b) of this section and obtain any of the following:

(1) Any wages or benefits lost as a result of the violation;

(2) An order of reinstatement without loss of position, seniority, or benefits; or

(3) An order directing the employer to offer employment to the prospective employee.

(f) The court may award reasonable costs, including court costs and attorneys' fees, to the prevailing party in an action brought pursuant to this section. (1991 (Reg. Sess., 1992), c. 1023, s. 1.)

Editor's Note. — Subsection (f) of this section has been so designated at the direction of the Revisor of Statutes, the subsection in the enacting act having been designated as a second subsection "(d)."

Legal Periodicals. — For survey of developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

§ 95-28.3. Leave for parent involvement in schools.

(a) It is the belief of the General Assembly that parent involvement is an essential component of school success and positive student outcomes. Therefore, employers shall grant four hours per year leave to any employee who is a parent, guardian, or person standing in loco parentis of a school-aged child so that the employee may attend or otherwise be involved at that child's school. However, any leave under this section is subject to the following conditions:

(1) The leave shall be at a mutually agreed upon time between the employer and the employee.

(2) The employer may require an employee to provide the employer with a written request for the leave at least 48 hours before the time desired for the leave.

(3) The employer may require that the employee furnish written verification from the child's school that the employee attended or was otherwise involved at that school during the time of the leave.

For the purpose of this section, "school" means any (i) public school, (ii) private church school, church of religious charter, or nonpublic school described in Parts 1 and 2 of Article 39 of Chapter 115C of the General Statutes that regularly provides a course of grade school instruction, (iii) preschool, and (iv) child care facility as defined in G.S. 110-86(3).

(b) Employers shall not discharge, demote, or otherwise take an adverse employment action against an employee who requests or takes leave under this section. Nothing in this section shall require an employer to pay an employee for leave taken under this section.

(c) An employee who is demoted or discharged or who has had an adverse employment action taken against him or her in violation of this section may bring a civil action within one year from the date of the alleged violation against the employer who violates this section and obtain either of the following:

(1) Any wages or benefits lost as a result of the violation; or

(2) An order of reinstatement without loss of position, seniority, wages, or benefits.

The burden of proof shall be upon the employee. (1993, c. 509, s. 1; 1997-506, s. 34.)

§ 95-29: Repealed by Session Laws 1973, c. 660, s. 4.

§ 95-30: Repealed by Session Laws 1971, c. 240.

§ 95-31. Acceptance by employer of assignment of wages.

No employer of labor shall be responsible for any assignment of wages to be earned in the future, executed by an employee, unless and until such assignment of wages is accepted by the employer in a written agreement to pay same. (1935, c. 410; 1937, c. 90.)

CASE NOTES

Section Is Constitutional. — The provisions of this section, rendering an assignment invalid unless accepted in writing by the employer, do not deprive the assignee of due process of law or the equal protection of the laws. Morris v. Holshouser, 220 N.C. 293, 17 S.E.2d 115, 137 A.L.R. 733 (1941).

When applied to contracts executed after its effective date, this section cannot be held unconstitutional as impairing the obligations of contracts. Morris v. Holshouser, 220 N.C. 293, 17 S.E.2d 115, 137 A.L.R. 733 (1941).

This section is a regulation of contracts growing out of the relationship of employer and employee imposed for the general welfare and is a valid exercise of the police power of the State. Morris v. Holshouser, 220 N.C. 293, 17 S.E.2d 115, 137 A.L.R. 733 (1941).

The fact that this section permits an employer, at his election, to accept an assignment of unearned wages executed by his employee does not in itself constitute an unconstitutional discrimination, since in the absence of legislative restraint, one engaged in private business may exercise his own pleasure as to the parties with whom he will deal. Morris v. Holshouser, 220 N.C. 293, 17 S.E.2d 115, 137 A.L.R. 733 (1941).

Purpose. — The end in view was not only to relieve the employer of unnecessary responsibility, but also to restrain the activities of those who were engaged in the business of buying at a discount the unearned wages of employees. Morris v. Holshouser, 220 N.C. 293, 17 S.E.2d 115, 137 A.L.R. 733 (1941).

Section Applies Only to Wages to Be

Earned. — An assignment by an employee of wages earned and due him from the employer is valid without acceptance by the employer, and the assignee may sue the employer thereon, the provision of this section being applicable only to wages to be earned in the future. Rickman v. Holshouser, 217 N.C. 377, 8 S.E.2d 199 (1940).

ARTICLE 4.

Conciliation Service and Mediation of Labor Disputes.

§ 95-32. Declaration of policy.

It is hereby declared as the public policy of this State that the best interests of the people of the State are served by the prevention or prompt settlement of labor disputes; that strikes and lockouts and other forms of industrial strife, regardless of where the merits of the controversy lie, are forces productive ultimately of economic waste; that the interests and rights of the consumers and the people of the State, while not direct parties thereto, should always be considered, respected and protected; and that the conciliation and voluntary mediation of such disputes under the guidance and supervision of a governmental agency will tend to promote permanent industrial peace and the health, welfare, comfort and safety of the people of the State. To carry out such policy, the necessity for the enactment of the provisions of this Article is hereby declared as a matter of legislative determination. (1941, c. 362, s. 1.)

Cross References. — For subsequent statute affecting this Article, see G.S. 95-36.1 to 95-36.9.

§ 95-33. Scope of Article.

The provisions of this Article shall apply to all labor disputes in North Carolina. (1941, c. 362, s. 2.)

§ 95-34. Administration of Article.

The administration of this Article shall be under the general supervision of the Commissioner of Labor of North Carolina. (1941, c. 362, s. 3.)

§ 95-35. Conciliation service established; personnel; removal; compensation.

There is hereby established in the Department of Labor a conciliation service. The Commissioner of Labor may appoint such employees as may be required for the consummation of the work under this Article, prescribe their duties and fix their compensation, subject to existing laws applicable to the appointment and compensation of employees of the State of North Carolina. Any member of or employee in the conciliation service may be removed from office by the Commissioner of Labor, acting in his discretion. (1941, c. 362, s. 4.)

§ 95-36. Powers and duties of Commissioner and conciliator.

Upon his own motion in an existent or imminent labor dispute, the Commissioner of Labor may, and, upon the direction of the Governor, must order a conciliator to take such steps as seem expedient to effect a voluntary, amicable and expeditious adjustment and settlement of the differences and issues between employer and employees which have precipitated or culminated in or threaten to precipitate or culminate in such labor dispute.

The conciliator shall promptly put himself in communication with the parties to such controversy, and shall use his best efforts, by mediation, to bring them to agreement.

The Commissioner of Labor, any conciliator or conciliators and all other employees of the Commissioner of Labor engaged in the enforcement and duties prescribed by this Article, shall not be compelled to disclose to any administrative or judicial tribunal any information relating to, or acquired in the course of their official activities under the provisions of this Article, nor shall any reports, minutes, written communications, or other documents or copies of documents of the Commissioner of Labor and the above employees pertaining to such information be subject to subpoena: Provided, that the Commissioner of Labor, any conciliator or conciliators and all other employees of the Commissioner of Labor engaged in the enforcement of this Article, may be required to testify fully in any examination, trial, or other proceeding in which the commission of a crime is the subject of inquiry. (1941, c. 362, s. 5; 1949, c. 673.)

Legal Periodicals. — For brief comment on the 1949 amendment, see 27 N.C.L. Rev. 465 (1949).

For comment, "You Can't Always Get What You Want: A Look at North Carolina's Public Records Law," see 72 N.C.L. Rev. 1527 (1994).

Article 4A.

Voluntary Arbitration of Labor Disputes.

§ 95-36.1. Declaration of policy.

It is hereby declared as the public policy of this State that the best interests of the people of the State are served by the prompt settlement of labor disputes; that strikes and lockouts and other forms of industrial strife, regardless of where the merits of the controversy lie, are forces productive ultimately of economic waste; that the interests and rights of the consumers and the people of the State, while not direct parties to such disputes, should always be considered, respected and protected; and, where efforts at amicable settlement have been unsuccessful, that the voluntary arbitration of such disputes will tend to promote permanent industrial peace and the health, welfare, comfort and safety of the people of the State. To carry out such policies, the necessity for the enactment of the provisions of this Article is hereby declared as a matter of legislative determination. (1945, c. 1045, s. 1; 1951, c. 1103, s. 1.)

Cross References. — As to arbitration and award generally, see G.S. 1-569.1 et seq. As to the State's conciliation service, see G.S. 95-32 through 95-36.

State Government Reorganization. — The administration of this Article was transferred to the Department of Labor by G.S. 143A-72, enacted by Session Laws 1971, c. 864.

Legal Periodicals. — For note on labor arbitration in North Carolina, see 29 N.C.L. Rev. 460 (1951).

CASE NOTES

Remedy Provided by Article Is Cumulative. — The statutory methods of arbitration provide cumulative and concurrent rather than exclusive procedural remedies. Lammonds v. Aleo Mfg. Co., 243 N.C. 749, 92 S.E.2d 143 (1956).

Effect on Employee's Right to Sue for Wages and Benefits Due Under Labor Con-

tract. — The fact that disputed provisions of a collective labor contract have been arbitrated under the procedure outlined in the contract does not make the question of an accounting for an employee's wages and other benefits under the terms of the contract one of arbitration and award under the Uniform Arbitration Act, former G.S. 1-544 et seq. (now G.S. 1-569.1 et seq.). Nor does the statutory procedure for the voluntary arbitration of labor disputes as contained in this Article preclude maintenance of an action by the employee for such accounting. Lammonds v. Aleo Mfg. Co., 243 N.C. 749, 92 S.E.2d 143 (1956).

§ 95-36.2. Scope of Article.

The provisions of this Article shall apply only to voluntary agreements to arbitrate labor disputes including, but not restricted to, all controversies between employers, employees and their respective bargaining representatives, or any of them, relating to wages, hours, and other conditions of employment. (1945, c. 1045, s. 2; 1951, c. 1103, s. 1.)

§ 95-36.3. Administration of Article.

(a) The administration of this Article shall be under the general supervision of the Commissioner of Labor of North Carolina.

(b) There is hereby established in the Department of Labor an arbitration service. The Commissioner of Labor may appoint such employees as may be required for the consummation of the work under this Article, prescribe their duties and fix their compensation, subject to existing laws applicable to the appointment and compensation of employees of the State of North Carolina. Any member of or employee in the arbitration service may be removed from office by the Commissioner of Labor, acting in his discretion.

(c) The Commissioner of Labor, with the written approval of the Attorney General as to legality, shall have power to adopt, alter, amend or repeal appropriate rules of procedure for selection of the arbitrator or panel and for conduct of the arbitration proceedings in accordance with this Article: Provided, however, that such rules shall be inapplicable to the extent that they are inconsistent with the arbitration agreement of the parties. (1945, c. 1045, s. 3; 1951, c. 1103, s. 1.)

§ 95-36.4. Voluntary arbitrators.

(a) It shall be the duty of the Commissioner of Labor to maintain a list of qualified and public-spirited citizens who will serve as arbitrators. All appointments of a single arbitrator or member of an arbitration panel by the Commissioner of Labor shall be made from the list of qualified arbitrators maintained by him.

(b) No person named by the Commissioner of Labor to act as an arbitrator in a dispute shall be qualified to serve as such arbitrator if such person has any financial or other interest in the company or labor organization involved in the dispute. (1945, c. 1045, s. 4; 1951, c. 1103, s. 1.)

§ 95-36.5. Fees and expenses.

(a) All the costs of any arbitration proceeding under this Article, including the fees and expenses of the arbitrator or arbitration panel, shall be paid by the parties to the proceeding in accordance with any agreement between them. In the absence of such an agreement, the award in the proceeding shall normally require the payment of such fees, expenses and other proper costs by one or more of the parties: Provided, that if the Commissioner of Labor deems that the public interest so requires, he may provide for the payment to any arbitrator appointed by him of per diem compensation at the rate established by the Commissioner, and actual travel and other necessary expenses incurred while performing duties arising under this Article.

(b) In cases where an arbitrator has been appointed by the Commissioner, the Department of Labor may furnish necessary stenographic, clerical and technical service and assistance to the arbitrator or arbitration panel.

(c) Expenditures of public funds authorized under this section shall be paid from funds appropriated for the administration of this Article. (1945, c. 1045, s. 5; 1947, c. 379, ss. 1-3; 1951, c. 1103, s. 1.)

Legal Periodicals. — For discussion of 1947 amendment affecting this and following sections, see 25 N.C.L. Rev. 446 (1947).

§ 95-36.6. Appointment of arbitrators.

The parties may by agreement determine the method of appointment of the arbitrator or arbitration panel. If the parties have agreed upon arbitration under this Article and have not otherwise agreed upon the number of arbitrators or the method for their appointment, the controversy shall be heard and decided by a single arbitrator designated in such manner as the Commissioner of Labor shall determine. Any person or agency selected by agreement or otherwise to appoint an arbitrator or arbitrators shall send by registered mail to each of the parties to the proposed proceeding notice of the demand for arbitration. The arbitrator or arbitration panel, as the case may be, shall have such powers and duties as are conferred by the voluntary agreement of the parties, and, if there is no agreement to the contrary, shall have power to decide the arbitrability as well as the merits of the dispute. (1945, c. 1045, s. 5; 1947, c. 379, ss. 1-3; 1951, c. 1103, s. 1.)

CASE NOTES

This section is modified by G.S. 95-36.9(b), giving the courts and not the arbitrators power to decide whether or not a party has agreed to the arbitration of the controversy involved. Charlotte City Coach Lines v. Brotherhood of R.R. Trainmen, 254 N.C. 60, 118 S.E.2d 37 (1961).

§ 95-36.7. Arbitration procedure.

Upon the selection or appointment of an arbitrator or arbitration panel in any labor dispute, a statement of the issues or questions in dispute shall be submitted to said arbitrator or panel in writing, signed by one or more of the parties or their authorized agents. The arbitrator or panel shall appoint a time and place for the hearing, and notify the parties thereof, and may postpone or adjourn the hearing from time to time as may be necessary, subject to any time limits which are agreed upon by the parties. If any party neglects to appear before the arbitrator or panel after reasonable notice, the arbitrator or panel may nevertheless proceed to hear and determine the controversy. Unless the parties have otherwise agreed, the findings and decision of a majority of an arbitration panel shall constitute the award of the panel and, if a majority vote of the panel cannot be obtained, then the findings and decision of the impartial chairman of the panel shall constitute such award. To be enforceable, the award shall be handed down within 60 days after the written statement of the issues or questions in dispute has been received by the arbitrator or panel, or within such further time as may be agreed to by the parties. (1945, c. 1045, s. 5; 1947, c. 379, ss. 1-3; 1951, c. 1103, s. 1.)

§ 95-36.8. Enforcement of arbitration agreement and award.

(a) Written agreements to arbitrate labor disputes, including but not restricted to controversies relating to wages, hours and other conditions of employment, shall be valid, enforceable and irrevocable, except upon such grounds as exist in law or equity for the rescission or revocation of any contract, in either of the following cases:

(1) Where there is a provision in a collective bargaining agreement or any other contract, hereafter made or extended, for the settlement by arbitration of a controversy or controversies thereafter arising between the parties;

(2) Where there is an agreement to submit to arbitration a controversy or controversies already existing between the parties.

(b) Any arbitration award, made pursuant to an agreement of the parties described in subsection (a) of this section and in accordance with this Article, shall be final and binding upon the parties to the arbitration proceedings. (1945, c. 1045, s. 5; 1947, c. 379, ss. 1-3; 1951, c. 1103, s. 1.)

CASE NOTES

This section is not preempted by the Federal Arbitration Act. Moore v. Duke Power Co., 971 F. Supp. 978 (W.D.N.C. 1997).

Arbitrator's Decision Bars Later Legal Claim. — Where plaintiff participated in binding arbitration pursuant to a collective bargaining agreement, the arbitrator's decision that plaintiff was discharged for "just cause" was binding on him and barred his claim for wrongful or retaliatory discharge. Shreve v. Duke Power Co., 85 N.C. App. 253, 354 S.E.2d 357 (1987).

Pursuant to the collective bargaining agreement and this section, plaintiff's state common law claim for wrongful discharge in violation of public policy was barred by the preclusive effect of arbitrator's decision that termination was proper. Moore v. Duke Power Co., 971 F. Supp. 978 (W.D.N.C. 1997).

Multiple Grievance Procedure. — Where employee accepted a multiple grievance award in accordance with collective bargaining contract, this statute did not prevent labor commissioner from bringing suit for retaliatory discharge; the multiple grievance procedure was not arbitration contemplated by this section. Brooks v. Stroh Brewery Co., 95 N.C. App. 226, 382 S.E.2d 874, cert. denied, 325 N.C. 704, 388 S.E.2d 449 (1989).

Cited in Tucker v. General Tel. Co., 50 N.C. App. 112, 272 S.E.2d 911 (1980).

§ 95-36.9. Stay of proceedings.

(a) If any action or proceeding be brought in any court upon any issue referable to arbitration under an agreement described in subsection (a) of G.S. 95-36.8, the court where the action or proceeding is pending or a judge of the superior court having jurisdiction in any county where the dispute arose shall stay the action or proceeding, except for any temporary relief which may be appropriate pending the arbitration award, until such arbitration has been had in accordance with the terms of the agreement. The application for stay may be made by motion in writing of a party to the agreement, but such motion must be made before answer or demurrer to the pleading by which the action or proceeding was begun.

(b) Any party against whom arbitration proceedings have been initiated may, within 10 days after receiving written notice of the issue or questions to be passed upon at the arbitration hearing, apply to any judge of the superior court having jurisdiction in any county where the dispute arose for a stay of the arbitration upon the ground that he has not agreed to the arbitration of the controversy involved. Any such application shall be made in writing and heard in a summary way in the manner and upon the notice provided by law or rules of court for the making and hearing of motions generally, except that it shall be entitled to priority in the interest of prompt disposition. If no such application is made within said 10-day period, a party against whom arbitration proceedings have been initiated cannot raise the issue of arbitrability except before the arbitrator and in proceedings subsequent to the award.

(c) Any party against whom an arbitration award has been issued may, within 10 days after receiving written notice of such award, apply to any judge of the superior court having jurisdiction in any county where the dispute arose for a stay of the award upon the ground that it exceeds the authority conferred by the arbitration agreement. Any such application shall be made in writing and heard in a summary way in the manner and upon the notice provided by law or rules of court for the making and hearing of motions generally, except that it shall be entitled to priority in the interest of prompt disposition. If no such application is made within said 10-day period, a party against whom arbitration proceedings have been initiated cannot raise the issue of arbitrability except before the arbitrator or arbitrators, or in proceedings to enforce the award. Any failure to abide by an award shall not constitute a breach of the contract to arbitrate, pending disposition of a timely application for stay of the award pursuant to this paragraph. (1951, c. 1103, s. 1.)

CASE NOTES

G.S. 95-36.6 is modified by this section, giving the courts and not the arbitrators power to decide whether or not a party has agreed to the arbitration of the controversy involved. Charlotte City Coach Lines v. Brotherhood of R.R. Trainmen, 254 N.C. 60, 118 S.E.2d 37 (1961).

Limitation of Action Under Labor Management Relations Act. — In an action to vacate an arbitrator's award under § 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185, the most clearly analogous state statute of limitations was determined to be the 90-day limitation provided in former G.S. 1-567.13(b), for vacating an award, rather than the 10-day limitation set forth in subsection (c) of this section for a stay of proceedings, notwithstanding the provision in former G.S. 1-567.2 that the Uniform Arbitration Act shall not apply "to arbitration agreements between employers and employees or between their respective representatives," since former G.S. 1-567.13(b) was the statute of limitations most analogous for the determination of timeliness. Gencorp, Inc. v. Local 850, United Rubber Workers of Am., 622 F. Supp. 216 (W.D.N.C. 1985).

Applied in Calvine Cotton Mills, Inc. v. Textile Workers Union, Local 677, 238 N.C. 719, 79 S.E.2d 181 (1953).

ARTICLE 5.

Regulation of Employment Agencies.

§§ 95-37 through 95-47: Recodified as §§ 95-47.1 to 95-47.13.

Editor's Note. — This Article was rewritten by Session Laws 1979, c. 780, s. 1, effective July 1, 1979, and has been recodified as Article 5A, G.S. 95-47.1 through 95-47.13.

ARTICLE 5A.

Regulation of Private Personnel Services.

§ 95-47.1. Definitions.

As used in this Article, unless the context clearly requires otherwise:

(1) "Accept" employment means to accept an employer's offer of employment or to begin work for an employer.

(2) "Applicant," except where it refers to an applicant for a private personnel services license, means any person who uses or attempts to use the services of a private personnel service in seeking employment.

(3) "Commissioner" means the North Carolina Commissioner of Labor or any person designated by the Commissioner as the representative of the Commissioner.

(4) "Complaint" means a communication to the Commissioner or department alleging facts that could support issuance of a warning or citation under G.S. 95-47.9.

(5) "Contract" means any agreement between a private personnel service and an applicant obligating the applicant to pay a fee or any agreement subsequent to such contract reducing the obligations of the private personnel service to the applicant under the contract.

(6) "Employee" means a person performing work or services of any kind or character for compensation.

(7) "Employer" means a person employing or seeking to employ a person for compensation, or any representative or employee of such employer.

(8) "Employment" means any service or engagement rendered or undertaken for wages, salary, commission, or other form of compensation.

(9) "Fee" means anything of value, including money or other valuable consideration or services or the promise of any of the foregoing, required or received by a private personnel service, in payment for any of its services, or act rendered or to be rendered by any private personnel service.

(10) "Interview" means a meeting between an employer and an applicant to discuss potential employment.

(11) "Job order" means an oral or written communication from an employer authorizing a private personnel service to refer applicants for a position the employer has available.

(12) "Licensee" means any person licensed by the Commissioner to operate a private personnel service.

(13) "Manager" of a private personnel service means the person who is responsible for the operation of an office of a private personnel service.

(14) "Owner" of a private personnel service means the sole proprietor of a private personnel service operated as a sole proprietorship; any partner in a partnership that owns or operates a private personnel service; any stockholder with a financial interest greater than 10 percent (10%) in a corporation that owns or operates a private personnel service.

(15) "Person" means any individual, association, partnership or corporation.

(16) "Private personnel service" means any business operated in the State of North Carolina by any person for profit which secures employment or by any form of advertising holds itself out to applicants as able to secure employment or to provide information or service of any kind purporting to promote, lead to or result in employment for the applicant with any employer other than itself, where any applicant may become liable for the payment of a fee to the private personnel service, either directly or indirectly. "Private personnel service" does not include:

a. Any educational, religious, charitable, fraternal or benevolent organization which charges no fee for services rendered in securing employment or providing information about employment;

b. Any employment service operated by the State of North Carolina, the Government of the United States, or any city, county, or town, or any agency thereof;

c. Any temporary help service that at no time advertises or represents that its employee may, with the approval of the temporary help service, be employed by one of its client companies on a permanent basis and which does not act as a private personnel service or an employer fee paid personnel service;

d. Any newspaper of general circulation or other business engaged primarily in communicating information other than information about specific positions of employment and that does not purport to adapt the information provided to the needs or desires of an individual subscriber;

e. Employment offices that charge no fee to the applicant other than union dues or to the employer and which are used solely for the hiring of employees under a valid union contract by the employer subscribing to this contract;

f. Any employer fee paid personnel consulting service or temporary help service that offers temporary to permanent placement when the service operates on a one hundred percent (100%) employer fee paid service basis, requires no applicant placement contract, and has no recourse against an applicant for a fee under any circumstances.

(17) "Refer" an applicant means to submit resumes to an employer, arrange interviews between an applicant and an employer, or to provide an employer with the name of an applicant. (1929, c. 178, ss. 1, 10; 1979, c. 780, s. 1; 1989, c. 414, s. 1.)

CASE NOTES

Cited in North Carolina Chiropractic Ass'n v. Aetna Cas. & Sur. Co., 89 N.C. App. 1, 365 S.E.2d 312 (1988).

§ 95-47.2. Licensing procedures.

(a) No person shall open, keep, maintain, own, operate or carry on a private personnel service unless the person has first procured a license therefor as provided in this Article.

(b) An application for license shall be made to the Commissioner. If the private personnel service is owned by an individual, the application shall be made by that individual; if the service is owned by a partnership, the application shall be made by all partners; if the service is owned by a corporation, the application shall be made by all stockholders who own at least twenty percent (20%) of the issued and outstanding voting stock of the corporation, or if the service is owned by an association, society, or corporation in which no one individual owns at least twenty percent (20%) of the issued and outstanding voting stock, the application shall be made by the president, vice-president, secretary and treasurer of the owner, by whatever title designated. The application shall state the name and address of the individual who is responsible for the direction and operation of the placement activities of the private personnel service whether that individual be one of the applicants or another person; whether or not that individual has ever been employed in a private personnel service; the name and address of each of the license applicant's prior employers during the five years immediately preceding the license application; and such other information relating to the good moral character of that individual as the Commissioner may require. No change in such persons shall take place without prior notification to the Commissioner.

(c) Each application for license shall be in writing and in the form prescribed by the Commissioner, and shall state truthfully the name under which the business is to be conducted; the street and number of the building or place where the business is to be conducted.

(d) Upon the receipt of an application for a license the Commissioner:

(1) Shall publish a notice of the pending application in a newspaper of general circulation in the area of the proposed location of the employment agency and may publish the notice in a newspaper of general circulation in each area in which the applicant (or if a corporation, the president and majority shareholder) has resided during the five years preceding the time of the application. The applicant shall incur the cost associated with the publication of this legal advertisement. The notice shall include a statement informing individuals of their right to protest the issuance of a license by filing within 10 days written comments with the Commissioner. The protest shall be in writing and signed by the person filing the protest or by his authorized agent or attorney, and shall state reasons why the license should not be granted. Upon the filing of a protest, the Commissioner, if he determines the protest to be of such a nature that a hearing should be conducted and that the protest is for a cause on which denial of a license may properly be based, shall appoint a time and place for a hearing on the application and shall give at least seven days' notice of that time and place to the license applicant and to the person filing the protest. The hearing shall be conducted in accordance with the provisions of the rules of the Administrative Procedure Act.

(2) Shall investigate the character, criminal record and business integrity of each applicant for agency license and shall investigate the criminal records of all persons listed as agency owners, officers, directors or managers. The applicant and all agency owners, officers, directors and managers shall assist the department in obtaining necessary information by authorizing the release of all relevant information. The applicant shall incur the cost associated with this background investigation.

(2a) The Department of Justice may provide a criminal record check to the Commissioner for a person or agency who has applied for a license through the Commissioner. The Commissioner shall provide to the Department of Justice, along with the request, the fingerprints of all applicants, any additional information required by the Department of Justice, and a form signed by the applicants consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicants' fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The Commissioner shall keep all information pursuant to this subdivision privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this subdivision.

(3) Upon completion of the investigation, or 60 days after the application was received, whichever is later, but in no case more than 75 days after the application was received, shall determine whether or not a license should be issued. The license shall be denied for any of the following reasons:

a. If the applicant for agency license, or the president or majority shareholder of a corporate applicant, omits or falsifies any material information asked for in the application and required by the Commissioner.

b. If any owner, officer, director or manager of the employment agency:

1. Has been convicted in any state of the criminal offense of embezzlement, obtaining money under false pretenses, forgery, conspiracy to defraud or any similar offense involving fraud or moral turpitude;
2. Was an owner, officer, director or manager of an employment agency or other business whose license was revoked or that was otherwise caused to cease operation by action of any State or federal agency or court because of violations of law or regulation relating to deceptive or unfair practices in the conduct of business;
3. As an owner or manager of an employment agency or other business or as an employment counselor was found by any State or federal agency or court to have violated any law or regulation relating to deceptive or unfair practices in the conduct of business; or
4. In any other demonstrable way engaged in deceptive or unfair practices in the conduct of business.

c. If the employment agency will be operated on the same premises as a loan agency (as defined in G.S. 105-88) or collection agency (as defined in G.S. 58-70-15).

(e) If it appears upon the hearing or from the inspection, examination or investigation made by the Commissioner that the owners, partners, corporation officers or the agency manager are not persons of good moral character or that the license applicant has not complied with the provisions of this Article, the application shall be denied and a license shall not be granted. The Commissioner shall find facts to substantiate his denial of the issuance of a license. Each application shall be granted or refused within 60 days from the date of its filing, or if a hearing is held, within 75 days. Any license heretofore or hereafter issued shall expire 12 months from the date of its issuance, and shall be renewed as hereinafter provided unless sooner revoked by the Commissioner.

(f) No license shall be granted to a person to operate as a private personnel service where the name of the business is similar or identical to that of any existing licensed business (except where a franchiser has licensed two or more persons to use the same name within the State) or directly or indirectly expresses or connotes any limitation, specification or discrimination contrary to current State or federal laws against discrimination in employment.

(g) Every license shall contain the name of the person licensed and shall designate the city in which the license is issued, the name of the manager and date of the license. The license shall be displayed in a conspicuous place in the area where job applicants are received by the agency.

(h) A license granted as provided in this Article shall not be valid for any person other than the person to whom it is issued or for any place other than that designated in the license and shall not be assigned or transferred without the consent of the Commissioner, whose consent must be based on the standards contained in this Article. Applications for consent to assign or transfer shall be made in the same manner as an application for a license, and all the provisions of this Article shall apply to applications for consent. The location of a private personnel service shall not be changed without notice to the Commissioner, and any change of location shall be endorsed upon the license. A person who has obtained a license in accordance with the provisions of this Article may apply for additional licenses to conduct additional private personnel services in accordance with the provisions of this Article. The manner of application, and the conditions and terms applicable to the issuance of the additional licenses shall be the same as for an original license. The same agency manager may be designated in all such licenses.

(i) Temporary license. — If ownership of a licensed private personnel service is transferred, the department shall issue a temporary license to any new owner or successor if it appears to the department that issuance of such a license would serve the public interest. A temporary license shall be effective for a period of 90 days and shall not be renewed.

(j) Each licensee shall, before the license is issued or renewed, deposit with the department a bond payable to the State of North Carolina and executed by a surety company duly authorized to transact business in the State of North Carolina in the amount of ten thousand dollars ($10,000) and upon condition that the private personnel service will pay to applicants all refunds due under this Article and regulations adopted hereunder if the private personnel service terminates its business. (1929, c. 178, ss. 2, 3; 1931, c. 312, s. 3; 1979, c. 780, s. 1; 1987, c. 282, s. 12; 1989, c. 414, s. 2; 2002-147, s. 12; 2003-308, s. 9.)

§ 95-47.3. Fees and contracts; filing with Commissioner.

(a) Every license applicant shall file with the Commissioner a schedule of fees or charges made by the private personnel service to applicants for employment for any services rendered, stating clearly the conditions under which the private personnel service refunds or does not refund a fee, together with all rules or regulations that may in any manner affect the fees charged or to be charged for any service. Every license applicant and licensee shall include in its schedule of fees or charges a clear description of how it determines fees for placement of employment, the compensation of which is based, in whole or in part, on commission. Changes in the schedule may be made, but no change shall become effective until seven calendar days after the filing thereof with the Commissioner. It is unlawful for a private personnel service to charge, demand, collect or receive a greater compensation from an applicant for employment for any service performed than as specified in the schedule filed with the Commissioner.

(b) Every license applicant shall file with the Commissioner a copy of the contract which the private personnel service will require applicants for employment to execute. (1979, c. 780, s. 1; 1991 (Reg. Sess., 1992), c. 970, s. 1.)

§ 95-47.3A. Fee reimbursement from employers due to overstated earnings expectations.

(a) An applicant who accepts employment that is compensated in whole or in part on a commission basis, and who pays a fee to the licensee calculated on the commission-based compensation amount stated by the employer in the written job order, may file a written complaint with the Commissioner if the applicant did not earn at least eighty percent (80%) of the compensation amount stated by the employer in the written job order. If the applicant files the written complaint before the period upon which the anticipated earnings is based has ended, the Commissioner shall prorate the amount earned over the period of time the applicant worked prior to the filing of the complaint in order to determine whether or not the applicant earned at least eighty percent (80%) of the compensation amount stated by the employer in the written job order.

(b) The Commissioner shall investigate all complaints filed pursuant to subsection (a) of this section. After completion of the investigation and a hearing, the Commissioner shall order the employer to reimburse the applicant for part or all of the fee paid by the applicant to the licensee if the Commissioner finds the applicant is entitled to the refund based on all of the following:

(1) The applicant did not earn at least eighty percent (80%) of the compensation amount stated by the employer in the written job order;
(2) The licensee reasonably relied on the compensation information provided by the employer in calculating the fee paid by the applicant;
(3) It is unrealistic to expect that an employee could earn substantially the amount of commission-based compensation stated by the employer in the written job order filed with the licensee; and
(4) The fee paid by the applicant to the licensee was calculated based on the commission-based compensation stated by the employer in the written job order.

(c) The reimbursement due the applicant under subsection (b) shall be the difference between the fee actually paid by the applicant to the licensee, and the fee that the applicant would have paid if the compensation stated by the employer in the written job order had been what the applicant actually earned or reasonably could have earned during the applicable employment period.

(d) The Commissioner shall adopt rules setting forth procedures for complaints and investigations, and standards for determining whether a statement by the employer in the licensee's written job order of potential or anticipated commission-based earnings is realistic under the circumstances. The Commissioner or his authorized representative shall have power to administer oaths and examine witnesses, issue subpoenas, compel the attendance of witnesses and the production of papers, books, accounts, records, payrolls, documents, and take depositions and affidavits in any proceeding hereunder. Additionally, the Commissioner shall adopt rules setting forth procedures for enforcement of any order made under subsections (b) and (c) of this section. Rules adopted by the Commissioner pursuant to this section shall be in accordance with Chapter 150B of the General Statutes.

(e) The Commissioner shall enforce and administer the provisions of this section, and the Commissioner or his authorized representative is empowered to hold hearings and to institute civil proceedings to collect on behalf of the applicant any amounts determined to be owed by the employer. (1991 (Reg. Sess., 1992), c. 970, s. 3.)

§ 95-47.4. Contracts; contents; approval; tying contracts forbidden.

(a) A contract between a private personnel service and an applicant shall be in writing, labeled as a contract, physically separate from any application and made in duplicate. One copy shall be given to the applicant and the other shall be kept by the private personnel service as required by G.S. 95-47.5(2).

(b) Any contract that obligates an applicant to pay a fee to the private personnel service shall include:

(1) The name, address and telephone number of the private personnel service;
(2) The name of the applicant;
(3) The date the contract was signed;
(4) A clear schedule of the fees to be charged to the applicant at various salary levels;
(5) A clear explanation of when the applicant becomes obligated to pay a fee;
(6) A clear refund policy (or no refund policy) that conforms to the requirements of G.S. 95-47.4(f) and (g);

(7) If the applicant is obligated whether or not the applicant accepts employment, a clear explanation of the services provided and a statement that the private personnel service does not guarantee that the applicant will obtain employment as a result of its services;

(8) A statement, in a type size no smaller than nine point, directly above the place for the applicant's signature, that reads as follows: "I have read and received a copy of this CONTRACT, which I understand makes me legally obligated to pay a fee under conditions outlined above." In the preceding statement the word "CONTRACT" and no others shall be in all capitals; and

(9) A statement that the private personnel service is licensed and regulated by the Commissioner and the address at which a copy of laws and regulations governing private personnel services may be obtained.

(c) A copy of each contract form to be used with applicants shall be filed with the Commissioner. Until the private personnel service receives written notification from the Commissioner that the form conforms to the requirements of this Article and regulations adopted hereunder, it shall not be used with applicants.

(d) A private personnel service shall not require an applicant to sign a contract with the private personnel service before the applicant has had an opportunity to read the contract and discuss the contract with an employee of the personnel agency who regularly arranges contacts and assists in negotiations between employers and applicants. A private personnel service shall not coerce an applicant into signing a contract by applying or using duress, undue influence, fraud or misrepresentation sufficient to invalidate the contract under North Carolina law.

(e) Any contract that obligates an applicant to pay a fee to the private personnel service when the applicant accepts employment shall be physically separate from any contract that obligates an applicant to pay a fee whether or not the applicant accepts employment. A private personnel service shall not require an applicant to sign one contract as a prerequisite to signing another contract or to pay a fee as a prerequisite to signing a contract. Express violations of this subsection are the following:

(1) Refusal to allow an applicant to contract for counseling, job information or resume writing services, if the applicant does not agree to pay an additional fee upon acceptance of employment; and

(2) Refusal to allow an applicant to contract for services which obligate the applicant only upon acceptance of employment, if the applicant does not agree to pay a registration fee or to contract for counseling, resume writing or other services.

(f) If a private personnel service has a refund policy, included on each contract that obligates an applicant upon acceptance of employment will be a statement defining:

(1) The length of the period of time covered by the refund policy;

(2) The exact manner of computing the refund so that the amount of refund due the applicant will be clear;

(3) The conditions under which a refund becomes due to the applicant. The conditions of the refund, if other than unconditional policy is used, shall contain a definition of the reasons for which a refund will not be made. A refund will not be denied except for a reason so stated in the definition of the contract;

(4) A personnel service shall abide by the refund policy stated on its contract by promptly paying to applicants any refund due under the terms of the contract.

(g) If a private personnel service has no refund policy, the private personnel service shall include on each contract that obligates an applicant upon acceptance of employment, in a type size no smaller than nine point, a statement that reads as follows:

"_______________ (name of private personnel service) will make NO REFUND under any circumstances of fees paid by the applicant." In the preceding statement the words NO REFUND and no others shall be in all capitals.

(h) If a private personnel service places an applicant in a position of employment, the compensation of which is based, in whole or in part, on commission, the private personnel service shall:

(1) Have a written job order from the employer that includes the anticipated earnings upon which the private personnel service may base its fee, or

(2) In lieu of the written job order required by subdivision (1) of this subsection, have a policy of providing the same fee reimbursement as may be available to applicants from employers under the provisions of G.S. 95-47.3A.

In no case may the applicant collect the same reimbursement from both the employer and the private personnel service. When the private personnel service elects to obtain the written job order from the employer and not have its own reimbursement policy as described in subdivision (2) of this subsection, the private personnel service shall explain to the applicant and the employer how the fee for the placement is calculated, and shall inform in writing both the applicant and the employer of the provisions of G.S. 95-47.3A governing fee refunds from employers. (1979, c. 780, s. 1; 1991 (Reg. Sess., 1992), c. 970, s. 2; 1993, c. 202, s. 1; 1993 (Reg. Sess., 1994), c. 769, s. 29(a).)

§ 95-47.5. Records.

Every private personnel service shall maintain for a period of two years, the following records:

(1) Job orders or job specifications.

(2) Executed applicant contracts.

(3) Information on all placements made, including the employer's name and address; name and address of applicant placed; salary of the position; amount of fee charged; and refunds, where applicable. (1929, c. 178, s. 4; 1931, c. 312, s. 3; 1979, c. 780, s. 1.)

§ 95-47.6. Prohibited acts.

A private personnel service shall not engage in any of the following activities or conduct:

(1) Induce or attempt to induce any employee placed by that private personnel service to terminate his employment in order to obtain other employment through the private personnel service; or procure or attempt to procure the discharge of any person from his employment.

(2) Publish or cause to be published any false or fraudulent information, representation, promise, notice or advertisement.

(3) Advertise in newspapers or otherwise, unless the advertising contains the name of the private personnel service and the word "personnel service."

(4) Direct an applicant to visit or call upon an employer for the purpose of obtaining employment without having first obtained a job order or authorization from the employer for the interview. A private personnel service may attempt to sell the services of an applicant to an employer from whom no job order has been received and may charge a fee if the efforts result in the applicant's being employed.

(5) Send or cause to be sent any person to any employer where the private personnel service knows that the prospective employment is or would be in violation of State or federal laws governing minimum wages or child labor, or has been notified that a labor dispute is in progress, without notifying the applicant of that fact, or knowingly arrange an interview for an employment or occupation prohibited by law.

(6) Send or cause to be sent any person to any place which the private personnel service knows is maintained for immoral or illicit purposes.

(7) Divide or share, either directly or indirectly, the fees collected by the private personnel service, with contractors, sub-contractors, employers or their agents, foremen or anyone in their employ, or if the contractors, sub-contractors or employers be a corporation, any of the officers, directors or employees of the corporation to whom applicants for employment are sent.

(8) Make, cause to be made, or use any name, sign or advertising device bearing a name which is similar to or may reasonably be confused with the name of a federal, State, city, county or other governmental unit or agency.

(9) Knowingly make any false or misleading promise or representation or give any false or misleading information to any applicant or employer in regard to any employment, work or position, its nature, location, duration, compensation or the circumstances surrounding any employment, work or position including the availability thereof.

(10) Accept a registration fee from an applicant.

(11) Impose or attempt to collect any fee from any applicant unless that applicant accepts employment with an employer to which the applicant was directly or indirectly introduced by the private personnel service.

(12) A fee may be charged for resume writing provided the private personnel service does not require the applicant to become obligated for any other services. (1979, c. 780, s. 1.)

Legal Periodicals. — For note, "Consumer Protection — The Unfair Trade Practice Act and the Insurance Code: Does Per Se Necessarily Preempt?," see 10 Campbell L. Rev. 487 (1988).

CASE NOTES

A private personnel service violated subdivision (2) of this section by advertising that "pre-screened, qualified applicants" were quickly available through it, where the work experience and reliability of the applicants had been neither investigated nor verified. Winston Realty Co. v. G.H.G., Inc., 70 N.C. App. 374, 320 S.E.2d 286 (1984), aff'd, 314 N.C. 90, 331 S.E.2d 677 (1985).

The jury was at liberty to conclude that some of plaintiff's damages proximately resulted from representations made by private personnel service as to the qualifications of applicants, where the plaintiff's witness testified that he relied upon defendant's false representations in hiring an employee through the private personnel service. Winston Realty Co. v. G.H.G., Inc., 70 N.C. App. 374, 320 S.E.2d 286 (1984), aff'd, 314 N.C. 90, 331 S.E.2d 677 (1985).

Unfair or Deceptive Trade Practices. — A violation of either or both subdivisions (2) and (9) of this section as a matter of law constitutes an unfair or deceptive trade practice in violation of G.S. 75-1.1. Winston Realty Co. v. G.H.G., Inc., 314 N.C. 90, 331 S.E.2d 677 (1985).

Proof of fraud necessarily constitutes a violation of the prohibition against unfair and deceptive acts. Winston Realty Co. v. G.H.G., Inc., 314 N.C. 90, 331 S.E.2d 677 (1985).

Cited in Gray v. North Carolina Ins. Underwriting Ass'n, 352 N.C. 61, 529 S.E.2d 676 (2000).

§ 95-47.7: Repealed by Session Laws 2003-308, s. 10, effective July 1, 2003.

§ 95-47.8: Repealed by Session Laws 2003-308, s. 11, effective July 1, 2003.

§ 95-47.9. Enforcement of Article; rules; hearing; penalty; criminal penalties.

(a) This Article shall be enforced by the Commissioner. The Commissioner or any duly authorized agent, deputies or assistants designated by the Commissioner, may upon receipt of a complaint that a private personnel service has violated a specific section of this Article, inspect those records relevant to the complaint which this Article requires the private personnel service to retain. The Commissioner may also subpoena those records and witnesses and may conduct investigations of any employer or other person where the Commissioner has reasonable grounds for believing that the employer or person has conspired or is conspiring with a private personnel service to violate this Article.

(b) The Commissioner shall adopt rules necessary to carry out and administer the provisions of this Article.

(c) Complaints against any licensed person shall be made in writing to the Commissioner.

(1) If the complaint alleges a violation of this Article, the Commissioner shall cause an investigation to be made. If, as a result of the investigation, the Commissioner has reason to believe that a material violation of this Article has been committed by a private personnel service, the Commissioner may, after compliance with Chapter 150B of the General Statutes, deny, suspend, or revoke a license issued under this Article if it is determined that the licensee or any employee of the licensee is guilty of violating the provisions of this Article. In addition, the Commissioner may issue warnings or levy a fine against the private personnel service that shall not exceed two hundred fifty dollars ($250.00).

(2) The denial, revocation, or suspension of a license or the issuance of a warning or fine by the Commissioner shall be in writing, shall be signed by the Commissioner or the Commissioner's designee, and shall state the grounds upon which the decision is based. The aggrieved person shall have the right to appeal from the decision as provided by Chapter 150B of the General Statutes.

(d) Whenever a license is revoked pursuant to subsection (c) of this section, another license shall not be issued to the same person within three years from the date of the revocation.

(e) Any person who operates as a private personnel service without first obtaining the appropriate license (i) shall be guilty of a Class 1 misdemeanor; and (ii) be subject to a civil penalty of not less than fifty dollars ($50.00) nor more than one hundred dollars ($100.00) for each day the private personnel service operates without a license, the penalty not to exceed a total of two thousand dollars ($2,000). Actions to recover civil penalties shall be initiated by the Attorney General. The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1929, c. 178, ss. 3-5, 7, 9; 1931, c. 312, s. 3; 1979, c. 780, s. 1; 1993, c. 539, s. 663; 1994, Ex. Sess., c. 24, s. 14(c); 1998-215, s. 109; 2003-308, s. 12.)

§ 95-47.10. Power of Commissioner to seek injunction.

The Commissioner may apply to courts having jurisdiction for injunctions to prevent violations of this Chapter or of rules issued pursuant thereto, and such courts are empowered to grant such injunctions regardless of whether criminal prosecution or other action has been or may be instituted as a result of such violation. A single act of unauthorized or illegal practice shall be sufficient, if shown, to invoke the injunctive relief of this section or criminal or civil penalties under G.S. 95-47.9(e). (1979, c. 780, s. 1.)

§ 95-47.11. Government employment agencies unaffected.

This Article shall not in any manner affect or apply to the State of North Carolina, the government of the United States, or to any city, county or town, or any agency of any of those governments. (1929, c. 178, s. 10; 1979, c. 780, s. 1.)

§ 95-47.12. License taxes placed upon agencies not affected.

This Article is not intended to conflict with or affect any license tax placed upon private personnel services by the revenue laws of North Carolina, but instead shall be construed as supplementary thereto in exercising the police powers of the State. (1929, c. 178, s. 11; 1979, c. 780, s. 1.)

§ 95-47.13. Severability.

If any provision of this Article or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications, and to this end the provisions of this Article are severable. (1929, c. 178, s. 9; 1979, c. 780, s. 1.)

§ 95-47.14. Notification requirement.

Any temporary help service as described in G.S. 95-47.1(16)c that operates in North Carolina shall notify the Department of Labor in writing that the temporary help service:

(1) Operates only as a temporary help service;
(2) Establishes an employer-employee relationship with its temporaries;
(3) Does not operate as a private personnel service or an employer fee paid personnel consulting service. (1989, c. 414, s. 3.)

§ 95-47.15. Certification requirement.

Any employer fee paid personnel consulting service or temporary help service, as the two terms are described in G.S. 95-47.1(16)f, that operates in North Carolina shall certify annually to the Department of Labor on a form prescribed by the Commissioner that the service:

(1) Operates on a one hundred percent (100%) employer fee paid basis;
(2) Requires no applicant placement contract; and
(3) Has no recourse against an applicant for a fee under any circumstances. (1989, c. 414, s. 3.)

§§ 95-47.16 through 95-47.18: Reserved for future codification purposes.

ARTICLE 5B.

Regulation of Job Listing Services.

§ 95-47.19. Definitions.

Definitions of terms used in this Article shall be the same as in Chapter 95, Article 5A (Regulation of Private Personnel Services), with the words "job listing service" substituted, where appropriate, for the words "private personnel service." "Job listing service" means any business operated in the State of North Carolina by any person for profit which publishes, either orally or in writing, lists of specific positions of employment available with any employer other than itself or which holds itself out to applicants as able to provide information about specific positions of employment available with any employer other than itself, which charges a fee to any applicant for its services or purported services and which performs none of the activities of a private personnel service other than the publishing of job listings. "Job listing service" does not include:

(1) Any educational, religious, charitable, fraternal or benevolent organization which charges no fee for services rendered in providing information about employment;
(2) Any employment service operated by the State of North Carolina, the Government of the United States, or any city, county or town, or any agency thereof;
(3) Any temporary help service that charges no fee for services rendered in providing information about employment;
(4) Any newspaper of general circulation or other business engaged primarily in communicating information other than information about specific positions of employment and that does not purport to adapt the information provided to the needs or desires of an individual subscriber;
(5) Employment offices that charge no fee to the applicant other than union dues and which are used solely for the hiring of employees under a valid union contract by the employers subscribing to this contract. (1979, c. 780, s. 2.)

§ 95-47.20. License required.

No person shall operate a job listing service in North Carolina without first obtaining a license from the Commissioner. A job listing service shall have a separate license for each location at which it maintains an office. (1979, c. 780, s. 2.)

§ 95-47.21. Violation of this Article; criminal and civil penalty.

Any person who violates the provisions of this Article by operating a job listing service without a valid license from the Commissioner shall be subject, under current regulations adopted pursuant to this Article, to criminal and civil penalties in the same amount and under substantially the same procedure as that provided under G.S. 95-47.9(e) for a person operating a private personnel service. (1979, c. 780, s. 2.)

§ 95-47.22. Licensing procedure.

(a) In addition to the requirements of subsection (b) of this section, the procedure, under rules adopted pursuant to this Article, for the issuance, denial and renewal of job listing service licenses and other aspects of the licensing of job listing services by the Commissioner shall be substantially the same as that provided under Article 5A of this Chapter for the licensing of private personnel services.

(b) Before the Department may issue or renew a license under this Article, each licensee shall deposit with the Department a bond payable to the State of North Carolina and executed by a surety company duly authorized to transact business in this State. The bond shall be in the amount of twenty-five thousand dollars ($25,000) and, if the job listing service terminates its business, shall be held by the Department until all refunds due applicants under this Article have been paid by the job listing service. (1979, c. 780, s. 2; 1993, c. 172, s. 1.)

§ 95-47.23. Enforcement.

Under regulations adopted pursuant to this Article, a job listing service may be issued a warning, citation or notice of violation, or may have its license revoked or suspended, or its licensee reprimanded, censured or placed on probation in substantially the same manner and under substantially the same procedure as that provided for a private personnel service under Article 5A of this Chapter. (1979, c. 780, s. 2.)

§ 95-47.24. Certain practices prohibited.

Under regulations adopted pursuant to this Article, a job listing service shall abide by provisions substantially the same as those provided under G.S. 95-47.6(7) (kickbacks), G.S. 95-47.6(9) (misrepresentation), and G.S. 95-47.2(d)(3)c. (loan or collection agencies) for a private personnel service. (1979, c. 780, s. 2; 1993, c. 172, s. 2.)

§ 95-47.25. Contracts; contents; approval.

A contract between a job listing service and an applicant shall be in writing, labeled as a contract, physically separate from any application form and made in duplicate, and shall include:

(1) A clear explanation of the services provided and the amount of the fee;

(2) In a type size no smaller than nine point, a statement that reads "I understand that ____________ (name of job listing service) does not guarantee that I will obtain employment through its services. I understand that ____________ (name of job listing service) does not refund fees for any reason," unless the job listing service agrees in the contract to refund to the applicant any fee the applicant paid to the job listing service if within three months of paying such a fee the applicant has not accepted an employment position listed in a publication of the job listing service;

(3) A statement that the job listing service is not a private personnel service or employment agency, that no additional fee will be charged to the applicant upon acceptance of employment and that the job listing service will not set up interviews or otherwise arrange direct contacts between an employer and the applicant; and

(4) A statement that the job listing service is licensed and regulated by the Commissioner and the address at which a copy of regulations governing job listing services may be obtained.

A copy of each contract form to be used with applicants shall be filed with the Commissioner. Until the job listing service receives written notification from the Commissioner that the form conforms to the requirements of this Article and regulations adopted hereunder, it shall not be used with applicants. A job listing service shall not accept a fee from any applicant before the applicant has read and received a copy of the contract. (1979, c. 780, s. 2.)

CASE NOTES

Cited in Varnell v. Henry M. Milgrom, Inc., 78 N.C. App. 451, 337 S.E.2d 616 (1985).

§ 95-47.26. Advertising and publication.

(a) In conducting any form of advertising, a job listing service shall identify itself by its business name and identify itself as a job listing service by using in the name or elsewhere in the advertising the term "job listing service."

(b) Prior to advertising or publishing information about an available job, a job listing service shall receive a job order and shall record the job order, the date it was received and the name of the employer representative or other business who gave the job order to the job listing service. No description or representation of an employment position shall be stated in any advertising or other publication, unless the information is included on the recorded job order for the position. Information about a single employment position shall not be used in more than one advertisement or listing in a single issue of any publication.

(c) A job listing service shall not publish or cause to be published any information which it knows or reasonably ought to know is false or deceptive or which it has no reasonable basis for believing to be true.

(d) In conducting any form of advertising, a job listing service shall not use the term "no fee" or any other term indicating that applicants will not be financially obligated to the job listing service. (1979, c. 780, s. 2.)

§ 95-47.27. Fee receipts.

A job listing service shall give every applicant from whom payment is received a receipt stating the name and address of the job listing service, the name of the applicant, the date and the amount of the payment. (1979, c. 780, s. 2.)

§ 95-47.28. Prohibited job listings.

A job listing service shall not publish information about a position of employment with an employer that the job listing service knows or has reason to know:

(1) Has included false information in the job order; or
(2) Has a strike or lockout at its business, unless the applicant is so informed in the publication; or
(3) Is engaging in unlawful or immoral activity; or
(4) Is in financial or other difficulty likely to lead to imminent cessation of operation, unless the applicant is so informed in the publication; or
(5) Is an employer in which the job listing service or any owner of the job listing service has a financial interest greater than ten percent (10%), unless the applicant is so informed in the publication. (1979, c. 780, s. 2.)

§ 95-47.29. Records of the job listing service.

Each job listing service shall maintain and make available for inspection by the Commissioner the following records of the operation of the job listing service for the 18 months immediately preceding:

(1) The job listing service's copies of all contracts executed with applicants;
(2) Copies of all fee receipts;
(3) Copies of all advertising and job lists published orally or in writing, indexed or attached to the recorded job order (including the date it was received and the name of the employer representative or other business who gave it) for each position advertised or listed, and records of the dates advertisements were run on publications issued; and
(4) Any records required by the Commissioner under regulations adopted pursuant to this Article. (1979, c. 780, s. 2.)

§ 95-47.30. Administration of this Article.

This Article shall be enforced under the general supervision of the Commissioner, who shall have the same powers and duties in the enforcement of this Article as in the enforcement of Article 5A of this Chapter. (1979, c. 780, s. 2.)

§ 95-47.31. Review of job listing services.

After the Commissioner receives written statements from two or more applicants complaining that the applicant failed to obtain employment as a result of the services of a job listing service, the Commissioner may contact other applicants who have paid a fee to the job listing service for the purpose of determining what percentage of such applicants obtain employment as a result of the services of the job listing service. After gathering information from such applicants and following the requirements of due process, the Commissioner shall place the survey results in the public records. (1979, c. 780, s. 2.)

§ 95-47.32. Severability.

If any provision of this Article or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications, and to this end the provisions of this Article are severable. (1979, c. 780, s. 2.)

ARTICLE 6.

Separate Toilets for Sexes.

§§ 95-48 through 95-53: Repealed by Session Laws 1993, c. 204, s. 1.

ARTICLE 7.

Board of Boiler Rules and Bureau of Boiler Inspection.

§§ 95-54 through 95-69.7: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1187, s. 1.

Editor's Note. — Repealed G.S. 95-69.3 to 95-69.7 were reserved sections.

ARTICLE 7A.

Uniform Boiler and Pressure Vessel Act.

§ 95-69.8. Short title.

This Article shall be known as the Uniform Boiler and Pressure Vessel Act of North Carolina. (1975, c. 895, s. 1.)

§ 95-69.9. Definitions.

(a) The term "board" shall mean the North Carolina Board of Boiler and Pressure Vessel Rules.

(b) The term "boiler" shall mean a closed vessel in which water is heated, steam is generated, steam is superheated, or any combination thereof, under pressure or vacuum by the direct or indirect application of heat. The term "boiler" shall also include fired units for heating or vaporizing liquids other than water where these units are complete within themselves.

(b1) The term "Chief Inspector" shall mean the individual appointed by the Commissioner to hold the office of Chief of the Boiler Safety Bureau within the Department of Labor. The Chief Inspector serves as the North Carolina member on the National Board of Boiler and Pressure Vessel Inspectors.

(c) The term "Commissioner" shall mean the North Carolina Commissioner of Labor.

(d) Repealed by Session Laws 2005-453, s. 1.

(d1) The term "Deputy Inspector" shall mean any Boiler and Pressure Vessel Inspector who is employed by the Department of Labor and is subordinate to the Chief Inspector.

(e) The term "inspection certificate" or "certificate of inspection" shall mean certification by the Chief Inspector that a boiler or pressure vessel is in compliance with the rules and regulations adopted under this Article.

(f) The term "inspector's commission" shall mean a written authorization by the Commissioner for a person who has met the qualifications set out in this Article to conduct inspections of boilers and pressure vessels.

(f1) The term "National Board" shall mean the National Board of Boiler and Pressure Vessel Inspectors.

(f2) The term "person" shall mean any individual, association, partnership, firm, corporation, private organization, or the State of North Carolina or any political subdivision of the State or any unit of local government.

(g) The term "pressure vessel" shall mean a vessel in which the pressure is obtained from an indirect source or by the application of heat from an indirect source or a direct source, other than those included within the term "boiler". (1975, c. 895, s. 2; 1993, c. 351, s. 1; 2005-453, s. 1.)

§ 95-69.10. Application of Article; exemptions.

(a) This Article shall apply to all boilers and pressure vessels constructed, used, or designed for operation in this State including all new and existing installations which are operated in connection with business buildings, institutional buildings, industrial buildings, assembly buildings, educational buildings, public residential buildings, recreation buildings, other public buildings, and water supplies. This Article shall also apply to boilers and hot water supply tanks, and heaters located in hotels, motels, tourist courts, camps, cottages, resort lodges, and similar places whenever the owner or operator advertises in any manner for transit patronage, or solicits such business for temporary abode by transit patrons.

(b) This Article shall not apply to:

(1) Boilers and pressure vessels owned or operated by the federal government, unless the agency in question has asked for coverage by this Article.

(2) Pressure vessels used for transportation or storage of compressed gases when constructed in compliance with the specifications of the United States Department of Transportation and when charged with gas marked, maintained, and periodically requalified for use, as required by appropriate regulations of the United States Department of Transportation.

(3) Portable pressure vessels used for agricultural purposes only or for pumping or drilling in an open field for water, gas or coal, gold, talc, or other minerals and metals.

(4) Boilers and pressure vessels which are located in private residences or in apartment houses of less than six families.

(5) Repealed by Session Laws 2007-231, s. 1, effective July 18, 2007.

(6) Air tanks located on vehicles licensed under the rules and regulations of other state authorities operating under rules and regulations substantially similar to those of this State and used for carrying passengers or freight within interstate commerce.

(7) Air tanks installed on right-of-way of railroads and used directly in the operation of trains.

(8) Any of the following pressure vessels that do not exceed the listed limitations if the vessel is not equipped with a quick actuating closure:

a. Five cubic feet in volume and 250 psig.
b. Three cubic feet in volume and 350 psig.
c. One and one-half cubic feet in volume and 600 psig.
d. An inside diameter of six inches with no limitation on pressure.

(9) Pressure vessels operating at a working pressure not exceeding 15 psig.

(10) Pressure vessels with a nominal water capacity not exceeding 120 gallons and containing water under pressure at temperatures not exceeding 120° F, including those containing air, the compression of which serves as a cushion.

(11) Boilers and pressure vessels on railroad steam locomotives that are subject to federal railway safety regulations pursuant to 49 C.F.R. § 230.

(12) Repealed by Session Laws 1985, c. 620, s. 2.

(13) Coil-type hot water supply boilers, generally referred to as steam jennies, where the water can flash into steam when released directly to the atmosphere through a manually operated nozzle and where adequate safety relief valves and controls are installed on them, provided none of the following limitations are exceeded:

a. There is no drum, header, or other steam space.
b. No steam is generated within the coil.
c. Maximum 1 inch tube size.
d. Maximum ¾ inch nominal pipe size.
e. Maximum 6 gallon nominal water storage capacity.
f. Water temperature of 350°F.

(14) Pressure vessels containing water at a temperature not exceeding 110 degrees fahrenheit except that this provision shall not exclude hydropneumatic pressure vessels from regulation.

(15) An air tank that does not exceed eight cubic feet in volume that is installed on a service vehicle.

(16) Autoclaves in medical offices and hospitals that are less than five cubic feet in volume, even if they are equipped with a quick actuating closure.

(17) Coil-type hot water supply boilers of the instantaneous type where adequate safety relief valves and controls are installed if none of the following limitations are exceeded:
  a. There is no drum, header, or other steam space.
  b. No steam is generated within the coil.
  c. Maximum one-inch tube size.
  d. Maximum three-quarter-inch nominal pipe size.
  e. Maximum six-gallon nominal water storage capacity.
  f. Water temperature not to exceed 250°F.
  g. Maximum heat input does not exceed 400,000 Btu/hr or 110 kW.
  h. Maximum pressure of 260 psig.

(18) Toy boilers, if all of the following apply:
  a. The water containing volume of the boiler is less than one quart.
  b. The operating pressure does not exceed 15 psig.
  c. The maximum outside diameter of the shell is no greater than six inches.
  d. The boiler is manually fired by solid fuels.

(19) Pressure vessels associated with electrical apparatus in electrical switchyards if the pressure vessels have proper pressure relief devices.

(20) Carbon dioxide tanks used in beverage dispensing service.

(c) The construction and inspection requirements established by the Department of Labor shall not apply to hot water supply boilers which are directly fired with oil, gas or electricity, or hot water supply tanks heated by steam or any other indirect means, which do not exceed any of the following limitations:

(1) Heat input of 200,000 Btu/hr or 58.6 kW.
(2) Repealed by Session Laws 2005-453, s. 2.
(3) Nominal water capacity of 120 gallons.

provided that they are equipped with ASME Code and National Board certified safety relief valves.

(d) The construction requirements established by the Department of Labor shall not apply to pressure vessels installed in this State prior to December 31, 1981, that:

(1) Are of one-piece, unwelded, forged construction;
(2) Are constructed before January 1, 1981, and operating or could be operated, under the laws of any state or Canadian Province that has adopted one or more sections of the ASME Code;
(3) Are transferred into this State without a change of ownership; and
(4) Are determined by the Chief Inspector to be constructed under standards substantially equivalent to those established by the department at the time of transfer;

provided that they are equipped with ASME Code and National Board certified safety relief valves.

(e) The construction requirements established by the Department of Labor shall not apply to pressure vessels installed in this State prior to December 31, 1984, that:

(1) Are manufactured from gray iron casting material, as specified by the American Society for Testing and Materials, (ASTM) 48-60T/30;
(2) Are constructed before December 31, 1967, and operating or could be operated, under the laws of any state or Canadian Province that has adopted one or more sections of the ASME Boiler and Pressure Vessel Code;
(3) Are transferred into this State without a change of ownership; and
(4) Are determined by the Chief Inspector to be constructed under standards substantially equivalent to those established by the department at the time of transfer;

provided that they are equipped with ASME Code and National Board certified safety relief valves.

(f) The construction requirements established by the Department of Labor shall not apply to hydropneumatic tanks installed or operated by a community water system prior to January 1, 1986.

(g) The inspection requirements established by the Department of Labor shall not apply to pressure vessels used for transportation or storage of liquefied petroleum gas that are subject to inspection in accordance with the requirements established by the Department of Agriculture and Consumer Services. (1975, c. 895, s. 3; 1979, c. 920, ss. 1, 2; 1981, c. 591; 1983, c. 654; 1985, c. 620, ss. 1, 2; c. 629; 1993, c. 351, s. 2; 2005-453, s. 2; 2007-231, s. 1.)

Effect of Amendments. — Session Laws 2007-231, s. 1, effective July 18, 2007, deleted former subdivision (b)(5) which read: "Pressure vessels used for transportation or storage of liquified petroleum gas."; substituted "railway safety regulations pursuant to 49 C.F.R. § 230" for "safety regulations" at the end of subdivision (b)(11); and added subsection (g).

§ 95-69.11. Powers and duties of Commissioner.

The Commissioner of Labor is hereby charged, directed, and empowered:

(1) To adopt, modify, or revoke rules governing the construction, operation, and use of boilers and pressure vessels, including, where necessary, requirements for fencing to prevent unauthorized persons from coming in contact with boilers and pressure vessels or the systems they are connected to.

(2) To delegate to the Chief Inspector any powers, duties, and responsibilities that the Commissioner determines will best serve the public interest in the safe operation of boilers and pressure vessels, and to supervise the Chief Inspector in the performance of those duties.

(3) To enforce rules adopted under authority of this Article.

(4) To inspect boilers and pressure vessels covered under this Article.

(5) To issue inspection certificates to those boilers and pressure vessels found in compliance with this Article.

(6) To enjoin violations of this Article in the civil and criminal courts of this State.

(7) To keep adequate records of the type, dimensions, age, conditions, pressure allowed upon, location, and date of the last inspection of all boilers and pressure vessels to which this Article applies.

(8) To require such periodic reports from inspectors, owners, and operators of boilers and pressure vessels as he deems appropriate in carrying out the purposes of this Article.

(9) To have free access, without notice, to any location in this State, during reasonable hours, where a boiler or pressure vessel is being built, installed, or operated for the purpose of ascertaining whether such boiler or pressure vessel is built, installed, or operated in accordance with the provisions of this Article.

(10) To investigate serious accidents involving boilers and pressure vessels to determine the causes of the accidents, and to have full subpoena powers in conducting the investigation.

(11) To establish reasonable fees for the inspection and issuance of inspection certificates for boilers and pressure vessels that are in use.

(12) To establish reasonable fees for the examination and certification of inspectors.

(13) To appoint qualified individuals to the Board of Boiler and Pressure Vessel Rules.

(14) To perform inspections and audits relating to the construction and repair of boilers and pressure vessels and to establish and collect fees for these activities.

(15) To order the payment of civil penalties provided by this section.

(16) To require that before any boiler or pressure vessel that is subject to this Article is transferred into the State, or is moved from one location to another within the State, the owner or the owner's authorized agent shall file with the Commissioner a written notice of intent to do so and the type of device involved and provide a copy of the specifications, previous inspection documents, or other information that the Commissioner deems necessary to determine whether the boiler or pressure vessel is in compliance with the provisions of this Article and the rules adopted under this Article. (1975, c. 895, s. 4; 1985, c. 620, s. 3; 1993, c. 351, s. 3; 2005-453, s. 3.)

§ 95-69.12. Boiler Safety Bureau established.

There is established a Boiler Safety Bureau within the Department of Labor. The Commissioner shall appoint a Chief Inspector of the Boiler Safety Bureau and any other employees that the Commissioner deems necessary to assist the Chief Inspector in administering the provisions of this Article and the rules adopted under this Article. (1975, c. 895, s. 5; 1981 (Reg. Sess., 1982), c. 1187, ss. 2, 3; 2005-453, s. 4.)

§ 95-69.13. Board of Boiler and Pressure Vessels Rules created; appointment, terms, compensation and duties.

(a) There is hereby created the North Carolina Board of Boiler and Pressure Vessels Rules consisting of nine members appointed by the Commissioner for a term of five years each. Of these nine appointed members, one shall be a representative of the owners and users of steam boilers within this State, one a representative of boiler manufacturers within this State, one a representative of boilermakers within this State who has had not less than five years' practical experience as a boilermaker, one shall be a representative of the owners or users of pressure vessels within the State, one shall be a representative of the pressure vessel manufacturers within the State, one a representative of boiler inspection and insurance companies authorized to insure boilers and pressure vessels within the State, one a representative of the antique boiler owners and operators in this State, one a contractor holding a Group I North Carolina Heating License, and one a mechanical engineer on the faculty of a recognized engineering college or a licensed professional engineer having boiler and pressure vessel experience. The Commissioner of Labor shall serve as chair. The Chief Inspector shall serve on the Board and in the absence of the Commissioner shall serve as chair.

(b) The Board shall meet at least twice annually and shall be responsible for:

(1) Studying and proposing rules and regulations, for adoption, modification or revocation by the Commissioner, governing the construction, installation, inspection, repair, alteration, use and operation of boilers and pressure vessels in this State. The rules and regulations so formulated shall conform as nearly as possible to the standards of the American Society of Mechanical Engineers.

(2) Devise and proctor examinations covering this Article and the rules adopted under this Article to applicants seeking a commission as inspectors of boilers and pressure vessels in this State.

(2a) Act as proctors during the administration of the National Board commissioning examination.

(3) Issue, suspend, or revoke inspector's commissions as inspectors of boilers and pressure vessels within this State. Whenever action is taken under this section to suspend or revoke a commission, the affected party shall be given notice of the availability of an administrative hearing and of judicial review in accordance with Chapter 150B of the General Statutes, the Administrative Procedure Act.

(c) The members of the Board shall serve without salary but shall be paid a subsistence and travel allowance as established in accordance with Chapter 138 of the General Statutes. (1975, c. 895, s. 6; 1977, c. 788; 1981 (Reg. Sess., 1982), c. 1187, s. 4; 1983, c. 717, s. 16; 1985, c. 620, s. 5; 2005-453, s. 5.)

§ 95-69.14. Rules and regulations governing the construction, operation and use of boilers and pressure vessels.

The Commissioner, after consultation with the Board, may adopt, modify, or revoke any rules and regulations governing the construction, installation, repair, alteration, inspection, use, and operation of boilers and pressure vessels as the Commissioner deems appropriate to insure the safe operation and avoidance of injury to person or property from boilers and pressure vessels. The rules and regulations will conform as nearly as possible to the standards of the American Society of Mechanical Engineers and the amendments and interpretations of those engineering standards.

The procedure for the adoption, modification, or revocation of the rules and regulations shall be in accordance with Chapter 150B of the General Statutes, the Administrative Procedure Act. (1975, c. 895, s. 7; 1985, c. 620, s. 4; 1987, c. 827, s. 1; 2005-453, s. 6.)

§ 95-69.15. Classification of inspectors; qualifications; examinations; inspector's commission.

(a) There shall be three types of inspectors authorized to conduct inspections and report their findings to the Chief Inspector under this Article:

(1) Boiler and Pressure Vessel Inspector or Deputy Inspector. — Shall be a qualified individual, employed by the Department of Labor and appointed by the Commissioner, to assist in conducting inspections under this Article and report on the suitability of boilers and pressure vessels so inspected.

(2) Special Inspector or Insurance Inspector. — Shall be a qualified individual regularly employed by an insurance company authorized to insure in this State against injury to person or property or both from explosions and accidents involving boilers and pressure vessels. Special Inspectors shall not include employees of private contract inspection agencies.

(3) Owner-User Inspectors. — Shall be a qualified individual employed on a full-time basis by a company operating pressure vessels for its own use and not for resale, and maintains an established inspection program for periodic inspection of pressure vessels owned or used by that company and where such inspection program is under the supervision of one or more engineers having qualifications satisfactory to the Commissioner.

(b) Inspector's Commission. — Any company authorized to insure in this State against loss to person or property as a result of an explosion or accident involving boilers and pressure vessels or operating boilers or pressure vessels or both for its own use and not for resale, may apply for the issuance of an inspector's commission for an individual within its employ who has a commission from the National Board.

A North Carolina commission authorizes an inspector to make inspections on boilers and pressure vessels and report on the suitability of said boilers and pressure vessels to the Chief Inspector. Those inspectors holding commissions as special inspectors shall be limited to making inspections on boilers and pressure vessels insured by their employer. Owner-user inspectors shall be limited to conducting inspections on boilers and pressure vessels operated by their respective employers.

A person seeking a commission from this State to conduct in-service inspections of boilers and pressure vessels must take and pass an examination on this Article and the rules adopted pursuant to this Article prior to receiving the commission. Any person who has had a commission in this State but who has been inactive for more than one year must take or retake and pass the State examination before conducting further in-service inspections of boilers and pressure vessels.

(c) Repealed by Session Laws 2007, c. 231, s. 2, effective July 18, 2007. (1975, c. 895, s. 8; 2005-453, s. 7; 2007-231, s. 2.)

Effect of Amendments. — Session Laws 2007-231, s. 2, effective July 18, 2007, deleted "certificates of competency;" preceding "inspector's commission" in the section heading; and deleted former subsection (c) which read: "Certificates of Competency. Certificates of competency may be issued by the Chief Inspector to those persons who take and pass a National Board commissioning examination administered by the Board."

§ 95-69.16. Inspection certificate required.

All boilers and pressure vessels subject to the provisions of this Article shall be inspected by a commissioned inspector. The Commissioner may determine both the frequency and the method of inspection. In determining the frequency of inspection, the Commissioner shall give due consideration to the hazard involved and the need for the protection of the public. The method of inspection must provide an adequate procedure to insure the safety of individuals likely to be injured by an explosion or accident involving a boiler or pressure vessel.

No boiler or pressure vessel may be operated without an inspection certificate, except pressure vessels being operated under an owner-user provision where administrative procedures of equal safety and competency have been approved by the Board and Commissioner. No more than 60 days grace period may be granted beyond the certificate expiration date. (1975, c. 895, s. 9; 1993, c. 351, s. 4; 2005-453, s. 8; 2007-231, s. 3.)

Effect of Amendments. — Session Laws 2007-231, s. 3, effective July 18, 2007, substituted "60 days" for "90 days" in the last sentence of the second paragraph.

§ 95-69.17. Noncomplying devices; appeal.

(a) If the Commissioner determines that a boiler or pressure vessel is subject to the provisions of this Article and that the operation of the boiler or pressure vessel is exposing the public to an unsafe condition likely to result in serious personal injury or property damage, the Commissioner may immediately order in writing that the use of the boiler or pressure vessel be stopped or limited until the Commissioner determines that the boiler or pressure vessel has been made safe for operation.

(b) If the Commissioner determines that the provisions of this Article or the rules adopted pursuant to this Article have not been complied with, the

Commissioner may refuse to issue or renew or may revoke, suspend, or amend an inspection certificate.

(c) Whenever action is taken under this section, the affected party shall be given notice of the availability of an administrative hearing and of judicial review in accordance with Chapter 150B of the General Statutes, the Administrative Procedure Act. (1975, c. 895, s. 10; 1987, c. 827, s. 263; 1993, c. 351, s. 5; 2005-453, s. 9.)

§ 95-69.18. Operation without inspection certificate; operation not in compliance with this Article; operation after nonissuance or revocation of certificate.

(a) No person may operate or permit to be operated any boiler or pressure vessel subject to the provisions of this Article without a valid inspection certificate unless the absence of a valid inspection certificate is the result of the Commissioner's failure to inspect the device.

(b) No person may operate or permit to be operated any boiler or pressure vessel subject to the provisions of this Article other than in accordance with this Article and the rules adopted pursuant to this Article.

(c) No person may operate or permit to be operated any boiler or pressure vessel subject to the provisions of this Article after the Commissioner has refused to issue or has revoked the inspection certificate for the boiler or pressure vessel. (1975, c. 895, s. 11; 1993, c. 539, s. 665; 1994, Ex. Sess., c. 24, s. 14(c); 2005-453, s. 10.)

§ 95-69.19. Violations; civil penalties; appeals.

(a) Any person who violates G.S. 95-69.18(a) or (b) (operation without inspection certificate; operation not in accordance with Article or rules and regulations) shall be subject to a civil penalty not to exceed two hundred fifty dollars ($250.00) for each day each boiler or pressure vessel is so operated or used.

(b) Any person who violates G.S. 95-69.18(c) (operation after refusal to issue or after revocation of inspection certificate) shall be subject to a civil penalty not to exceed five hundred dollars ($500.00) for each day any such boiler or pressure vessel is so operated or used.

(c) In determining the amount of any penalty ordered under authority of this section, the Commissioner shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person being charged, the gravity of the violation, the good faith of the person, and the record of previous violations.

(d) The determination of the amount of the penalty by the Commissioner shall be final, unless within 15 days after receipt of notice thereof by certified mail with return receipt, by signature confirmation as provided by the U.S. Postal Service, by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) with delivery receipt, or via hand delivery, the person charged with the violation takes exception to the determination in which event the final determination of the penalty shall be made in an administrative proceeding and in a judicial proceeding pursuant to Chapter 150B of the General Statutes, the Administrative Procedure Act.

(e) The Commissioner may file in the office of the clerk of the superior court of the county where the violation occurred or where the person against whom a civil penalty has been ordered resides, or if a corporation is involved in the county where the corporation maintains its principal place of business, a certified copy of a final order of the Commissioner unappealed from, or of a final order of the Commissioner affirmed upon appeal. Upon filing of the final order, the clerk of superior court shall enter judgment in accordance with the order and notify the parties. The judgment shall have the same force and effect as a judgment by the superior court of the General Court of Justice. (2005-453, s. 11; 2007-231, s. 6.)

Effect of Amendments. — Session Laws 2007-231, s. 6, effective July 18, 2007, inserted "with return receipt, by signature confirmation as provided by the U.S. Postal Service, by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) with delivery receipt, or via hand delivery" in subsection (d).

§ 95-69.20. Violations; criminal penalties.

(a) Any person who knowingly and willfully misrepresents himself as an authorized inspector administering or enforcing the provisions of this Article or the rules adopted pursuant to this Article shall be guilty of a Class 2 misdemeanor.

(b) Any person knowingly making a material and false statement, representation, or certification in any application, record, report, plan, or any other document filed or required to be maintained pursuant to this Article or the rules adopted pursuant to this Article shall be guilty of a Class 2 misdemeanor. (2005-453, s. 12.)

Article 8.

Bureau of Labor for the Deaf.

§§ 95-70 through 95-72: Repealed by Session Laws 1975, c. 412, s. 1.

Editor's Note. — Session Laws 1975, c. 412, which repealed this Article, in s. 3 provided: "The intent of this act is to transfer the Bureau of Labor for the Deaf from the Department of Labor to the Department of Human Resources as a Type I transfer as defined in G.S. 143A-6(a)."

See also G.S. 168-14.

Article 9.

Earnings of Employees in Interstate Commerce.

§ 95-73. Collections out of State to avoid exemptions forbidden.

No resident creditor or other holder of any book account, negotiable instrument, duebill or other monetary demand arising out of contract, due by or chargeable against any resident wage earner or other salaried employee of any railway corporation or other corporation, firm, or individual engaged in interstate business shall send out of the State, assign, or transfer the same, for value or otherwise, with intent to thereby deprive such debtor of his personal earnings and property exempt by law from application to the payment of his debts under the laws of the State of North Carolina, by instituting or causing to be instituted thereon against such debtor, in any court outside of this State, in such creditor's own name or in the name of any other person, any action, suit, or proceeding for the attachment or garnishment of such debtor's earnings in the hands of his employer, when such creditor and debtor and the railway corporation or other corporation, firm, or individual owing the wages or salary intended to be reached are under the jurisdiction of the courts of this State. (1909, c. 504, s. 1; C.S., s. 6568.)

CASE NOTES

The resident creditor is not forbidden to send his claim out of the State for collection by suit or otherwise, provided no effort is made in the foreign state by attachment or garnishment to deprive the resident debtor of his personal earnings and property exempt from application to the payment of his debts under the laws of this State. Padgett v. Long, 225 N.C. 392, 35 S.E.2d 234 (1945).

§ 95-74. Resident not to abet collection out of State.

No person residing or sojourning in this State shall counsel, aid, or abet any violation of the provisions of G.S. 95-73. (1909, c. 504, s. 2; C.S., s. 6569.)

§ 95-75. Remedies for violation of § 95-73 or 95-74; damages; indictment.

Any person violating any provisions of G.S. 95-73 or 95-74 shall be answerable in damages to any debtor from whom any book account, negotiable instrument, duebill, or other monetary demand arising out of contract shall be collected, or against whose earnings any warrant of attachment or notice of garnishment shall be issued, in violation of the provisions of G.S. 95-73, to the full amount of the debt thus collected, attached, or garnisheed, to be recovered by civil action in any court of competent jurisdiction in this State; and any person so offending shall likewise be guilty of a Class 3 misdemeanor, punishable only by a fine of not more than two hundred dollars ($200.00). (1909, c. 504, s. 3; C.S., s. 6570; 1993, c. 539, s. 666; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Necessary Allegation. — In a suit to recover damages for violation of the provisions of G.S. 95-73, an allegation that the forbidden purpose was accomplished by instituting in the foreign state an action, suit or proceeding for the attachment or garnishment of the debtor's earnings in the hands of his employer would seem to be an essential element of the cause of action. An allegation that the debtor was threatened with attachment or garnishment of his wages and was forced to pay the foreign judgment in order to avoid same is not sufficient. Padgett v. Long, 225 N.C. 392, 35 S.E.2d 234 (1945).

§ 95-76. Institution of foreign suit, etc., evidence of intent to violate.

In any civil or criminal action instituted in any court of competent jurisdiction in this State for any violation of the provisions of G.S. 95-73 and 95-74, proof of the institution or prosecution of any action, suit, or proceeding in violation of the provisions of G.S. 95-73, or the issuance of service therein of any warrant of attachment, notice, or garnishment or other like writ for the garnishment of earnings of the defendant therein, or of the payment by the garnishee therein of any final judgment rendered in any such action, suit, or proceeding shall be deemed prima facie evidence of the intent of the creditor or other holder of the debt sued upon to deprive such debtor of his personal earnings and property exempt from application to the payment of his debts under the laws of this State, in violation of the provisions of this Article. (1909, c. 504, s. 4; C.S., s. 6571.)

§ 95-77. Construction of Article.

No provision of this Article shall be so construed as to deprive any person entitled to its benefits of any legal or equitable remedy already possessed under the laws of this State. (1909, c. 504, s. 5; C.S., s. 6572.)

ARTICLE 10.

Declaration of Policy as to Labor Organizations.

§ 95-78. Declaration of public policy.

The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion. It is hereby declared to be the public policy of North Carolina that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization or association. (1947, c. 328, s. 1.)

Legal Periodicals. — For discussion of this Article, see 25 N.C.L. Rev. 447 (1947).

For note on preemption and State injunctive enforcement of the "Right-to-Work" law, see 36 N.C.L. Rev. 502 (1958).

For note, "Application of Right-to-Work Laws in Multistate Workforce Situations," see 55 N.C.L. Rev. 685 (1977).

For article, "Right-To-Work Laws in the Southern States," see 59 N.C.L. Rev. 29 (1980).

For comment on public employee bargaining in North Carolina, see 59 N.C.L. Rev. 214 (1980).

CASE NOTES

Article Is Constitutional. — This Article does not abridge the freedom of speech and the opportunities of unions and their members "peaceably to assemble and to petition the government for a redress of grievances," which are guaranteed by U.S. Const., Amend. I and made applicable to the states by U.S. Const., Amend. XIV. Nor does it conflict with U.S. Const., Art. I, § 10 insofar as it impairs the obligation of contracts made prior to its enactment. Nor does it deny unions and their members equal protection of the laws contrary to U.S. Const., Amend. XIV. Nor does it deprive employers, unions or members of unions of their liberty without due process of law in violation of U.S. Const., Amend. XIV. Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed. 212 (1949).

This Article is a valid exercise of the police power of the State, and does not violate former § 17, Art. I, of the State Constitution (see now N.C. Const., Art. I, § 19). State v. Whitaker, 228 N.C. 352, 45 S.E.2d 860 (1947), aff'd sub nom. Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed. 212 (1949).

Not Discriminatory. — This Article is applicable to all employers and employees within the State, and therefore the fact that persons or groups coming within its scope must perforce be affected in different degrees because of the difference of their economic, social or political positions, does not render the act unconstitutional as discriminatory. State v. Whitaker, 228 N.C. 352, 45 S.E.2d 860 (1947), aff'd sub nom. Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed. 212 (1949).

G.S. 95-79 through 95-81 constitute the public policy of North Carolina with respect to the right to work. Poole & Kent Corp. v. C.E. Thurston & Sons, 286 N.C. 121, 209 S.E.2d 450 (1974).

By this Article the legislature in emphatic language declared its public policy with respect to conditions incident to the right to employment. Douglas Aircraft Co. v. Local 379, Int'l Bhd. of Elec. Workers, 247 N.C. 620, 101 S.E.2d 800 (1958).

This Article defines certain rights of employers and employees. Beasley v. Food Fair of N.C., Inc., 282 N.C. 530, 193 S.E.2d 911 (1973), aff'd, 416 U.S. 653, 94 S. Ct. 2023, 40 L. Ed. 2d 443 (1974).

The violation of this Article is a criminal offense. State v. Whitaker, 228 N.C. 352, 45 S.E.2d 860 (1947), aff'd sub nom. Lincoln Fed.

Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed. 212 (1949).

Punishable as for Misdemeanor. — This Article is declaratory of public policy and was enacted in the interest of the public welfare, and therefore the violation of its provisions is a criminal offense punishable as for a misdemeanor, notwithstanding the failure of the statute to prescribe a penalty for its breach. The fact that the act incidentally provides for the redress of private injuries does not alter this result. State v. Bishop, 228 N.C. 371, 45 S.E.2d 858 (1947).

Article Is in Force Except as Limited by National Labor Legislation. — Except to the extent Congress, in enacting labor legislation related to interstate commerce, has preempted the field, this Article is in full force and effect. Hudson v. Atlantic C.L.R.R., 242 N.C. 650, 89 S.E.2d 441 (1955), cert. denied, 351 U.S. 949, 76 S. Ct. 844, 100 L. Ed. 1473 (1956).

Construction of Section. — This section cannot be construed to contravene the national policy as between employer and supervisor. Beasley v. Food Fair of N.C., Inc., 282 N.C. 530, 193 S.E.2d 911 (1973), aff'd, 416 U.S. 653, 94 S. Ct. 2023, 40 L. Ed. 2d 443 (1974).

To enforce a provision of a construction contract whereby all of defendant subcontractor's labor must be acceptable to the plaintiff general contractor by requiring subcontractor to remove its nonunion members from the project and replace them with union members would result in a direct violation of the public policy declared in this section and of the express prohibition contained in G.S. 95-80. Poole & Kent Corp. v. C.E. Thurston & Sons, 21 N.C. App. 1, 203 S.E.2d 74, aff'd, Poole & Kent Corp. v. C.E. Thurston & Sons, 286 N.C. 121, 209 S.E.2d 450 (1974).

Provisions for a "closed shop" in agreements executed subsequent to the effective date of this Article, and such provisions in extensions of prior contracts executed subsequent to that date, are contrary to public policy and void. In re Port Publishing Co., 231 N.C. 395, 57 S.E.2d 366, 14 A.L.R.2d 842 (1950).

Union Shop Agreement Valid Under Federal Railway Labor Act. — A union shop agreement, complying in all respects with the provisions of the Union Shop Amendment of 1951 to the Federal Railway Labor Act is not void by virtue of this Article. Hudson v. Atlantic C.L.R.R., 242 N.C. 650, 89 S.E.2d 441 (1955), cert. denied, 351 U.S. 949, 76 S. Ct. 844, 100 L. Ed. 1473 (1956).

In an action to restrain alleged unlawful picketing pursuant to a conspiracy to force plaintiff to violate the State Right-to-Work Law, on motion to show cause why a temporary restraining order should not be continued, the facts were insufficient to show that continuance of the temporary restraining order enjoined the exercise of any rights of defendants protected by the Federal Labor Management Act, and the order would not be disturbed, the question being determinable upon the evidence to be offered upon the hearing upon the merits. J.A. Jones Constr. Co. v. Local 755 Int'l Bhd. of Elec. Workers, 246 N.C. 481, 98 S.E.2d 852 (1957).

Applied in Brotherhood of Ry. & S.S. Clerks v. Allen, 373 U.S. 113, 83 S. Ct. 1158, 10 L. Ed. 2d 235 (1963).

Cited in Willard v. Huffman, 247 N.C. 523, 101 S.E.2d 373 (1958); National Right to Work Legal Defense & Educ. Found., Inc. v. United States, 487 F. Supp. 801 (E.D.N.C. 1979); Sesco v. Dana World Trade Corp., — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 3072 (W.D.N.C. Feb. 7, 2002).

§ 95-79. Certain agreements declared illegal.

Any agreement or combination between any employer and any labor union or labor organization whereby persons not members of such union or organization shall be denied the right to work for said employer, or whereby such membership is made a condition of employment or continuation of employment by such employer, or whereby any such union or organization acquires an employment monopoly in any enterprise, is hereby declared to be against the public policy and an illegal combination or conspiracy in restraint of trade or commerce in the State of North Carolina. (1947, c. 328, s. 2.)

CASE NOTES

Picketing for the purpose of forcing an employer to employ only union labor is for an unlawful purpose by virtue of this section. Douglas Aircraft Co. v. Local 379, Int'l Bhd. of Elec. Workers, 247 N.C. 620, 101 S.E.2d 800 (1958).

Federal Preemption. — Where orderly and peaceful picketing is for the unlawful purpose of forcing an employer to breach the Right-to-Work Law embraced in this section by employing only union labor, and also constitutes an unfair labor practice within the purview of the

Federal Labor Management Relations Act, the North Carolina courts have no authority to issue a restraining order enjoining such picketing, since under the federal decisions the federal law exclusively preempts the field and removes the matter from the jurisdiction of the State courts. Douglas Aircraft Co. v. Local 379, Int'l Bhd. of Elec. Workers, 247 N.C. 620, 101 S.E.2d 800 (1958).

Void Agreement. — An agreement between an employer and its employees which makes union membership a prerequisite of employment is void in this jurisdiction. In re Port Publishing Co., 231 N.C. 395, 57 S.E.2d 366, 14 A.L.R.2d 842 (1950).

Valid Severable Provisions. — While G.S. 95-79 through 95-84 preclude "closed shop" agreements, these sections do not preclude provisions relating to working conditions, hours, rates of pay, training of journeymen, overtime, vacation and severance pay, and such provisions are severable and may be sustained irrespective of the invalidity of a "closed shop" provision in the contract. In re Port Publishing Co., 231 N.C. 395, 57 S.E.2d 366, 14 A.L.R.2d 842 (1950).

Applied in Poole & Kent Corp. v. C.E. Thurston & Sons, 286 N.C. 121, 209 S.E.2d 450 (1974).

§ 95-80. Membership in labor organization as condition of employment prohibited.

No person shall be required by an employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such employer. (1947, c. 328, s. 3.)

Legal Periodicals. — For note, "Application of Right-to-Work Laws in Multistate Workforce Situations," see 55 N.C.L. Rev. 685 (1977).

CASE NOTES

Editor's Note. — *See also the case notes under G.S. 95-79.*

To enforce a provision of a construction contract whereby all of defendant subcontractor's labor must be acceptable to the plaintiff general contractor by requiring subcontractor to remove its nonunion members from the project and replace them with union members would result in a direct violation of the public policy declared in G.S. 95-78 and of the express prohibition contained in this section. Poole & Kent Corp. v. C.E. Thurston & Sons, 21 N.C. App. 1, 203 S.E.2d 74, aff'd, Poole & Kent Corp. v. C.E. Thurston & Sons, 286 N.C. 121, 209 S.E.2d 450 (1974).

Void Agreement. — An agreement between an employer and its employees which makes union membership a prerequisite of employment is void in this jurisdiction. In re Port Publishing Co., 231 N.C. 395, 57 S.E.2d 366, 14 A.L.R.2d 842 (1950).

Cited in Poole & Kent Corp. v. C.E. Thurston & Sons, 286 N.C. 121, 209 S.E.2d 450 (1974).

§ 95-81. Nonmembership as condition of employment prohibited.

No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment. (1947, c. 328, s. 4.)

Legal Periodicals. — For note on federal preemption of state damage remedies for discharge, see 53 N.C.L. Rev. 571 (1974).

For note, "Application of Right-to-Work Laws in Multistate Workforce Situations," see 55 N.C.L. Rev. 685 (1977).

For comment on public employee bargaining in North Carolina, see 59 N.C.L. Rev. 214 (1980).

CASE NOTES

Editor's Note. *— See also the case notes under G.S. 95-83.*

Employer's Right to Discharge Supervisor for Union Membership Is Federal. — Congress and the federal courts have adopted a national industrial relations policy which gives an employer the right to discharge his supervisor for union membership. Beasley v. Food Fair of N.C., Inc., 282 N.C. 530, 193 S.E.2d 911 (1973), aff'd, 416 U.S. 653, 94 S. Ct. 2023, 40 L. Ed. 2d 443 (1974).

And the State is precluded from interfering with that policy. Beasley v. Food Fair of N.C., Inc., 282 N.C. 530, 193 S.E.2d 911 (1973), aff'd, 416 U.S. 653, 94 S. Ct. 2023, 40 L. Ed. 2d 443 (1974).

When plaintiff seeks to deprive an employer of his right to discharge his supervisor for membership in a union, the doctrine of federal preemption applies, and the state court is without jurisdiction over the subject matter of the controversy. Beasley v. Food Fair of N.C., Inc., 282 N.C. 530, 193 S.E.2d 911 (1973), aff'd, 416 U.S. 653, 94 S. Ct. 2023, 40 L. Ed. 2d 443 (1974).

Void Agreement. — An agreement between an employer and its employees which makes nonmembership in a labor union a prerequisite of employment is void in this jurisdiction. In re Port Publishing Co., 231 N.C. 395, 57 S.E.2d 366, 14 A.L.R.2d 842 (1950).

Jurisdiction over Violation. — Where the National Labor Relations Board has declined jurisdiction because the amount of interstate commerce involved is less than the jurisdictional amount fixed by the Board, a State court has jurisdiction of an action for damages brought for an alleged violation of this section. Willard v. Huffman, 250 N.C. 396, 109 S.E.2d 233, cert. denied, 361 U.S. 893, 80 S. Ct. 195, 4 L. Ed. 2d 150 (1959). See Keller v. Huffman Full Fashioned Mills, Inc., 251 N.C. 92, 110 S.E.2d 480 (1959).

Cited in Poole & Kent Corp. v. C.E. Thurston & Sons, 21 N.C. App. 1, 203 S.E.2d 74 (1974); Poole & Kent Corp. v. C.E. Thurston & Sons, 286 N.C. 121, 209 S.E.2d 450 (1974); Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 340 S.E.2d 116 (1986); Coman v. Thomas Mfg. Co., 91 N.C. App. 327, 371 S.E.2d 731 (1988).

§ 95-82. Payment of dues as condition of employment prohibited.

No employer shall require any person, as a condition of employment or continuation of employment, to pay any dues, fees, or other charges of any kind to any labor union or labor organization. (1947, c. 328, s. 5.)

§ 95-83. Recovery of damages by persons denied employment.

Any person who may be denied employment or be deprived of continuation of his employment in violation of G.S. 95-80, 95-81 and 95-82 or of one or more of such sections, shall be entitled to recover from such employer and from any other person, firm, corporation, or association acting in concert with him by appropriate action in the courts of this State such damages as he may have sustained by reason of such denial or deprivation of employment. (1947, c. 328, s. 6.)

Legal Periodicals. — For note on federal preemption of state damage remedies for discharge, see 53 N.C.L. Rev. 571 (1974).

For note on workers' compensation and retaliatory discharge, see 58 N.C.L. Rev. 629 (1980).

CASE NOTES

Employer's Right to Discharge Supervisor for Union Membership Is Federal. — Congress and the federal courts have adopted a national industrial relations policy which gives an employer the right to discharge his supervisor for union membership. Beasley v. Food Fair of N.C., Inc., 282 N.C. 530, 193 S.E.2d 911 (1973), aff'd, 416 U.S. 653, 94 S. Ct. 2023, 40 L. Ed. 2d 443 (1974).

And the State is precluded from interfering with that policy. Beasley v. Food Fair of N.C., Inc., 282 N.C. 530, 193 S.E.2d 911 (1973), aff'd, 416 U.S. 653, 94 S. Ct. 2023, 40 L. Ed. 2d 443 (1974).

When plaintiffs seek to deprive an employer of his right to discharge his supervisor for membership in a union, the doctrine of federal preemption applies, and the state court is without jurisdiction over the subject matter of the controversy. Beasley v. Food Fair of N.C., Inc., 282 N.C. 530, 193 S.E.2d 911 (1973), aff'd, 416 U.S. 653, 94 S. Ct. 2023, 40 L. Ed. 2d 443 (1974).

What Plaintiff Must Show. — In order for the plaintiff in the instant case to recover for damages allegedly sustained as a result of his discharge in violation of the provisions of G.S. 95-81, the burden is on him to show by competent evidence, and by the greater weight thereof, that he was discharged solely by reason of his participation in the discussions with his fellow employees in connection with their proposed plan to join a labor union or that such participation therein was the "motivating" or "moving cause" for the discharge. Willard v. Huffman, 247 N.C. 523, 101 S.E.2d 373 (1958).

What Jury Must Find. — Where there is a conflict in the evidence as to the reason for discharge, in an action brought under the provisions of G.S. 95-81 and the following sections, in order for a plaintiff to recover damages thereunder, the jury must find that the discharge resulted solely from the plaintiff's exercise of rights protected under this statute, or that the plaintiff's exercise of such rights was the motivating or moving cause for such discharge. Willard v. Huffman, 247 N.C. 523, 101 S.E.2d 373 (1958).

Jurisdiction over Violation. — Where the National Labor Relations Board has declined jurisdiction because the amount of interstate commerce involved is less than the jurisdictional amount fixed by the Board, a State court has jurisdiction of an action for damages brought for an alleged violation of this section. Willard v. Huffman, 250 N.C. 396, 109 S.E.2d 233, cert. denied, 361 U.S. 893, 80 S. Ct. 195, 4 L. Ed. 2d 150 (1959). See also Keller v. Huffman Full Fashioned Mills, Inc., 251 N.C. 92, 110 S.E.2d 480 (1959).

Cited in Dockery v. Lampart Table Co., 36 N.C. App. 293, 244 S.E.2d 272 (1978); Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 340 S.E.2d 116 (1986); Harris v. Duke Power Co., 319 N.C. 627, 356 S.E.2d 357 (1987); Coman v. Thomas Mfg. Co., 325 N.C. 172, 381 S.E.2d 445 (1989).

§ 95-84. Application of Article.

The provisions of this Article shall not apply to any lawful contract in force on the effective date hereof but they shall apply in all respects to contracts entered into thereafter and to any renewal or extension of any existing contract. (1947, c. 328, s. 7.)

CASE NOTES

Applied in Beasley v. Food Fair of N.C., Inc., 282 N.C. 530, 193 S.E.2d 911 (1973).

Cited in Willard v. Huffman, 247 N.C. 523, 101 S.E.2d 373 (1958).

ARTICLE 11.

Minimum Wage Act.

§§ 95-85 through 95-96: Repealed by Session Laws 1979, c. 839, s. 2.

Cross References. — For present statute covering the subject matter of the repealed sections, see G.S. 95-25.1 et seq.

ARTICLE 12.

Units of Government and Labor Unions, Trade Unions, and Labor Organizations, and Public Employee Strikes.

§ 95-97: Repealed by Session Laws 1998-217, s. 26, effective October 31, 1998.

Legal Periodicals. — For article, "Public Employee Labor Relations in the Southeast — An Historical Perspective," see 59 N.C.L. Rev. 71 (1980).

For comment on public employee bargaining in North Carolina, see 59 N.C.L. Rev. 214 (1980).

Editor's Note. — Session Laws 2006-264, s. 50, effective August 27, 2006, rewrote the Article heading by substituting "Units of Government and Labor Unions, Trade Unions, and Labor Organizations, and Public Employee Strikes" for "Public Employees Prohibited from Becoming Members of Trade Unions or Labor."

CASE NOTES

This section is unconstitutional on its face. Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969).

This section is void on its face as an abridgement of freedom of association protected by U.S. Const., Amend. I and U.S. Const., Amend. XIV. Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969).

G.S. 95-99 is so related to this section that it cannot survive the invalidation thereof. Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969).

Applied in NLRB v. Randolph Elec. Membership Corp., 343 F.2d 60 (4th Cir. 1965).

Cited in City of Winston-Salem v. Chauffeurs Local Union 391, 470 F. Supp. 442 (M.D.N.C. 1979).

§ 95-98. Contracts between units of government and labor unions, trade unions or labor organizations concerning public employees declared to be illegal.

Any agreement, or contract, between the governing authority of any city, town, county, or other municipality, or between any agency, unit, or instrumentality thereof, or between any agency, instrumentality, or institution of the State of North Carolina, and any labor union, trade union, or labor organization, as bargaining agent for any public employees of such city, town, county or other municipality, or agency or instrumentality of government, is hereby declared to be against the public policy of the State, illegal, unlawful, void and of no effect. (1959, c. 742.)

Legal Periodicals. — For note discussing judicial deference to the administrative discretion of prison officials in the context of Jones v. North Carolina Prisoners' Labor Unions, Inc., 433 U.S. 119, 97 S. Ct. 2532, 53 L. Ed. 2d 629 (1977), see 14 Wake Forest L. Rev. 647 (1978).

For article, "Public Employee Labor Relations in the Southeast — An Historical Perspective," see 59 N.C.L. Rev. 71 (1980).

For article, "The Southern Public Employee Unions' Constitutional Card: Utilization of the Equal Protection Clause," see 59 N.C.L. Rev. 85 (1980).

For comment on public employee bargaining in North Carolina, see 59 N.C.L. Rev. 214 (1980).

For survey of developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

CASE NOTES

Constitutionality. — This section is a valid and constitutional exercise of the legislative authority of the General Assembly of North Carolina. Atkins v. City of Charlotte, 296 F.

Supp. 1068 (W.D.N.C. 1969).

This section is unenforceable in the face of the federal Railway Labor Act. International Longshoremen's Ass'n v. North Carolina Ports Auth., 463 F.2d 1 (4th Cir.), cert. denied, 409 U.S. 982, 93 S. Ct. 318, 34 L. Ed. 2d 245 (1972).

The State Ports Authority, operating terminal railroads to transfer freight from ships to interstate carriers, is a carrier under the Railway Labor Act and is required to negotiate with a labor union on pay rates. International Longshoremen's Ass'n v. North Carolina Ports Auth., 463 F.2d 1 (4th Cir.), cert. denied, 409 U.S. 982, 93 S. Ct. 318, 34 L. Ed. 2d 245 (1972).

The provisions of the Railway Labor Act providing for collective bargaining between carriers and the duly elected representatives of their employees are supreme and preempt the provisions of this section. International Longshoremen's Ass'n v. North Carolina State Ports Auth., 370 F. Supp. 33 (E.D.N.C. 1974), aff'd, 511 F.2d 1007 (4th Cir. 1975).

Regulations Relating to Prisoners' Labor Union. — Regulations promulgated by the Department of Correction prohibiting prisoners from soliciting other inmates to join a prisoners' labor union and barring union meetings and bulk mailings concerning the union from outside sources were not in violation of rights of free speech, association and assembly, or of equal protection. Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 97 S. Ct. 2532, 53 L. Ed. 2d 629 (1977).

Right of Association to Express Wage Views Before City Council. — Although this section forbids North Carolina municipalities from entering into contracts or agreements with labor unions or associations, that prohibition does not extend to a union's advocacy of a particular point of view. Thus, North Carolina's policy prohibiting governmental bodies from negotiating with labor unions was not implicated and therefore could not serve as a compelling state interest allowing restriction of the Hickory Fire Fighters Association's right to advocate its position on firefighters' wages in front of the city council. Hickory Fire Fighters Ass'n, Local 2653 v. City of Hickory, 656 F.2d 917 (4th Cir. 1981).

Cited in NLRB v. Randolph Elec. Membership Corp., 343 F.2d 60 (4th Cir. 1965); English v. Powell, 592 F.2d 727 (4th Cir. 1979); City of Winston-Salem v. Chauffeurs Local Union 391, 470 F. Supp. 442 (M.D.N.C. 1979); Jacksonville Professional Fire Fighters Ass'n Local 2961 v. City of Jacksonville, 685 F. Supp. 513 (E.D.N.C. 1988).

OPINIONS OF ATTORNEY GENERAL

Municipal housing authority is governed by this section. See opinion of Attorney General to Mr. Robert E. Allen, Attorney, Housing Authority, Greensboro, 40 N.C.A.G. 315 (1969).

Municipalities cannot check off or deduct union dues for their employees. See opinion of Attorney General to Mr. Milton Short, Councilman, City of Charlotte, 40 N.C.A.G. 591 (1969).

§ 95-98.1. Strikes by public employees prohibited.

Strikes by public employees are hereby declared illegal and against the public policy of this State. No person holding a position either full- or part-time by appointment or employment with the State of North Carolina or in any county, city, town or other political subdivision of the State of North Carolina, or in any agency of any of them, shall willfully participate in a strike by public employees. (1981, c. 958, s. 1.)

§ 95-98.2. Strike defined.

The word "strike" as used herein shall mean a cessation or deliberate slowing down of work by a combination of persons as a means of enforcing compliance with a demand upon the employer, but shall not include protected activity under Article 16 of this Chapter: Provided, however, that nothing herein shall limit or impair the right of any public employee to express or communicate a complaint or opinion on any matter related to the conditions of public employment so long as the same is not designed to and does not interfere with the full, faithful, and proper performance of the duties of employment. (1981, c. 958, s. 1.)

§ 95-99. Penalty for violation of Article.

Any violation of the provisions of this Article is hereby declared to be a Class 1 misdemeanor. (1959, c. 742; 1993, c. 539, s. 667; 1994, Ex. Sess., c. 24, s. 14(c).)

Legal Periodicals. — For comment on public employee bargaining in North Carolina, see 59 N.C.L. Rev. 214 (1980).

CASE NOTES

Section Unconstitutional. — This section is so related to (former) G.S. 95-97 that it cannot survive the invalidation of that section. Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969).

Cited in NLRB v. Randolph Elec. Membership Corp., 343 F.2d 60 (4th Cir. 1965).

§ 95-100. No provisions of Article 10 of Chapter 95 applicable to units of government or their employees.

The provisions of Article 10 of Chapter 95 of the General Statutes shall not apply to the State of North Carolina or any agency, institution, or instrumentality thereof or the employees of same nor shall the provisions of Article 10 of Chapter 95 of the General Statutes apply to any public employees or any employees of any town, city, county or other municipality or the agencies or instrumentalities thereof, nor shall said Article apply to employees of the State or any agencies, instrumentalities or institutions thereof or to any public employees whatsoever. (1959, c. 742.)

Legal Periodicals. — For comment on public employee bargaining in North Carolina, see 59 N.C.L. Rev. 214 (1980).

CASE NOTES

Cited in City of Winston-Salem v. Chauffeurs Local Union 391, 470 F. Supp. 442 (M.D.N.C. 1979).

Article 13.

Payments to or for Benefit of Labor Organizations.

§ 95-101. Definition.

As used in this Article, the term “labor organization” means any organization of any kind, or any agency or employee representation committee or plan, in which employee or employees participate and which exists for the purpose in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. (1963, c. 244.)

§ 95-102. Certain payments to and agreements to pay labor organizations unlawful.

It shall be unlawful for any carrier or shipper of property or any association of such carriers or shippers to agree to pay, or to pay, to or for the benefit of a labor organization, directly or indirectly, any charge by reason of the placing upon, delivery to, or movement by rail, or by a railroad car, of a motor vehicle, trailer, or container which is also capable of being moved or propelled upon the highways and any such agreement shall be void and unenforceable. (1963, c. 244.)

§ 95-103. Acceptance of such payments unlawful.

It shall be unlawful for any labor organization to accept or receive from any carrier or shipper of property, or any association of such carriers or shippers, any payment described in G.S. 95-102 above. (1963, c. 244.)

§ 95-104. Penalty.

Any person, firm, corporation, association or partnership which or who agrees to pay, or does pay, or agrees to receive, or does receive, any payment described in this Article shall be guilty of a Class 3 misdemeanor and shall only be fined not less than one hundred dollars ($100.00), nor more than one thousand dollars ($1,000) for each offense. Each act of violation, and each day during which such an agreement remains in effect, shall constitute a separate offense. (1963, c. 244; 1993, c. 539, s. 668; 1994, Ex. Sess., c. 24, s. 14(c).)

ARTICLE 14.

Inspection Service Fees.

§§ 95-105, 95-106: Repealed by Session Laws 2001-427, s. 11(a) and (b), effective July 1, 2003.

Section Repealed upon Adoption of Rule. — Session Laws 2001-427, s. 11(a) and (b), repealed G.S. 95-105 and G.S. 95-106. Session Laws 2001-427, s. 11(g), provides that the repeal of these sections by s. 11(a) and (b) becomes effective upon the effective date of a rule adopted pursuant to G.S. 95-110.5(20), as enacted by s. 11(e) of the act. Effective July 1, 2003, the North Carolina Department of Labor adopted a permanent rule regarding the fees that had been governed by G.S. 95-105 and G.S. 95-106. As a result, these sections stand repealed, effective July 1, 2003.

§ 95-107. Assessment and collection of fees; certificates of safe operation.

The assessment of the fees adopted by the Commissioner pursuant to G.S. 95-69.11, 95-110.5, 95-111.4 and 95-120 shall be made against the owner or operator of the equipment and may be collected at the time of inspection. If the fees are not collected at the time of inspection, the Department must bill the owner or operator of the equipment for the amount of the fee assessed for the inspection of the equipment and the amount assessed is payable by the owner or operator of the equipment upon receipt of the bill. Certificates of safe operation may be withheld by the Department of Labor until such time as the assessed fees are collected. (1975, c. 777, s. 3; 1995, c. 217, s. 1; 2001-427, s. 11(c); 2005-347, s. 6; 2005-453, s. 13.)

§ 95-108. Disposition of fees.

All fees collected by the Department of Labor pursuant to G.S. 95-69.11, 95-110.5, 95-111.4 and 95-120 shall be deposited with the State Treasurer and shall be used exclusively for inspection and certification purposes. (1975, c. 777, s. 4; 2001-427, s. 11(d); 2005-347, s. 7; 2005-453, s. 14.)

§ 95-109: Repealed by Session Laws 1985 (Regular Session, 1986), c. 990, s. 3.

§ 95-110: Reserved for future codification purposes.

Article 14A.

Elevator Safety Act of North Carolina.

§ 95-110.1. Short title and legislative purpose.

(a) This Article shall be known as the Elevator Safety Act of North Carolina.

(b) The General Assembly finds that the use of unsafe and defective lifting devices imposes a substantial probability of serious and preventable injury to employees and the public exposed to unsafe conditions and that prevention of these injuries and protection of employees and the public from unsafe conditions is in the best interests and welfare of the people of the State. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-110.2. Scope.

This Article shall govern the design, construction, installation, plans review, testing, inspection, certification, operation, use, maintenance, alteration, relocation and investigation of accidents involving:

(1) Elevators, dumbwaiters, escalators, and moving walks;
(2) Personnel hoists;
(3) Inclined stairway chair lifts;
(4) Inclined and vertical wheelchair lifts;
(5) Manlifts; and
(6) Special equipment.

This Article shall not apply to devices and equipment located and operated in a single family residence, to conveyors and related equipment within the scope of the American National Standard Safety Standard for Conveyors and Related Equipment (ANSI/ASME B20.1) constructed, installed and used exclusively for the movement of materials, or to mining equipment specifically covered by the Federal Mine Safety and Health Act or the Mine Safety and Health Act of North Carolina or the rules and regulations adopted pursuant thereto. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-110.3. Definitions.

(a) The term "Commissioner" shall mean the North Carolina Commissioner of Labor or his authorized representative.

(b) The term "Director" shall mean the Director of the Elevator and Amusement Device Division of the North Carolina Department of Labor.

(c) The term "dumbwaiter" shall mean a hoisting and lowering mechanism equipped with a car or platform which moves in guides in a substantially vertical direction, the floor area of which does not exceed nine square feet, the total inside height of which, whether or not provided with fixed or removable shelves, does not exceed four feet, the capacity of which does not exceed 500 pounds, and which is used exclusively for carrying materials.

(d) The term "elevator" shall mean a hoisting and lowering mechanism equipped with a car or platform which moves in guides, and which serves two or more floors of a building or structure.

(e) The term "escalator" shall mean a power driven, inclined continuous stairway used for raising and lowering passengers.

(f) The term "inclined stairway chair lift" shall mean a hoisting and lowering mechanism with one or more chairs or a platform for one or more wheelchairs installed on a stairway for the purpose of transporting a physically disabled person.

(g) The term "inclined or vertical wheelchair lift" shall mean a powered platform-elevating device used to transport a physically disabled person in a wheelchair.

(h) The term "manlift" shall mean platforms or brackets and accompanying handholds, mounted on, or attached to, an endless belt operating vertically in one direction only and being supported by, and driven through, pulleys at the top and bottom and intended primarily for the conveyance of persons.

(i) The term "moving walk" shall mean a type of passenger carrying device on which passengers stand or walk and in which the passenger carrying surface remains parallel to its direction of motion and is uninterrupted.

(j) The term "operator" shall mean any person having direct control over the operation of any covered device or equipment.

(k) The term "owner" shall mean any person or authorized agent of such person who owns a device or equipment subject to regulation under this Article, or in the event the device or equipment is leased, the lessee. The term "owner" also shall include the State of North Carolina or any political subdivision thereof or any unit of local government.

(*l*) The term "person" shall mean any individual, association, partnership, firm, corporation, private organization, or the State of North Carolina or any political subdivision thereof or any unit of local government.

(m) The term "personnel hoist" shall mean an elevator installed inside or outside of buildings during construction, alteration or demolition and used primarily to raise and lower workers and other persons connected with or related to the building project.

(n) The term "special equipment" shall mean any permanently or semi-permanently located device, manually or power-operated, used for moving or lifting person or persons and materials but not considered as an elevator, escalator, dumbwaiter, moving walk, personnel hoist, inclined stairway chair lift, inclined or vertical wheelchair lift, or manlift. Special equipment shall include, but not be limited to, manhoists, lift bridges, elevators which are used only for handling building materials and workmen during construction, and stage and orchestra lifts. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-110.4. Elevator and Amusement Device Division established.

There is hereby created an Elevator and Amusement Device Division within the Department of Labor. The Commissioner shall appoint a director of the Elevator and Amusement Device Division and such other employees as the Commissioner deems necessary to assist the director in administering the provisions of this Article. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-110.5. Powers and duties of Commissioner.

The Commissioner of Labor is hereby empowered:

(1) To delegate to the Director of the Elevator and Amusement Device Division such powers, duties and responsibilities as the Commissioner determines will best serve the public interest in the safe operation of lifting devices and equipment;

(2) To supervise the Director of the Elevator and Amusement Device Division;

(3) To adopt, modify, or revoke such rules and regulations as are necessary for the purpose of carrying out the provisions of this Article including, but not limited to, those governing the design, construction, installation, plans review, testing, inspection, certification, operation, use, maintenance, alteration and relocation of devices and equipment subject to the provisions of this Article. The rules and regulations promulgated pursuant to this rulemaking authority shall conform with good engineering practice as evidenced generally by the most recent editions of the American National Standard Safety Code for Elevators, Dumbwaiters, Escalators and Moving Walks, the National Electrical Code, the American National Standard Safety Requirements for Personnel Hoists, the American National Standard Safety Code for Manlifts, the American National Standard Safety Standard for Conveyors and Related Equipment and similar codes promulgated by agencies engaged in research concerning strength of material, safe design, and other factors bearing upon the safe operation of the devices and equipment subject to the provisions of this Article. The rules and regulations may apply different standards to devices and equipment subject to this Article depending upon their date of installation. The rules and regulations for special equipment shall not adopt specifically any portion of the American National Standard Safety Code for Elevators, Dumbwaiters, Escalators and Moving Walks to inclined and vertical reciprocating conveyors;

(4) To enforce rules and regulations adopted under authority of this Article;

(5) To inspect and have tested for acceptance all new, altered or relocated devices or equipment subject to the provisions of this Article;

(6) To make maintenance and periodic inspections and tests of all devices and equipment subject to the provisions of this Article as often as every six months;

(7) To issue certificates of operation which certify for use such devices and equipment as are found to be in compliance with this Article and the rules and regulations promulgated thereunder;

(8) To have free access, with or without notice, to the devices and equipment subject to the provisions of this Article, during reasonable hours, for purposes of inspection or testing;

(9) To obtain an Administrative Search and Inspection Warrant in accordance with the provisions of Article 4A of Chapter 15 of the General Statutes;

(10) To investigate accidents involving the devices and equipment subject to the provisions of this Article to determine the cause of such accident, and he shall have full subpoena powers in conducting such investigation;

(11) To institute proceedings in the civil or criminal courts of this State, when a provision of this Article or the rules and regulations promulgated thereunder has been violated;

(12) To issue a limited certificate of operation for any device or equipment subject to the provisions of this Article to allow the temporary or restricted use thereof;

(13) To adopt, modify or revoke rules and regulations governing the qualifications of inspectors;

(14) To grant exceptions from the requirements of the rules and regulations promulgated under authority of this Article and to permit the use of other devices when such exceptions and uses will not expose the public to an unsafe condition likely to result in serious personal injury or property damage;

(15) To require that a construction permit must be obtained from the Commissioner before any device or equipment subject to the provisions of this Article is installed, altered or moved from one place to another and to require that the Commissioner must be supplied with whatever plans, diagrams or other data he deems necessary to determine whether or not the proposed construction is in compliance with the provisions of this Article and the rules and regulations promulgated thereunder;

(16) To prohibit the use of any device or equipment subject to the provisions of this Article which is found upon inspection to expose the public to an unsafe condition likely to cause personal injury or property damage. Such device or equipment shall be made operational only upon the Commissioner's determination that such device or equipment has been made safe;

(17) To order the payment of all civil penalties provided by this Article. Funds collected pursuant to a civil penalty order shall be deposited with the State Treasurer;

(18) To require that any device or equipment subject to the provisions of this Article which has been out-of-service and not continuously maintained for one or more years shall not be returned to service without first complying with all rules and regulations governing existing installations; and

(19) To coordinate enforcement and inspection activity relative to equipment, devices and operations covered by this Article in order to minimize duplication of liability or regulatory responsibility on the part of the employer or owner.

(20) To establish fees not to exceed two hundred dollars ($200.00) for the inspection and issuance of certificates of operation for all devices and equipment subject to this Article upon installation or alteration, for each follow-up inspection, and for annual periodic inspections thereafter. (1985 (Reg. Sess., 1986), c. 990, s. 1; 1995, c. 217, s. 2; 2001-427, s. 11(e).)

§ 95-110.6. Noncomplying devices and equipment; appeal.

(a) Whenever the Commissioner determines that a device or equipment is subject to the provisions of this Article, and that the operation of such device or equipment is exposing the public to an unsafe condition likely to result in serious personal injury or property damage, he may immediately order in writing that the use of the device or equipment be stopped or limited until such time as he determines that the device or equipment has been made safe for use by the public.

(b) Whenever the Commissioner determines that the provisions of this Article or the rules and regulations promulgated thereunder have not been complied with, he may refuse to issue or renew or may revoke, suspend or amend a certificate of operation.

(c) Whenever action is taken under this section, the affected party shall be given notice of the availability of an administrative hearing and of judicial review in accordance with Chapter 150B of the General Statutes, the Administrative Procedure Act. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-110.7. Operation without certificate; operation not in accordance with Article or rules and regulations; operation after refusal to issue or after revocation of certificate.

(a) No person shall operate or permit to be operated or use any device or equipment subject to the provisions of this Article without a valid certificate of operation unless the absence of a valid certificate is the result of the Commissioner's failure to inspect such device.

(b) No person shall operate or permit to be operated or use any device or equipment subject to the provisions of this Article otherwise than in accordance with this Article and the rules and regulations promulgated thereunder.

(c) No person shall operate or permit to be operated or use any device or equipment subject to the provisions of this Article after the Commissioner has refused to issue or has revoked the certificate of operation for such device or equipment. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-110.8. Operation of unsafe device or equipment.

No person shall operate, permit to be operated or use any device or equipment subject to the provisions of this Article if such person knows or reasonably should know that such operation or use will expose the public to an unsafe condition which is likely to result in personal injury or property damage. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-110.9. Reports required.

(a) The owner of any device or equipment regulated under the provisions of this Article, or his authorized agent, shall within 24 hours notify the Commissioner of each and every occurrence involving such device or equipment when:

(1) The occurrence results in death or injury requiring medical treatment, other than first aid, by a physician. First aid means the one time treatment or observation of scratches, cuts not requiring stitches, burns, splinters and contusions or a diagnostic procedure, including examination and x-rays, which does not ordinarily require medical treatment even though provided by a physician or other licensed personnel; or

(2) The occurrence results in damage to the device indicating a substantial defect in design, mechanics, structure or equipment, affecting the future safe operation of the device. No reporting is required in the case of normal wear and tear.

(b) The Commissioner, without delay, after notification and determination that an occurrence involving injury or damage as specified in subsection (a) has occurred, shall make a complete and thorough investigation of the occurrence. The report of the investigation shall be placed on file in the office of the division and shall give in detail all facts and information available. The owner may submit for inclusion in the file results of investigations independent of the department's investigation.

(c) No person, following an occurrence as specified in subsection (a), shall operate, attempt to operate, use or move or attempt to move such device or equipment, or part thereof, without the approval of the Commissioner, unless so as to prevent injury to any person or persons.

(d) No person, following an occurrence as specified in subsection (a), shall remove or attempt to remove from the premises any damaged or undamaged part of such device or equipment or repair or attempt to repair any damaged part necessary to a complete and thorough investigation. The department must initiate its investigation within 24 hours of being notified. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-110.10. Violations; civil penalties; appeals.

(a) Any person who violates G.S. 95-110.7(a) or (b) (Operation without certificate; operation not in accordance with Article or rules and regulations) shall be subject to a civil penalty not to exceed two hundred fifty dollars ($250.00) for each day each device or equipment is so operated or used.

(b) Any person who violates G.S. 95-110.7(c) (Operation after refusal to issue or after revocation of certificate) or G.S. 95-110.9(c) (Reports required) shall be subject to a civil penalty not to exceed five hundred dollars ($500.00) for each day any such device or equipment is operated or used.

(c) Any person who violates the provisions of G.S. 95-110.9(d) (Reports required) shall be subject to a civil penalty not to exceed five hundred dollars ($500.00).

(d) In determining the amount of any penalty ordered under authority of this section, the Commissioner shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person being charged, the gravity of the violation, the good faith of the person and the record of previous violations.

(e) The determination of the amount of the penalty by the Commissioner shall be final, unless within 15 days after receipt of notice thereof by certified mail with return receipt, by signature confirmation as provided by the U.S. Postal Service, by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) with delivery receipt, or via hand delivery, the person charged with the violation takes exception to the determination in which event the final determination of the penalty shall be made in an administrative proceeding and in a judicial proceeding pursuant to Chapter 150B of the General Statutes, the Administrative Procedure Act.

(f) The Commissioner may file in the office of the clerk of the superior court of the county wherein the person, against whom a civil penalty has been ordered, resides, or if a corporation is involved, in the county wherein the corporation maintains its principal place of business, or in the county wherein the violation occurred, a certified copy of a final order of the Commissioner unappealed from, or of a final order of the Commissioner affirmed upon appeal. Whereupon, the clerk of said court shall enter judgment in accordance therewith and notify the parties. Such judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though said judgment had been rendered in a suit duly heard and determined by the superior court of the General Court of Justice. (1985 (Reg. Sess., 1986), c. 990, s. 1; 2003-308, s. 3; 2007-231, s. 7.)

Effect of Amendments. — Session Laws 2007-231, s. 7, effective July 18, 2007, in subsection (e), substituted "with return receipt, by signature confirmation as provided by the U.S. Postal Service" for "or" and inserted "or via hand delivery."

§ 95-110.11. Violations; criminal penalties.

(a) Any person who violates G.S. 95-110.8 (Operation of unsafe device or equipment) shall be guilty of a Class 2 misdemeanor.

(b) Any person misrepresenting himself as an authorized inspector administering or enforcing the provisions of this Article or the rules and regulations promulgated thereunder shall be guilty of a Class 2 misdemeanor.

(c) Any person knowingly making a material and false statement, representation or certification in any application, record, report, plan or any other document filed or required to be maintained pursuant to this Article or the rules and regulations promulgated thereunder shall be guilty of a Class 2 misdemeanor which may include a fine of up to five thousand dollars ($5,000). (1985 (Reg. Sess., 1986), c. 990, s. 1; 1993, c. 539, s. 669; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 95-110.12. Legal representation.

It shall be the duty of the Attorney General of North Carolina, when requested, to represent the Department of Labor in actions or proceedings in connection with this Article or the rules and regulations promulgated thereunder. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-110.13. Authorization for similar safety and health federal-State programs.

Consistent with the requirements and conditions provided in this Article and the rules and regulations promulgated thereunder, the State, upon recommendation of the Commissioner of Labor, may enter into agreements or arrangements with appropriate federal agencies for the purpose of administering the enforcement of federal statutes and rules and regulations governing devices and equipment subject to the provisions of this Article. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-110.14. Confidentiality of trade secrets.

All information reported to or otherwise obtained by the Commissioner or his agents or representatives in connection with any inspection or proceeding under this Article or the rules and regulations promulgated thereunder which contains or might reveal a trade secret shall be considered confidential, except as to carrying out this Article and the rules and regulations promulgated thereunder, or when it is relevant in any proceeding under the same. In any such proceeding the Commissioner or the court shall issue such orders as may be appropriate to protect the confidentiality of trade secrets. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-110.15. Construction of Article and rules and regulations and severability.

This Article and the rules and regulations promulgated thereunder shall receive a liberal construction to the end that the welfare of the people may be protected. If any provisions of either or the application thereof to any person or circumstances is held to be invalid, such invalidity shall not affect those provisions or applications which can be given effect without the invalid provision or application, and to that end the provisions of this Article are severable. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-111: Reserved for future codification purposes.

Article 14B.

Amusement Device Safety Act of North Carolina.

§ 95-111.1. Short title and legislative purpose.

(a) This Article shall be known as the "Amusement Device Safety Act of North Carolina".

(b) The General Assembly finds that although most amusement devices are free from defect and operated in a safe manner, those which are not impose a substantial probability of serious and preventable injury to the public. Protection of the public from exposure to such unsafe conditions and the prevention of injuries is in the best interest and welfare of the people of the State.

(c) It is the intent of this Article that amusement devices shall be designed, constructed, assembled or disassembled, maintained, and operated so as to prevent injuries. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

CASE NOTES

Cited in Multiple Claimants v. N.C. HHS, Div. of Facility & Detention Servs., 176 N.C. App. 278, 626 S.E.2d 666, 2006 N.C. App. LEXIS 530 (2006); Multiple Claimants v. N.C. HHS, Div. of Facility Servs., 361 N.C. 372, 646 S.E.2d 356, 2007 N.C. LEXIS 599 (2007).

§ 95-111.2. Scope.

(a) This Article shall govern the design, construction, installation, plans review, testing, inspection, certification, operation, use, maintenance, alteration, relocation and investigation of accidents involving amusement devices.

(b) This Article shall not apply to any device which does not normally require the supervision or services of an operator. (1985 (Reg. Sess., 1986), c. 990, s. 2; 1991, c. 178, s. 1; 2003-170, s. 1.)

§ 95-111.3. Definitions.

(a) The term "amusement device" shall mean any mechanical or structural device or attraction that carries or conveys or permits persons to walk along, around or over a fixed or restricted route or course or within a defined area including the entrances and exits thereto, for the purpose of giving such persons amusement, pleasure, thrills or excitement. The term shall include but not be limited to roller coasters, Ferris wheels, merry-go-rounds, glasshouses, waterslides, and walk-through dark houses. This term shall not include the following:

(1) Devices operated on a river, lake, or any other natural body of water;
(2) Wavepools;
(3) Roller skating rinks;
(4) Ice skating rinks;
(5) Skateboard ramps or courses;
(6) Mechanical bulls;
(7) Buildings or concourses used in laser games;
(8) All terrain vehicles;
(9) Motorcycles;
(10) Bicycles; and
(11) Mopeds.

(b) The term "amusement park" shall mean any tract or area used principally as a permanent location for amusement devices.

(b1) The term "carnival area" shall mean any area, track, or structure that is rented, leased, or owned as a temporary location for amusement devices.

(c) The term "Commissioner" shall mean the North Carolina Commissioner of Labor or his authorized representative.

(d) The term "Director" shall mean the Director of the Elevator and Amusement Device Division of the North Carolina Department of Labor.

(e) The term "operator" shall mean any person having direct control of the operation of an amusement device. The term "operator" shall not include any person on the device for the purpose of receiving amusement, pleasure, thrills, or excitement.

(f) The term "owner" shall mean any person or authorized agent of such person who owns an amusement device or in the event such device is leased, the lessee. The term "owner" also shall include the State of North Carolina or any political subdivision thereof or any unit of local government.

(g) The term "person" shall mean any individual, association, partnership, firm, corporation, private organization, or the State of North Carolina or any political subdivision thereof or any unit of local government.

(h) The term "waterslide" shall mean a stationary amusement device that provides a descending ride on a flowing water film through a trough or tube or on an inclined plane into a pool of water. This term does not include devices where the vertical distance between the highest and the lowest points does not exceed 15 feet. (1985 (Reg. Sess., 1986), c. 990, s. 2; 1987, c. 864, s. 90(a); 1991, c. 178, s. 2.)

OPINIONS OF ATTORNEY GENERAL

A "go-cart" operated on a track by patrons for a fee is an amusement device as defined by subsection (a) of this section, and is subject to the requirements of the Amusement Device Safety Act of North Carolina. See opinion of Attorney General to Mr. John C. Brooks, Commissioner, North Carolina Department of Labor, 59 N.C.A.G. 25 (1989).

§ 95-111.4. Powers and duties of Commissioner.

The Commissioner of Labor is hereby empowered:

(1) To delegate to the Director of the Elevator and Amusement Device Division such powers, duties and responsibilities as the Commissioner determines will best serve the public interest in the safe operation of amusement devices;

(2) To supervise the Director of the Elevator and Amusement Device Division;

(3) To adopt, modify, or revoke such rules and regulations as are necessary for the purpose of carrying out the provisions of this Article including, but not limited to, those governing the design, construction, installation, plans review, testing, inspection, certification, operation, use, maintenance, alteration and relocation of devices subject to the provisions of this Article. The rules and regulations promulgated pursuant to this rulemaking authority shall conform with good engineering and safety standards, formulas and practices;

(4) To enforce rules and regulations adopted under authority of this Article;

(5) To inspect and have tested for acceptance all new and relocated devices subject to the provisions of this Article. Relocated amusement devices shall be inspected upon reassembly at each new location within this State; provided that the Commissioner may provide for less frequent inspections when he determines that the device is of such a type and its use is of such a nature that inspection less often than upon each reassembly would not expose the public to an unsafe condition likely to result in serious personal injury or property damage;

(6) To inspect amusement devices which have been substantially rebuilt or substantially modified so as to change the original action, structure or capacity of the device;

(7) To make maintenance and periodic inspections and tests of all devices subject to the provisions of this Article. Devices located in amusement parks shall be inspected at least once annually;

(8) To issue certificates of operation which certify for use such devices as are found to be in compliance with this Article and the rules and regulations promulgated thereunder;

(9) To have reasonable access, with or without notice, to the devices subject to the provisions of this Article during reasonable hours, for purposes of inspection or testing;

(10) To obtain an Administrative Search and Inspection Warrant in accordance with the provisions of Article 4A of Chapter 15 of the General Statutes;

(11) To investigate accidents involving devices subject to the provisions of this Article to determine the cause of such accident, and he shall have full subpoena powers in conducting such investigation;

(12) To institute proceedings in the civil courts of this State, when a provision of this Article or the rules and regulations promulgated thereunder has been violated;

(13) To adopt, modify or revoke rules and regulations governing the qualifications of inspectors;

(14) To grant exceptions from the requirements of the rules and regulations promulgated under authority of this Article and to permit the use of other devices when such exceptions and uses will not expose the public to an unsafe condition likely to result in serious personal injury or property damage;

(15) To require that before any device subject to the provisions of this Article is erected in this State, or before any additions or alterations which substantially change such device are made, or before the physical spacing between such devices is changed, the owner or his authorized agent shall file with the Commissioner a written notice of his intention to do so and the type of device involved. Should circumstances necessitate, the Commissioner may require that such owner or his authorized agent furnish a copy of the plans, diagrams, specifications or stress analyses of such device before the inspection of same. When such plans, diagrams, specifications or stress analyses are requested by the Commissioner, he shall review them within 10 days of receipt, and upon approval, he shall authorize the device for use by the public;

(16) To prohibit the use of any device subject to the provisions of this Article which is found upon inspection to expose the public to an unsafe condition likely to cause personal injury or property damage. Such device shall be made operational only upon the Commissioner's determination that such device has been made safe;

(17) To order the payment of all civil penalties provided by this Article. The clear proceeds of funds collected pursuant to a civil penalty order shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2; and

(18) To coordinate enforcement and inspection activity relative to equipment, devices and operations covered by this Article in order to minimize duplication of liability or regulatory responsibility on the part of the employer or owner.

(19) To establish fees not to exceed two hundred fifty dollars ($250.00) for the inspection and issuance of certificates of operation for devices subject to this Article that are in use. (1985 (Reg. Sess., 1986), c. 990, s. 2; 1987, c. 635, s. 2; 1998-215, s. 110; 2001-427, s. 11(f).)

CASE NOTES

Claim Barred by Public Duty Doctrine. — A claim against the Department of Labor under the Tort Claims Act based on the failure of a Department employee to enforce compliance with regulations regarding go-kart seat belts did not fall within the "special relationship" or "special duty" exceptions to the public duty doctrine and the claim was barred. Hunt ex rel. Hasty v. North Carolina Dep't of Labor, 125 N.C. App. 293, 480 S.E.2d 413 (1997), rev'd, 348 N.C. 192, 499 S.E.2d 747 (1998).

§ 95-111.5. Pre-opening inspection and test; records; revocation of certificate of operation.

(a) An owner of a device subject to the provisions of this Article, or his authorized agent, is hereby required to make a pre-opening inspection and test of such device, prior to admitting the public, each day such device is intended to be used.

(b) An owner of a device subject to the provisions of this Article, or his authorized agent, is hereby required to maintain for at least the previous 12 months a signed record of the required pre-opening inspection and test and such other pertinent information as the Commissioner may require by rule or regulation.

(c) The Commissioner is hereby empowered to revoke the certificate of operation for any device regulated by this Article upon failure by the owner or his authorized agent to make the required pre-opening inspection and test or to maintain the required record. (1985 (Reg. Sess., 1986), c. 990, s. 2; 2003-170, s. 2.)

§ 95-111.6. Noncomplying devices; appeal.

(a) Whenever the Commissioner determines that a device is subject to the provisions of this Article and the operation of such device is exposing the public to an unsafe condition likely to result in serious personal injury or property damage, he immediately may order in writing that the use of the device be stopped or limited until such time as he determines that the device has been made safe for use by the public.

(b) Whenever the Commissioner determines that the provisions of this Article or the rules and regulations promulgated thereunder have not been complied with, he may refuse to issue or renew or may revoke, suspend or amend a certificate of operation.

(c) Whenever action is taken under this section, the affected party shall be given notice of the availability of an administrative hearing and of judicial review in accordance with Chapter 150B of the General Statutes, the Administrative Procedure Act. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

§ 95-111.7. Operation without certificate; operation not in accordance with Article or rules and regulations; operation after refusal to issue or after revocation of certificate.

(a) No person shall operate or permit to be operated or use any device subject to the provisions of this Article without a valid certificate of operation.

(b) No person shall operate or permit to be operated or use any device subject to the provisions of this Article otherwise than in accordance with this Article and the rules and regulations promulgated thereunder.

(c) No person shall operate or permit to be operated or use any device subject to the provisions of this Article after the Commissioner has refused to issue or has revoked the certificate of operation for such device. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

§ 95-111.8. Location notice.

No person shall operate for the public or permit the operation for the public any device subject to the provisions of this Article after initial assembly or after reassembly at any location within this State without first notifying the Commissioner of the intention to operate for the public. Written notice of a planned schedule of operation or use shall be received at least 10 days prior to the first planned date of operation or use. (1985 (Reg. Sess., 1986), c. 990, s. 2; 2003-170, s. 3.)

§ 95-111.9. Operation of unsafe device.

No person shall operate, permit to be operated or use any device subject to the provisions of this Article if such person knows or reasonably should know that such operation or use will expose the public to an unsafe condition which is likely to result in personal injury or property damage. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

§ 95-111.10. Reports required.

(a) The owner of any device regulated under the provisions of this Article, or his authorized agent, shall within 24 hours, notify the Commissioner of each and every occurrence involving such device when:

(1) The occurrence results in death or injury requiring medical treatment, other than first aid, by a physician. First aid means the one time treatment or observation of scratches, cuts not requiring stitches, burns, splinters and contusions or a diagnostic procedure, including examination and x-rays, which does not ordinarily require medical treatment even though provided by a physician or other licensed personnel; or

(2) The occurrence results in damage to the device indicating a substantial defect in design, mechanics, structure or equipment, affecting the future safe operation of the device. No reporting is required in the case of normal wear and tear.

(b) The Commissioner, without delay, after notification and determination that an occurrence involving injury or damage as specified in subsection (a) has occurred, shall make a complete and thorough investigation of the occurrence. The report of the investigation shall be placed on file in the office of the division and shall give in detail all facts and information available. The owner may submit for inclusion in the file results of investigations independent of the department's investigation.

(c) No person, following an occurrence as specified in subsection (a), shall operate, attempt to operate, use or move or attempt to move such device or part thereof, without the approval of the Commissioner, unless so as to prevent injury to any person or persons.

(d) No person, following an occurrence as specified in subsection (a), shall remove or attempt to remove from the premises any damaged or undamaged part of such device or repair or attempt to repair any damaged part necessary to a complete and thorough investigation. The department must initiate its investigation within 24 hours of being notified. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

§ 95-111.11. Operators.

(a) Any operator of a device subject to the provisions of this Article shall be at least 18 years of age. An operator shall operate no more than one device at any given time. An operator shall be in attendance at all times the device is in operation.

(b) No person shall operate any amusement device equipment while under the influence of alcohol or any other impairing substance as defined by G.S.

20-4.01(14a). It shall be a violation of this subsection to knowingly permit the operation of any amusement device while the operator is under the influence of an impairing substance. (1985 (Reg. Sess., 1986), c. 990, s. 2; 2003-170, s. 4.)

§ 95-111.12. Liability insurance.

(a) No owner shall operate a device subject to the provisions of this Article, unless at the time, there is in existence a contract of insurance providing coverage of not less than one million dollars ($1,000,000) per occurrence against liability for injury to persons or property arising out of the operation or use of such device or there is in existence a contract of insurance providing coverage of not less than five hundred thousand dollars ($500,000) per occurrence against liability for injury to persons or property arising out of the operation or use of the amusement devices if the annual gross volume of the devices does not exceed two hundred seventy-five thousand dollars ($275,000); provided waterslides shall not be required to be insured as herein provided for an amount in excess of one hundred thousand dollars ($100,000) per occurrence. The insurance contract to be provided must be by any insurer or surety that is acceptable to the North Carolina Insurance Commissioner and authorized to transact business in this State; provided, however, that insurance for waterslides may be purchased under Article 21 of Chapter 58 of the General Statutes or under G.S. 58-28-5(b).

(b) No certificate of operation shall be issued by the Commissioner until such time as the owner or his authorized agent provides proof of the required contract of insurance.

(c) The Commissioner shall have the right to request from the owner of a device regulated by this Article, or his authorized agent, proof of the required contract of insurance, and upon failure of the owner or his authorized agent to provide such proof, the Commissioner shall have the right to prevent the commencement of or to stop the operation of the device until such time as proof is provided.

(d) Operators of waterslides, as defined in G.S. 95-111.3(h), shall notify the Commissioner of all incidences of personal injury involving the waterslides, as required by G.S. 95-111.10(a). (1985 (Reg. Sess., 1986), c. 990, s. 2; 1987, c. 635, s. 1; c. 864, ss. 90(b), 91(a); 1989, c. 232; 1989 (Reg. Sess., 1990), c. 914; 1995, c. 517, s. 34.)

Editor's Note. — Session Laws 1995, c. 517, s. 42, provided that subsection (a) as amended by s. 34 of that act would expire December 31, 1997. Subsection (a) is set out as it read prior to amendment by this act.

§ 95-111.13. Violations; civil penalties; appeal; criminal penalties.

(a) Any person who violates G.S. 95-111.7(a) or (b) (Operation without certificate; operation not in accordance with Article or rules and regulations) shall be subject to a civil penalty not to exceed two hundred fifty dollars ($250.00) for each day each device is so operated or used.

(b) Any person who violates G.S. 95-111.7(c) (Operation after refusal to issue or after revocation of certificate) or G.S. 95-111.10(c) (Reports required) or G.S. 95-111.12 (Liability insurance) shall be subject to a civil penalty not to exceed five hundred dollars ($500.00) for each day each device is so operated or used.

(c) Any person who violates G.S. 95-111.8 (Location notice) shall be subject to a civil penalty not to exceed five hundred dollars ($500.00) for each day any device is operated or used without the location notice having been provided.

(d) Any person who violates the provisions of G.S. 95-111.10(d) (Reports required) or knowingly permits the operation of an amusement device in violation of G.S. 95-111.11(a) (Operator requirements) shall be subject to a civil penalty not to exceed five hundred dollars ($500.00).

(e) Any person who violates G.S. 95-111.9 (Operation of unsafe device) or G.S. 95-111.11(b) (Operation of an amusement device while impaired) shall be subject to a civil penalty not to exceed one thousand dollars ($1,000).

(f) In determining the amount of any penalty ordered under authority of this section, the Commissioner shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person being charged, the gravity of the violation, the good faith of the person and the record of previous violations.

(g) The determination of the amount of the penalty by the Commissioner shall be final, unless within 15 days after receipt of notice thereof by certified mail with return receipt, by signature confirmation as provided by the U.S. Postal Service, by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) with delivery receipt, or via hand delivery, the person charged with the violation takes exception to the determination, in which event final determination of the penalty shall be made in an administrative proceeding and in a judicial proceeding pursuant to Chapter 150B of the General Statutes, the Administrative Procedure Act.

(h) The Commissioner may file in the office of the clerk of the superior court of the county wherein the person, against whom a civil penalty has been ordered, resides, or if a corporation is involved, in the county wherein the corporation maintains its principal place of business, or in the county wherein the violation occurred, a certified copy of a final order of the Commissioner unappealed from, or of a final order of the Commissioner affirmed upon appeal. Whereupon, the clerk of said court shall enter judgment in accordance therewith and notify the parties. Such judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though said judgment had been rendered in a suit duly heard and determined by the superior court of the General Court of Justice.

(i) Any person who willfully violates any provision of this Article, and the violation causes the death of any person, shall be guilty of a Class 2 misdemeanor, which may include a fine of not more than ten thousand dollars ($10,000); except that if the conviction is for a violation committed after a first conviction of such person, the person shall be guilty of a Class 1 misdemeanor, which may include a fine of not more than twenty thousand dollars ($20,000). This subsection shall not prevent any prosecuting officer of the State of North Carolina from proceeding against such person on a prosecution charging any degree of willful or culpable homicide. (1985 (Reg. Sess., 1986), c. 990, s. 2; 2003-170, s. 5; 2003-308, s. 4; 2007-231, s. 8.)

Effect of Amendments. — Session Laws 2007-231, s. 8, effective July 18, 2007, in subsection (g), substituted "with return receipt, by signature confirmation as provided by the U.S. Postal Service" for "or" and inserted "or via hand delivery."

§ 95-111.14. Denial of permission to enter amusement device.

The owner or amusement device operator may deny any person entrance to an amusement device if he or she believes such entry may jeopardize the safety of the person desiring entry, riders or other persons. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

§ 95-111.15. Legal representation.

It shall be the duty of the Attorney General of North Carolina, when requested, to represent the Department of Labor in actions or proceedings in connection with this Article or the rules and regulations promulgated thereunder. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

§ 95-111.16. Authorization for similar safety and health federal-State programs.

Consistent with the requirements and conditions provided in this Article and the rules and regulations promulgated thereunder, the State, upon recommendation of the Commissioner of Labor, may enter into agreements or arrangements with appropriate federal agencies for the purpose of administering the enforcement of federal statutes and rules and regulations governing devices subject to the provisions of this Article. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

§ 95-111.17. Confidentiality of trade secrets.

All information reported to or otherwise obtained by the Commissioner or his agents or representatives in connection with any inspection or proceeding under this Article or the rules and regulations promulgated thereunder which contains or might reveal a trade secret shall be considered confidential, except as to carrying out this Article and the rules and regulations promulgated thereunder or when it is relevant in any proceeding under the same. In any such proceeding the Commissioner or the Court shall issue such orders as may be appropriate to protect the confidentiality of trade secrets. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

§ 95-111.18. Construction of Article and rules and regulations and severability.

This Article and the rules and regulations promulgated thereunder shall receive a liberal construction to the end that the welfare of the people may be protected. If any provisions of either or the application thereof to any person or circumstances is held to be invalid, such invalidity shall not affect those provisions or applications which can be given effect without the invalid provision or application, and to that end the provisions of this Article are severable. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

CASE NOTES

Cited in Multiple Claimants v. N.C. HHS, Div. of Facility Servs., 361 N.C. 372, 646 S.E.2d 356, 2007 N.C. LEXIS 599 (2007).

§§ 95-112 through 95-115: Reserved for future codification purposes.

ARTICLE 15.

Passenger Tramway Safety.

§ 95-116. Declaration of policy.

In order to safeguard life, health, property, and the welfare of this State, it shall be the policy of the State of North Carolina to protect its citizens and visitors from unnecessary mechanical hazards in the operation of ski tows, lifts, tramways and related devices to insure that reasonable design and construction are used, that accepted safety devices and sufficient personnel are provided for, and that periodic inspections and adjustments are made which are deemed essential to the safe operation of ski tows, ski lifts and passenger tramways. The primary responsibility for design, construction, maintenance, and inspection rests with the operators of such passenger tramway devices. The State, through the Commissioner of Labor, shall register all ski lift devices and passenger tramways and establish reasonable standards of design and operational practices, and cause to be made such inspections as may be necessary in carrying out this policy. (1969, c. 1021.)

Cross References. — As to actions relating to skier safety and skiing accidents, see G.S. 99C-1 through 99C-5.

§ 95-117. Definitions.

Each word or term defined in this Article has the meaning indicated in this section, unless a different meaning is plainly required by the context.

(1) "Commissioner" means the Commissioner of Labor of the State of North Carolina.

(2) "Industry" means activities of all those persons in the State who own, manage, or direct the operation of passenger tramways.

(3) "Operator" means any person, firm, corporation, or organization which owns, manages, or directs the operation of a passenger tramway. "Operator" may apply to the State or any political subdivision or instrumentality thereof.

(4) "Passenger tramway" means a device used to transport passengers uphill on skis, or in cars on tracks, or suspended in the air by the use of steel cables, chains or belts, or by ropes, and usually supported by trestles or towers with one or more spans. "Passenger tramway" shall include the following devices:

a. "Chairlift," a type of transportation on which passengers are carried on chairs suspended in the air and attached to a moving cable, chain or link belt supported by trestles or towers with one or more spans, or similar devices;

a1. "Conveyor," a type of transportation on which passengers are transported uphill on a flexible moving element (conveyor belt) that travels uphill on one path and generally returns underneath the uphill portion.

b. "J bar, T bar or platter pull," so-called and similar types of devices or means of transportation which pull skiers riding on skis by means of an attachment to a main overhead cable supported by trestles or towers with one or more spans;

c. "Multicar aerial passenger tramway," a device used to transport passengers in several open or in closed cars attached to, and suspended from, a moving wire rope or attached to a moving wire rope and supported on a standing wire rope, or similar device;

d. "Rope tow," a type of transportation which pulls the skiers, riding on skis as the skier grasps the rope manually, or similar devices;

e. "Skimobile," a device in which a passenger car running on steel or wooden tracks is attached to and pulled by a steel cable, or similar device;

f. "Two-car aerial passenger tramway," a device used to transport passengers in two open or enclosed cars attached to, and suspended from, a moving wire rope or attached to a moving wire rope and supported on a standing wire rope or similar device. (1969, c. 1021; 2005-347, s. 1.)

§ 95-118. Registration required; application procedures.

(a) No person shall operate or permit to be operated or use any device subject to the provisions of this Article without a valid registration certificate.

(b) Operators of devices subject to the provisions of this Article shall apply to the Commissioner of Labor, on forms provided by the Commissioner, for registration of the devices that the operator owns or manages, or the operation of which the operator directs. The application shall contain information that the Commissioner may reasonably require in order for the Commissioner to determine whether the passenger tramway sought to be registered by the operator complies with the intent of this Article and the rules adopted by the Commissioner. (1969, c. 1021; 2005-347, s. 2.)

§ 95-119. Certification criteria; procedures; display of certificate.

(a) A registration certificate shall be issued without delay when the Commissioner is satisfied that the facts stated in the application are sufficient to enable the Commissioner to fulfill his or her duties under this Article and that the device sought to be registered complies with the rules adopted pursuant to this Article. Each registration certificate shall expire on October 31 of the year next following the date of issuance.

(b) The Commissioner may conduct any inspections necessary to determine whether the device sought to be registered complies with the intent of this Article and the rules adopted pursuant to this Article.

(c) The registration certificate for each device subject to the provisions of this Article shall be displayed prominently at the place where passengers are loaded onto the device. (1969, c. 1021; 2005-347, s. 3.)

§ 95-120. Powers and duties of the Commissioner.

In addition to all other powers and duties conferred and imposed upon the Commissioner by this Article, the Commissioner shall have and exercise the following powers and duties:

(1) To adopt, modify, or revoke the rules necessary for carrying out the provisions of this Article, including those governing the design, construction, installation, operation, use, and maintenance of devices subject to the provisions of this Article. The rules adopted under this section shall conform as nearly as possible to the standards contained in the B77.1 — American National Standards Safety Requirements for Aerial Passenger Tramways and with good engineering and safety standards, formulas, and practices.

(1a) To enforce the rules adopted under this Article.

(1b) To grant exceptions from the requirements of the rules adopted under this Article and to permit the use of other devices when the exceptions and uses will not expose the public to an unsafe condition likely to result in serious personal injury or damage to property.

(2) To hold hearings and take evidence in all matters relating to the exercise and performance of the powers and duties vested in the Commissioner, subpoena witnesses, administer oaths, and compel the testimony of witnesses and the production of books, papers and records relevant to any inquiry.

(3) To approve, deny, revoke, and renew the registration certificates in accordance with the rules adopted pursuant to this Article.

(4) To institute civil actions for injunctive or other relief against violators of this Article.

(5) To cause the seal of the Commissioner of Labor to be affixed to all registrations issued by the Commissioner, and to employ, within the funds available to the Commissioner, and prescribe the duties of the personnel as the Commissioner may deem necessary in the administration of this Article.

(6) To have reasonable access, with or without notice, to the devices subject to the provisions of this Article during reasonable hours, for the purposes of inspections and testing.

(7) To investigate accidents involving devices subject to the provisions of this Article to determine the cause of the accident. The Commissioner shall have full subpoena powers in conducting the investigations.

(8) To coordinate enforcement and inspection activity relative to equipment, devices, and operations covered by this Article in order to minimize duplication of liability or regulatory responsibility on the part of the operator, owner, or employer.

(9) To establish fees not to exceed one hundred thirty-seven dollars ($137.00) for the inspection and issuance of registration certificates for devices that are in use and subject to this Article. (1969, c. 1021; 2005-347, s. 4.)

Cross References. — As to duties of ski operators and skiers, see G.S. 99C-2.

§ 95-120.1. Liability insurance.

(a) No person shall operate a device subject to the provisions of this Article, unless at the time of operation, there is in existence:

(1) A contract of insurance providing coverage of not less than one million dollars ($1,000,000) per occurrence against liability for injury to persons or property arising out of the operation or use of the device; or

(2) A contract of insurance providing coverage of not less than five hundred thousand dollars ($500,000) per occurrence against liability for injury to persons or property arising out of the operation or use of the devices if the annual gross volume of the devices does not exceed two hundred seventy-five thousand dollars ($275,000).

The insurance contract to be provided must be made by an insurer or surety that is acceptable to the North Carolina Insurance Commissioner and authorized to transact business in this State.

(b) The Commissioner shall not issue a certificate of registration until the operator or the operator's authorized agent provides proof of the required contract of insurance.

(c) The Commissioner may request from the operator of a device subject to the provisions of this Article or the operator's authorized agent, proof of the required contract of insurance, and upon failure of the operator or authorized agent to provide proof of insurance, the Commissioner shall have the power to prevent the commencement of or to stop the operation of the device until such time as proof is provided. (2005-347, s. 5.)

§ 95-121. Inspections and reports.

The Commissioner may cause to be made such inspections of the construction, operation, and maintenance of passenger tramways as he shall deem to be reasonably necessary. If, as the result of an inspection, it is found that a violation of the Commissioner's rules and regulations exists, or a condition in passenger tramway construction, operation or maintenance exists, which endangers safety of the public, an immediate report shall be made to the Commissioner for appropriate investigation and order. (1969, c. 1021.)

§ 95-122. Emergency shutdown.

When facts are presented to the Commissioner tending to show that an unreasonable hazard exists in the continued operation of a passenger tramway, and after such verification of said facts as is practical under the circumstances and consistent with the public safety, the Commissioner may by an emergency order require the operator of said tramway forthwith to cease using the same for the transportation of passengers. Such emergency order shall be in writing, signed by the Commissioner, and notice thereof shall be served upon the operator or his agent immediately in control of said passenger tramway by a true copy of such order, with a return being made of such service and endorsed on the original order. Such emergency shutdown shall be effective for a period not to exceed 48 hours from the time of service. Immediately after the issuance of an emergency order, the Commissioner shall conduct an investigation into the facts of the case and shall take such action as may be appropriate and as provided by the provisions of this Article. (1969, c. 1021.)

§ 95-123. Orders.

If, after investigation, the Commissioner finds that a violation of any of his rules and regulations exists, or that there is a condition in passenger tramway construction, operation, or maintenance which endangers the safety of the public, the Commissioner shall forthwith issue his written order setting forth his findings, the corrective action to be taken, and fixing a reasonable time for compliance therewith. The order shall be sent to the affected operator by certified mail with return receipt, by signature confirmation as provided by the U.S. Postal Service, by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) with delivery receipt, or via hand delivery, and shall become final unless the operator contests the order by filing a petition for a contested case under G.S. 150B-23 within 20 days after receiving the order. The Commissioner shall have the power to institute injunctive proceedings in any court of competent jurisdiction of the district court district as defined in G.S. 7A-133 or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be, in which the passenger tramway is located for the purpose of restraining the operation of said tramway or for compelling compliance with any lawful order of the Commissioner. Judicial review of a final decision under this section may be obtained under Article 4 of Chapter 150B of the General Statutes. (1969, c. 1021; 1973, c. 1331, s. 3; 1987, c. 827, s. 264; 1987 (Reg. Sess., 1988), c. 1037, s. 106; 2003-308, s. 5; 2007-231, s. 9.)

Effect of Amendments. — Session Laws 2007-231, s. 9, effective July 18, 2007, in the second sentence, substituted "with return receipt, by signature confirmation as provided by the U.S. Postal Service" for "or" and inserted "or via hand delivery."

§ 95-124. Suspension of registration.

If any operator fails to comply with the lawful order of the Commissioner as issued under this Article, and within the time fixed thereby, the Commissioner may suspend the registration of the affected passenger tramway for such time as he may consider necessary for the protection of the safety of the public. Any operator who shall be convicted, or enter a plea of guilty or nolo contendere, to operating a passenger tramway which has not been registered by the Commissioner, or after its registration has been suspended by the Commissioner, shall be guilty of a Class 1 misdemeanor. (1969, c. 1021; 1993, c. 539, s. 670; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 95-125. Effective date of initial applications.

This Article shall take effect and become operative on July 30, 1969, provided that the initial applications for registration of passenger tramways shall be filed on or before November 1, 1969, and passenger tramways in existence on November 1, 1969, may be operated without registration until final action is taken by the Commissioner on the application for registration thereof. (1969, c. 1021.)

Article 16.

Occupational Safety and Health Act of North Carolina.

§ 95-126. Short title and legislative purpose.

(a) This Article shall be known as the "Occupational Safety and Health Act of North Carolina" and also may be referred to by abbreviations as "OSHANC."

(b) Legislative findings and purpose:

(1) The General Assembly finds that the burden of employers and employees of this State resulting from personal injuries and illnesses arising out of work situations is substantial; that the prevention of these injuries and illnesses is an important objective of the government of this State; that the greatest hope of attaining this objective lies in programs of research, education and enforcement, and in the earnest cooperation of the federal and State governments, employers and employees.

(2) The General Assembly of North Carolina declares it to be its purpose and policy through the exercise of its powers to ensure so far as possible every working man and woman in the State of North Carolina safe and healthful working conditions and to preserve our human resources:

a. By encouraging employers and employees in their effort to reduce the number of occupational safety and health hazards at the place of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;

b. By providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;

c. By authorizing the Commissioner to develop occupational safety and health standards applicable to business giving consideration to the needs of employers and employees and to adopt standards promulgated from time to time by the Secretary of Labor under the Occupational Safety and Health Act of 1970, and by creating a safety and health review commission for carrying out adjudicatory functions under this Article;

d. By building upon advances already made through employer and employee initiative for providing safe and healthful working conditions;

e. By providing occupational health criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience;

f. By providing for training programs to increase the number and competence of personnel engaged in the field of occupational safety and health;

g. By providing an effective enforcement program which shall include a prohibition against giving advance notice of an inspection and sanctions for any individual violating this prohibition;

h. By providing for appropriate reporting procedures with respect to occupational safety and health which procedures will help achieve the objectives of this Article and accurately describe the nature of the occupational safety and health problem;

i. By encouraging joint employer-employee efforts to reduce injuries and diseases arising out of employment;

j. By providing for research in the field of occupational safety and health, by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems;

k. By exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems, in recognition of the fact that occupational health standards present problems often different from those involved in occupational safety;

l. By authorizing the Commissioner to enter into contracts with the Department of Health and Human Services, or any other State or local units, to the end the Commissioner and the Department of Health and Human Services and other State or local units may fully cooperate and carry out the ends and purposes of this Article.

m. The General Assembly of North Carolina appoints and elects the North Carolina Department of Labor as the designated agency to administer the Occupational Safety and Health Act of North Carolina. (1973, c. 295, s. 1; c. 476, s. 128; 1989, c. 727, s. 219(13); 1997-443, s. 11A.33; 2005-133, s. 2.)

Cross References. — For the Migrant Housing Act of North Carolina, see G.S. 95-222 et seq.

Editor's Note. — Session Laws 2005-133, s. 1, effective June 29, 2005, as amended by Session Laws 2006-226, s. 30, provides: "Under the Occupational Safety and Health Act of North Carolina, the name of the Safety and Health Review Board is changed to the North Carolina Occupational Safety and Health Review Commission. The Revisor of Statutes is authorized to substitute the term 'Commission' for the term 'Board' wherever that term appears in the General Statutes in relation to the Act. The Revisor of Statutes is also authorized to insert the words 'North Carolina Occupational' in front of the phrase 'Safety and Health Review Commission' wherever that phrase appears in the General Statutes in relation to the Act."

Legal Periodicals. — For survey of 1974 case law on proceedings under the Occupational Safety and Health Act, see 53 N.C.L. Rev. 1005 (1975).

For survey of 1979 constitutional law, see 58 N.C.L. Rev. 1326 (1980).

For article, "Smoking in the Workplace: Who Has What Rights?," see 11 Campbell L. Rev. 311 (1989).

For article discussing the protection of nonsmokers' rights in the workplace, see 11 Campbell L. Rev. 339 (1989).

For article, "Proving Violations or Proving Affirmative Defenses Under the Occupational Safety and Health Act of North Carolina," see 18 N.C. Cent. L.J. 99 (1989).

For article, "North Carolina Employment Law After *Coman*: Reaffirming Basic Rights in the Workplace," see 24 Wake Forest L. Rev. 905 (1989).

For article, "Penalties Under the Occupational Safety and Health Act of North Carolina," see 19 N.C. Cent. L.J. 27 (1990).

CASE NOTES

Purpose. — The primary purpose of this Act is to keep conditions in the workplace safe for workers. This purpose cannot possibly be accomplished where employers are allowed to delegate to a third party a specific duty promulgated under the Act that is designed to protect the safety of workers. Therefore, where an employer, on a regular basis, is not aware of the reputation of the electrician who grounds equipment emitting dangerous currents of electricity, such blatant disregard for the safety of employees cannot be ignored. Brooks v. BCF Piping, Inc., 109 N.C. App. 26, 426 S.E.2d 282 (1993).

There is statutory authority under G.S. 95-126(b)(2)(m) granted to the North Carolina Department of Labor to protect the health and safety of all employees in North Carolina; the operations manual is a non-binding interpretive statement, not a rule requiring formal rule-making procedures — accordingly, the exception that requires rule-making if the rights and duties of the employer are affected does not apply; thus, the operations manual merely established guidelines that directed Occupational Safety and Health Act inspectors as to what parties could be cited for violation of a rule and thus did not require formal rule-making. Comm'r of Labor v. Weekley Homes, L.P., 169 N.C. App. 17, 609 S.E.2d 407 (2005).

Applied in House of Raeford Farms, Inc. v. Brooks, 63 N.C. App. 106, 304 S.E.2d 619 (1983).

Cited in Brooks v. McWhirter Grading Co., 303 N.C. 573, 281 S.E.2d 24 (1981); Daniel Constr. Co. v. Brooks, 73 N.C. App. 426, 326 S.E.2d 339 (1985); Walker v. Westinghouse Elec. Corp., 77 N.C. App. 253, 335 S.E.2d 79 (1985); Pittman v. Inco, Inc., 78 N.C. App. 134, 336 S.E.2d 637 (1985); Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 340 S.E.2d 116 (1986).

§ 95-127. Definitions.

In this Article, unless the context otherwise requires:

(1) The term "Advisory Council" shall mean the Advisory Council or body established under this Article.

(2) The term "Commission" means the North Carolina Occupational Safety and Health Review Commission established under this Article.

(3) The term "classified service" means a position included in the State Merit System of Personnel Administration subject to the laws, rules and regulations of the State Personnel Board as administered by the State Personnel Director and as set forth in Chapter 126 of the General Statutes.

(4) The term "Commissioner" means the Commissioner of Labor of North Carolina.

(5) The term "days" shall mean a calendar day unless otherwise noted.

(6) The term "Department" means the Department of Labor of North Carolina.

(7) The term "Deputy Commissioner" means the Deputy Commissioner of the North Carolina Department of Labor, who is appointed by the Commissioner to aid and assist the Commissioner in the performance of his duties. The Deputy Commissioner shall exercise such power and authority as delegated to him by the Commissioner.

(8) The term "Director" means the officer or agent appointed by the Commissioner of Labor for the purpose of assisting in the administration of the Occupational Safety and Health Act of North Carolina.

(9) The term "employee" means an employee of an employer who is employed in a business or other capacity of his employer, including any and all business units and agencies owned and/or controlled by the employer.

(10) The term "employer" means a person engaged in a business who has employees, including any state or political subdivision of a state, but

does not include the employment of domestic workers employed in the place of residence of his or her employer.

(11) The term "established federal standard" means any operative occupational safety and health standard established by any agency of the United States and presently in effect, or contained in any act of Congress in force on the date of enactment of this Article, and adopted by the Secretary of Labor under the Occupational Safety and Health Act of 1970.

(12) The term "federal act," as referred to in this Article, means the Occupational Safety and Health Act of 1970 (Public Law 91-596, 91st Congress, Act of December 29, 1970, 84 Stat. 1950).

(13) The term "imminent danger" means any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death, or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Article.

(14) The term "issue" means an industrial, occupational or hazard grouping.

(15) The term "occupational safety and health standards" means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, safety devices, operations or processes reasonably necessary and appropriate to provide safe and healthful employment and places of employment, and shall include all occupational safety and health standards adopted and promulgated by the Secretary which also may be and are adopted by the State of North Carolina under the provisions of this Article. This term includes but is not limited to interim federal standards, consensus standards, any proprietary standards or permanent standards, as well as temporary emergency standards which may be adopted by the Secretary, promulgated as provided by the Occupational Safety and Health Act of 1970, and which standards or regulations are published in the Code of Federal Regulations or otherwise properly promulgated under the federal act or any appropriate federal agencies.

(16) The term "person" means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives.

(17) The term "Secretary" means the United States Secretary of Labor.

(18) A "serious violation" shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use at such place of employment, unless the employer did not know, and could not, with the exercise of reasonable diligence, know of the presence of the violation.

(19) The term "State" means the State of North Carolina. (1973, c. 295, s. 2; 1987, c. 282, s. 14; 2005-133, s. 3.)

Editor's Note. — Session Laws 2005-133, s. 1, effective June 29, 2005, as amended by Session Laws 2006-226, s. 30, provides: "Under the Occupational Safety and Health Act of North Carolina, the name of the Safety and Health Review Board is changed to the North Carolina Occupational Safety and Health Review Commission. The Revisor of Statutes is authorized to substitute the term 'Commission' for the term 'Board' wherever that term appears in the General Statutes in relation to the Act. The Revisor of Statutes is also authorized to insert the words 'North Carolina Occupational' in front of the phrase 'Safety and Health Review Commission' wherever that phrase appears in the General Statutes in relation to the Act."

Legal Periodicals. — For article, "Proving Violations or Proving Affirmative Defenses Under the Occupational Safety and Health Act of

North Carolina," see 18 N.C. Cent. L.J. 99 (1989).

CASE NOTES

Serious Violation. — The evidence supported a determination by the Safety and Health Review Board [now the Occupational Safety and Health Review Commission] that respondent was guilty of a serious and repeated Occupational Safety and Health Act violation in failing to slope to adequate angle of repose or provide adequate shoring for sewer line trench in hard or compact soil more than five feet in depth at job site on April 21, 1977, where it showed that the trench in question was eight feet deep and at least eight feet in length; there was no sloping or shoring or wall support of any kind; and respondent had paid a fine for failing properly to shore, slope or otherwise protect the sides of a trench in 1974, although the 1974 violation was for work in soft or unstable soil rather than in hard or compact soil. Brooks v. McWhirter Grading Co., 49 N.C. App. 352, 271 S.E.2d 568 (1980), rev'd on other grounds, 303 N.C. 573, 281 S.E.2d 24 (1981).

Evidence that petitioner's employee would walk along 10-inch-wide steel beams at a height of 40 to 60 feet above the ground and would perform work tasks while balanced on those beams, at no time being secured by a safety rope, presented the possibility of an accident which would carry a substantial probability of death or serious injury, and thus showed a "serious violation" within the meaning of subdivision (18). Moreover, substantial evidence supported the conclusion that the violation was "willful," that is, that it was a deliberate disregard of a duty, imposed by statute, regulation or contract, necessary to the safety of a person or property. O.S. Steel Erectors v. Brooks, 84 N.C. App. 630, 353 S.E.2d 869 (1987).

To establish a serious violation, the Commissioner of Labor must show by substantial evidence that the violation creates (1) the possibility of an accident, and (2) the substantially probable result of which is death or serious physical injury. Yates Constr. Co. v. Commissioner of Labor, 126 N.C. App. 147, 484 S.E.2d 430 (1997).

Cited in Brooks v. North Carolina DOT, 115 N.C. App. 163, 443 S.E.2d 897, cert. denied, 338 N.C. 308, 451 S.E.2d 632 (1994); Brooks v. McWhirter Grading Co., 303 N.C. 573, 281 S.E.2d 24 (1981); Brooks v. Stroh Brewery Co., 95 N.C. App. 226, 382 S.E.2d 874 (1989); Brooks v. BCF Piping, Inc., 109 N.C. App. 26, 426 S.E.2d 282 (1993); Brooks v. Ansco & Assocs., 114 N.C. App. 711, 443 S.E.2d 89 (1994); Associated Mechanical Contractors v. Payne, 342 N.C. 825, 467 S.E.2d 398 (1996); Yates Constr. Co. v. Commissioner of Labor, 126 N.C. App. 147, 484 S.E.2d 430 (1997).

OPINIONS OF ATTORNEY GENERAL

Grower or Owner of Temporary Labor Camps Is Responsible for Enforcement of Safety and Health Regulations. — See opinion of Attorney General to Mr. Weldon B. Denny, Assistant Director, Occupational Safety and Health Act of N.C., 43 N.C.A.G. 245 (1973).

§ 95-128. Coverage.

The provisions of this Article or any standard or regulation promulgated pursuant to this Article shall apply to all employers and employees except:

(1) The federal government, including its departments, agencies and instrumentalities;

(2) Employees whose safety and health are subject to protection under the Atomic Energy Act of 1954, as amended;

(3) Employees whose safety and health are subject to protection under the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. 801) and the Federal Metal and Nonmetallic Mine Safety Act (30 U.S.C. 725), or Subtitle V of Title 49 of the United States Code;

(4) Railroad employees whose safety and health are subject to protection under Subtitle V of Title 49 of the United States Code;

(5) Employees engaged in all maritime operations;

(6) Employees whose employer is within that class and type of employment which does not permit federal funding, on a matching basis, to

the State in return of State enforcement of all occupational safety and health issues. (1973, c. 295, s. 3; 1998-217, s. 27.)

Legal Periodicals. — For article, "An Analysis of the Retaliatory Employment Discrimination Act and Protected Activity under the Occupational Safety and Health Act of North Carolina," see 15 Campbell L. Rev. 29 (1992).

CASE NOTES

Cited in Brooks v. North Carolina DOT, 115 N.C. App. 163, 443 S.E.2d 897, cert. denied, 338 N.C. 308, 451 S.E.2d 632 (1994).

§ 95-129. Rights and duties of employers.

Rights and duties of employers shall include but are not limited to the following provisions:

(1) Each employer shall furnish to each of his employees conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or serious physical harm to his employees;

(2) Each employer shall comply with occupational safety and health standards or regulations promulgated pursuant to this Article;

(3) Each employer shall refrain from any unreasonable restraint on the right of the Commissioner or Director, or their lawfully appointed agents, to inspect the employer's place of business. Each employer shall assist the Commissioner, the Director or the lawful agents of either or both of them, in the performance of their inspection duties by supplying or by making available information, any necessary personnel or necessary inspection aides;

(4) Any employer, or association of employers, is entitled to participate in the development of standards by submission of comments on proposed standards, participation in hearings on proposed standards, or by requesting the development of standards on a given issue under G.S. 95-131;

(5) Any employer is entitled, under G.S. 95-137, to review of any citation issued because of his alleged violation of any standard promulgated under this Article, or the length of the abatement period allowed for the correction of an alleged violation;

(6) Any employer is entitled, under G.S. 95-137, to a review of any penalty in the form of civil damages assessed against him because of his alleged violation of this Article;

(7) Any employer is entitled, under G.S. 95-132, to seek an order granting a variance from any occupational safety or health standard;

(8) Any employer is entitled, under G.S. 95-152, to protection of his trade secrets and other legally privileged communications. (1973, c. 295, s. 4.)

Legal Periodicals. — For article, "Smoking in the Workplace: Who Has What Rights?," see 11 Campbell L. Rev. 311 (1989).

For article discussing the protection of nonsmokers' rights in the workplace, see 11 Campbell L. Rev. 339 (1989).

For article, "Proving Violations or Proving Affirmative Defenses Under the Occupational Safety and Health Act of North Carolina," see 18 N.C. Cent. L.J. 99 (1989).

CASE NOTES

Nondelegable Duties. — The primary purpose of this Act is to keep conditions in the workplace safe for workers. This purpose cannot possibly be accomplished where employers are allowed to delegate to a third party a specific duty promulgated under the Act that is designed to protect the safety of workers. Brooks v. BCF Piping, Inc., 109 N.C. App. 26, 426 S.E.2d 282 (1993).

Company was hired by another to provide welding services and delivered welding equipment, which it had inspected, to plant. The equipment that was improperly wired was owned by welding company, placed on the worksite by welding company employees and was to be used by welding company's employees. Although it was proper and customary to send the male end plug and allow someone else to attach it, welding company's reliance on the plant's electrician to properly ground machinery and protect its employees from the existence of a hazard was unreasonable pursuant to the North Carolina Occupational Safety and Health Act which imposed a specific duty on welding company to inspect the arc welder to make sure it was properly grounded; such a statutory duty was nondelegable. Brooks v. BCF Piping, Inc., 109 N.C. App. 26, 426 S.E.2d 282 (1993).

Member of an LLC did not undertake an independent duty to ensure worker safety at a plant where the employer was the LLC, who had a nondelegable duty under North Carolina law to provide a worker with a safe workplace, and the member had not undertaken any affirmative duty to provide a safe workplace for the LLC's employees in entering an operating agreement for the plant with other members of the LLC. Spaulding v. Honeywell Int'l, Inc., — N.C. App. —, 646 S.E.2d 645, 2007 N.C. App. LEXIS 1477 (2007).

Construction with Federal Law. — North Carolina courts have yet to specifically address the interpretation of subdivision (1) of this section; therefore, because of the similarity between the state and federal provisions, federal decisions may be turned to for guidance. Brooks v. Rebarco, Inc., 91 N.C. App. 459, 372 S.E.2d 342 (1988).

Commissioner was not precluded by § 1910.303(g)(2) of the National Electric Code from citing elevator company for violation of the general duty clause based on allegations that elevator company exposed its workers to hazards resulting from the use of a "temporary run station" having live parts unguarded by approved enclosures and operating on less than 50 volts. Brooks v. Dover Elevator Co., 94 N.C. App. 139, 379 S.E.2d 707 (1989).

When Hazard Recognized. — A hazard is recognized only when the Commissioner of Labor demonstrates that feasible measures can be taken to reduce materially the likelihood of death or serious physical harm resulting to employees. Brooks v. Rebarco, Inc., 91 N.C. App. 459, 372 S.E.2d 342 (1988).

Standard for Determining Existence of Hazard. — Whether or not a hazard exists is to be determined by the standard of a reasonably prudent person. Industry custom and practice are relevant and helpful but are not dispositive. If a reasonable and prudent person would recognize a hazard, the industry cannot eliminate it by closing its eyes. Brooks v. Rebarco, Inc., 91 N.C. App. 459, 372 S.E.2d 342 (1988).

Showing Prerequisite to Suit Under "General Duty Clause" of Subdivision (1). — To successfully prosecute a violation under subdivision (1), known as the "general duty clause," a complainant must show that an employer failed to render its workplace free of a hazard which was "recognized" and causing or likely to cause death or serious physical harm. Brooks v. Rebarco, Inc., 91 N.C. App. 459, 372 S.E.2d 342 (1988).

Burden of Proof. — Where commissioner had issued a citation to elevator company for violating the general duty clause, commissioner had the burden of proving: (1) the employer failed to render its workplace free of a hazard; (2) the hazard was recognized; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) there were feasible means by which the employer could have eliminated or materially reduced the hazard. Brooks v. Dover Elevator Co., 94 N.C. App. 139, 379 S.E.2d 707 (1989).

Multi-Employer Work Sites. — Under G.S. 95-129(2), the employer, a general contractor, failed in its duty to inspect the job site to detect safety violations committed by its own employees and also those committed by its subcontractors; thus, the citation issued by the State Department of Labor for failing to conduct frequent and regular inspections of the job sites was appropriate. Comm'r of Labor v. Weekley Homes, L.P., 169 N.C. App. 17, 609 S.E.2d 407 (2005).

The rule as to employer culpability for safety violations in cases involving multi-employer work sites is that an employer is expected to make reasonable efforts to detect and abate any violation of safety standards of which it is aware and to which its employees are exposed, despite the fact that the employer did not commit the violation. Brooks v. Rebarco, Inc., 91 N.C. App. 459, 372 S.E.2d 342 (1988).

G.S. 95-129 does not limit an employer's responsibility to comply with occupational health and safety standards to only its own employees. Comm'r of Labor v. Weekley Homes, L.P., 169 N.C. App. 17, 609 S.E.2d 407 (2005).

General contractor's duty under G.S. 95-129(2), requiring that each employer shall comply with occupational safety and health standards or regulations, extends to employees of subcontractors on job sites; however, the duty is a reasonable duty and the general contractor is only liable for violations that its subcontractor may create if it could reasonably have been expected to detect the violation by inspecting the job site. Comm'r of Labor v. Weekley Homes, L.P., 169 N.C. App. 17, 609 S.E.2d 407 (2005).

Applied in Prevette v. Clark Equip. Co., 62 N.C. App. 272, 302 S.E.2d 639 (1983); Brown v. Kroger Co., 169 N.C. App. 312, 610 S.E.2d 447, 2005 N.C. App. LEXIS 611 (2005).

Cited in Brooks v. Butler, 70 N.C. App. 681, 321 S.E.2d 440 (1984); Shreve v. Duke Power Co., 85 N.C. App. 253, 354 S.E.2d 357 (1987).

§ 95-130. Rights and duties of employees.

Rights and duties of employees shall include but are not limited to the following provisions:

(1) Employees shall comply with occupational safety and health standards and all rules, regulations and orders issued pursuant to this Article which are applicable to their own actions and conduct.

(2) Employees and representatives of employees are entitled to participate in the development of standards by submission of comments on proposed standards, participation in hearings on proposed standards, or by requesting the development of standards on a given issue under G.S. 95-131.

(3) Employees shall be notified by their employer of any application for a temporary order granting the employer a variance from any provision of this Article or standard or regulation promulgated pursuant to this Article.

(4) Employees shall be given the opportunity to participate in any hearing which concerns an application by their employer for a variance from a standard promulgated under this Article.

(5) Any employee who may be adversely affected by a standard or variance issued pursuant to this Article may file a petition for review with the Commissioner who shall review the matters set forth and alleged in the petition.

(6) Any employee who has been exposed or is being exposed to toxic materials or harmful physical agents in concentrations or at levels in excess of that provided for by any applicable standard shall have a right to file a petition for review with the Commissioner who shall investigate and pass upon same.

(7) Subject to regulations issued pursuant to this Article any employee or authorized representative of employees shall be given the right to request an inspection and to consult with the Commissioner, Director, or their agents, at the time of the physical inspection of any work place as provided by the inspection provision of this Article.

(8) to (10) Repealed by Session Laws 1991 (Regular Session, 1992), c. 1021, s. 2.

(11) Any employee or representative of employees who believes that any period of time fixed in the citation given to his employer for correction of a violation is unreasonable has the right to contest such time for correction by filing a written and signed notice within 20 days from the date the citation is posted within the establishment.

(12) Nothing in this or any other provision of this Article shall be deemed to authorize or require medical examination, immunization, or treatment for those who object thereto on religious grounds, except where such is necessary for the protection of the health or safety of others. (1973, c. 295, s. 5; 1991 (Reg. Sess., 1992), c. 1021, s. 2.)

Legal Periodicals. — For note on workers' compensation and retaliatory discharge, see 58 N.C.L. Rev. 629 (1980).

For article, "Smoking in the Workplace: Who Has What Rights?," see 11 Campbell L. Rev. 311 (1989).

For article discussing the protection of nonsmokers' rights in the workplace, see 11 Campbell L. Rev. 339 (1989).

For article, "North Carolina Employment Law After *Coman*: Reaffirming Basic Rights in the Workplace," see 24 Wake Forest L. Rev. 905 (1989).

For note, "Coman v. Thomas Manufacturing Co.: Recognizing a Public Policy Exception to the At-Will Employment Doctrine," see 68 N.C.L. Rev. 1178 (1990).

For article, "An Analysis of the Retaliatory Employment Discrimination Act and Protected Activity under the Occupational Safety and Health Act of North Carolina," see 15 Campbell L. Rev. 29 (1992).

CASE NOTES

Discharge Not Linked to Protected Activities. — Although employee's complaint to his employer and employee's filing of the Occupational Safety and Health Act of North Carolina (OSHANC) claim were protected activities, employer met its burden of proof of showing that employee would have been discharged in the absence of his protected activity; the following factors supported this conclusion: (i) employee disregarded company safety policy thereby creating two potentially life-threatening situations, (ii) the absence of any evidence of insidious intent on the part of the first-shift employees who reported the incidents, (iii) the lack of any connection whatever between these employees' reporting the incidents and Nettles' OSHANC complaint eight months earlier, and (iv) the time lapse between the OSHANC complaint and the incidents precipitating employee's termination. Brooks v. Stroh Brewery Co., 95 N.C. App. 226, 382 S.E.2d 874, cert. denied, 325 N.C. 704, 388 S.E.2d 449 (1989).

Labor Commissioner's Suit Barred. — Employee's acceptance of multiplant grievance committee decision rendered pursuant to the collective bargaining agreement barred labor commissioner's suit for retaliatory discharge; the limited scope of the benefits sought, namely back pay for the period during employee's suspension, made this action one for private rather than public benefits. Brooks v. Stroh Brewery Co., 95 N.C. App. 226, 382 S.E.2d 874, cert. denied, 325 N.C. 704, 388 S.E.2d 449 (1989).

Cited in Brooks v. Taylor Tobacco Enters. Inc., 39 N.C. App. 529, 251 S.E.2d 656 (1979); Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 340 S.E.2d 116 (1986); Shreve v. Duke Power Co., 85 N.C. App. 253, 354 S.E.2d 357 (1987); Guy v. Travenol Lab., Inc., 812 F.2d 911 (4th Cir. 1987); Harris v. Duke Power Co., 319 N.C. 627, 356 S.E.2d 357 (1987); Coman v. Thomas Mfg. Co., 325 N.C. 172, 381 S.E.2d 445 (1989).

§ 95-131. Development and promulgation of standards; adoption of federal standards and regulations.

(a) All occupational safety and health standards promulgated under the federal act by the Secretary, and any modifications, revision, amendments or revocations in accordance with the authority conferred by the federal act or any other federal act or agency relating to safety and health and adopted by the Secretary, shall be adopted as the rules of the Commissioner of this State unless the Commissioner decides to adopt an alternative State rule as effective as the federal requirement and providing safe and healthful employment in places of employment as required by the federal act and standards and regulations heretofore referred to and as provided by the Occupational Safety and Health Act of 1970. Chapter 150B of the General Statutes governs the adoption of rules by the Commissioner.

(b), (c) Repealed by Session Laws 1991, c. 418, s. 8.

(d) Rules adopted under this section shall provide insofar as possible the highest degree of safety and health protection for employees; other considerations shall be the latest available scientific data in the field, the feasibility of the standard, and experience gained under this and other health and safety laws. Whenever practical the standards established in a rule shall be expressed in terms of objective criteria and of the performance desired. In establishing standards dealing with toxic materials or harmful physical agents, the Commissioner, after consultation and recommendations of the

Department of Health and Human Services, shall set a standard which most adequately assures, to the extent possible, on the basis of the most available evidence that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.

(e) The Commissioner may not adopt State standards, for products distributed or used in interstate commerce, which are different from federal standards for such products unless the adoption of such State standard, or standards, is required by compelling local conditions and does not unduly burden interstate commerce.

(f) Repealed by Session Laws 1991, c. 418, s. 8.

(g) Any rule, regulation, scope, or standard for agricultural employers adopted or promulgated prior to July 12, 1988, that differs from the federal rule, regulation, scope, or standard is repealed effective September 1, 1989, unless readopted pursuant to Chapter 150B of the General Statutes. (1973, c. 295, s. 6; c. 476, s. 128; 1975, 2nd Sess., c. 983, s. 81; 1987, c. 285, s. 17; 1987 (Reg. Sess., 1988), c. 1111, ss. 7, 8; 1989, c. 727, s. 219(14); 1991, c. 418, s. 8; 1997-443, s. 11A.34.)

Cross References. — As to an agency's exercise of its authority to adopt rules, see Article 2A of Chapter 150B.

Editor's Note. — Session Laws 2006-264, s. 102(a), (b), provide: "The Department of Labor shall adopt rules in connection with its requirements regarding fall protection for tower climbers as follows:

"(1) With regard to employer-provided rescue procedures, employers must ensure that at least two trained and designated rescue employees are on-site when employees are working at heights over six feet on the tower, except that where only two employees are on-site, then an employer may comply with this requirement if one employee is a trained and designated rescue employee and one employee has been employed for less than nine months and has received documented orientation from the employer outlining steps to take in an emergency.

"(2) With regard to third-party-provided rescue procedures, the employer must obtain verification from the third-party rescue service that the service is able to respond to a rescue summons in a timely manner and that the service is proficient in rescue-related tasks and equipment needed to rescue climbers from elevated heights on communication structures. The employer must also provide the selected third-party rescue service with contact information regarding the tower site and allow the service to conduct whatever preparation for rescue it deems necessary

"Notwithstanding G.S. 150B-21.1(a), the Department of Labor may adopt the rules provided for by this section as temporary rules within 270 days after the effective date of this act."

Legal Periodicals. — For article, "Proving Violations or Proving Affirmative Defenses Under the Occupational Safety and Health Act of North Carolina," see 18 N.C. Cent. L.J. 99 (1989).

For article, "North Carolina Employment Law After *Coman*: Reaffirming Basic Rights in the Workplace," see 24 Wake Forest L. Rev. 905 (1989).

CASE NOTES

Federal court decisions interpreting the federal Occupational Health and Safety Act have been followed by North Carolina courts when interpreting this Article. Brooks v. Butler, 70 N.C. App. 681, 321 S.E.2d 440 (1984), cert. denied, 313 N.C. 327, 329 S.E.2d 385 (1985).

OSHA Regulations Are Admissible to Establish Standard of Care. — Occupational Safety and Health Act regulations are some evidence of the custom in the construction industry and are admissible to establish the standard of care required of reasonable men in the same circumstances. Cowan v. Laughridge Constr. Co., 57 N.C. App. 321, 291 S.E.2d 287 (1982).

By virtue of G.S. 95-131(a), the requirements of 29 C.F.R. § 1910.22(b)(1) are a statutory requirement that brings an employee's injury and an employer's subsequent citation within the scope of G.S. 97-12. Brown v. Kroger Co., 169 N.C. App. 312, 610 S.E.2d 447, 2005 N.C. App. LEXIS 611 (2005).

But Violation of OSHA Rules Is Not Negligence Per Se. — Since a willful violation of an Occupational Safety and Health Act rule constitutes a misdemeanor only if said violation causes the death of an employee, and for all other violations, the sanction is a possible civil penalty assessed by the Commissioner, the adopted OSHA regulations are not penal in nature, and, therefore, a violation does not constitute negligence per se. Cowan v. Laughridge Constr. Co., 57 N.C. App. 321, 291 S.E.2d 287 (1982).

Industry Practice Is Only One Factor in Determining Reasonableness. — Each industry is permitted to evaluate the hazards associated with its own operations and determine what, if anything, to do about them. But the practice in the industry is but one circumstance to consider, along with the other circumstances, in determining whether a practice meets the reasonable man standard of the common law. Daniel Constr. Co. v. Brooks, 73 N.C. App. 426, 326 S.E.2d 339 (1985).

Equating the practice of an industry with what is reasonably safe and proper can result in outmoded, unsafe standards being followed to the detriment of workers in that industry. Daniel Constr. Co. v. Brooks, 73 N.C. App. 426, 326 S.E.2d 339 (1985).

Applied in McCuiston v. Addressograph-Multigraph Corp., 308 N.C. 665, 303 S.E.2d 795 (1983); Comm'r of Labor v. Weekley Homes, L.P., 169 N.C. App. 17, 609 S.E.2d 407 (2005).

Cited in Brooks v. McWhirter Grading Co., 303 N.C. 573, 281 S.E.2d 24 (1981); Prevette v. Clark Equip. Co., 62 N.C. App. 272, 302 S.E.2d 639 (1983); O.S. Steel Erectors v. Brooks, 84 N.C. App. 630, 353 S.E.2d 869 (1987); Brooks v. Dover Elevator Co., 94 N.C. App. 139, 379 S.E.2d 707 (1989); Sloan v. Miller Bldg. Corp., 119 N.C. App. 162, 458 S.E.2d 30 (1995).

§ 95-132. Variances.

(a) Temporary Variances. —

(1) The Commissioner may upon written application by an employer issue an order granting such employer a temporary variance from standards adopted by this Article or promulgated by the Commissioner under this Article. Any such order shall prescribe the practices, means, methods, operations and processes which the employer must adopt or use while the variance is in effect and state in detail a program for coming into compliance with the standard.

(2) An application for a temporary variance shall contain all information required as enumerated in 29 C.F.R. 1905.10(b) which is hereby incorporated by reference, as if herein fully set out.

(3) Upon receipt of an application for an order granting a temporary variance, the Commissioner to whom such application is addressed may issue an interim order granting such a temporary variance, for the purpose of permitting time for an orderly consideration of such application. No such interim order may be effective for longer than 180 days.

(4) Such a temporary variance may be granted only after notice to employees and interested parties and opportunity for hearing. The temporary variance may be for a period of no longer than required to achieve compliance or one year, whichever is shorter, and may be renewed only once. Application for renewal of a variance must be filed in accordance with provisions in the initial grant of the temporary variance.

(5) An order granting a temporary variance shall be issued only if the employer establishes

a. (i) That he is unable to comply with the standard by the effective date because of unavailability of professional or technical personnel or materials and equipment required or necessary construction or alteration of facilities or technology, (ii) that all available steps have been taken to safeguard his employees against the hazards covered by the standard, and (iii) that he has an effective program for coming into compliance with the standard as quickly as practicable, or

b. That he is engaged in an experimental program as described in subsection (c) of this section as hereinafter stated.

(b) Permanent Variances. —

(1) Any affected employer may apply to the Commissioner for a rule or order for a permanent variance from a standard promulgated under this section. Affected employees shall be given notice of each such application and an opportunity to participate in a hearing. The Commissioner shall issue such rule or order if he determines on the record, after opportunity for an inspection where appropriate and a hearing, that the proponent of the variance has demonstrated by a preponderance of the evidence that the conditions, practices, means, methods, operations, or processes used or proposed to be used by an employer will provide employment and places of employment to his employees which are as safe and healthful as those which would prevail if he complied with the standard.

(2) The rule or order so issued shall prescribe the conditions the employer must maintain, and the practices, means, methods, operations, and processes which he must adopt and utilize to the extent they differ from the standard in question.

(3) Such a rule or order may be modified or revoked upon application by an employer, employees, or by the Commissioner on his own motion, in the manner prescribed for its issuance under this subsection at any time after six months from its issuance.

(c) Experimental Variances. — The Commissioner is authorized to grant a variance from any standard or portion thereof whenever he determines that such variance is necessary to permit an employer to participate in an experiment approved by him designed to demonstrate or validate new and improved techniques to safeguard the health or safety of workers. (1973, c. 295, s. 7; 1997-456, s. 27.)

Legal Periodicals. — For article, "Proving Violations or Proving Affirmative Defenses Under the Occupational Safety and Health Act of North Carolina," see 18 N.C. Cent. L.J. 99 (1989).

§ 95-133. Office of Director of Occupational Safety and Health; powers and duties of the Director.

(a) There is hereby created and established in the North Carolina Department of Labor a division to be known as the Occupational Safety and Health Division. The Commissioner shall appoint a Director to administer this division who shall be subject to the direction and supervision of the Commissioner. The Director shall carry out the responsibilities of the State of North Carolina as prescribed under the Occupational Safety and Health Act of 1970, and any subsequent federal laws or regulations relating to occupational safety and health, and this Article, as written, revised or amended by legislative enactment and as delegated or authorized by the Commissioner. The Commissioner shall make and promulgate such rules, amendments, or revisions in rules, as he may deem advisable for the administration of the office, he shall also accept and use the services, facilities, and personnel of any agency of the State or of any subdivision of State government, either as a free service or by reimbursement. The Director shall devote full time to his duties of office and shall not hold any other office. The Director, subject to the approval of the Commissioner, shall select a professional staff of qualified and competent employees to assist in the statewide administration of the Article. All of the employees referred to herein shall be under the classified service, as herein defined in G.S. 95-127, subdivision (3).

(b) Subject to the general supervision of the Commissioner and Deputy Commissioner, the Director shall be responsible for the administration and enforcement of all laws, rules and regulations which it is the duty of the

Division to administer and enforce. The Director shall have the power, jurisdiction and authority to:

(1) Uniformly superintend, enforce and administer applicable occupational safety and health laws of the State of North Carolina;

(2) Make or cause to be made all necessary inspections, analyses and research for the purpose of seeing that all laws and rules and regulations which the office has the duty, power and authority to enforce are promptly and effectively carried out;

(3) Make all necessary investigations, develop information and reports upon conditions of employee safety and health, and upon all matters relating to the enforcement of this Article and all lawful regulations issued thereunder;

(4) Report to the Federal Occupational Safety and Health Administration any information which it may require;

(5) Recommend to the Commissioner such rules, regulations, standards, or changes in rules, regulations and standards which the Director deems advisable for the prevention of accidents, occupational hazards or the prevention of industrial or occupational diseases;

(6) Recommend to the Commissioner that he institute proceedings to remove from his or her position any employee of the Office who accepts any favor, privilege, money, object of value, or property of any kind whatsoever or who shall give prior notice of a compliance inspection of a work place unless authorized under the provisions of this Article;

(7) Employ experts, consultants or organizations for work related to the occupational safety and health program of the Division and compensate same with the approval of the Commissioner;

(8) Institute hearings, investigations, request the issuance of citations and propose such penalties as he may in his judgment consider necessary to carry out the provisions of this Article;

(9) The Commissioner shall have the power and authority to issue all types of notices, citations, cease and desist orders, or any other pleading, form or notice necessary to enforce compliance with this Article as hereinafter set forth. The Commissioner is also empowered and authorized to apply to the courts of the State having jurisdiction for orders or injunctions restraining unlawful acts and practices prohibited by this Article or not in compliance with this Article and to apply for mandatory injunctions to compel enforcement of the Article, and the Commissioner is authorized, and further authorized by and through his agents, to institute criminal actions or proceedings for such violations of the Article as are subject to criminal penalties. The Director shall recommend to the Commissioner the imposition and amount of civil penalties provided by this Article, and the Commissioner may institute such proceedings as necessary for the enforcement and payment of such civil penalties subject to such review of the Commission as hereinafter set forth.

(10) The Director may recommend to the Commissioner that any person, firm, corporation or witness be cited for contempt or for punishment as of contempt, and the Commissioner is authorized to enter any order of contempt or as of contempt as he may deem proper and necessary, and any hearing examiner may recommend to the Commissioner that such order or citation for contempt be made.

(11) The Commissioner or the Director, or their authorized agents, shall have the power and authority to issue subpoenas for witnesses and for the production of any and all papers and documents necessary for any hearing or other proceeding and to require the same to be served by the process officers of the State. The Commissioner and the Director

may administer any and all oaths that are necessary in the enforcement of this Article and may certify as to the authenticity of all records, papers, documents and transcripts under the seal of the Department of Labor.

(12) All orders, citations, cease and desist orders, stop orders, sanctions and contempt orders, civil penalties and the proceedings thereon shall be subject to review by the Commission as hereinafter provided, including all assessments for civil penalties. (1973, c. 295, s. 8; 2005-133, s. 4.)

Editor's Note. — Session Laws 2005-133, s. 1, effective June 29, 2005, as amended by Session Laws 2006-226, s. 30, provides: "Under the Occupational Safety and Health Act of North Carolina, the name of the Safety and Health Review Board is changed to the North Carolina Occupational Safety and Health Review Commission. The Revisor of Statutes is authorized to substitute the term 'Commission' for the term 'Board' wherever that term appears in the General Statutes in relation to the Act. The Revisor of Statutes is also authorized to insert the words 'North Carolina Occupational' in front of the phrase 'Safety and Health Review Commission' wherever that phrase appears in the General Statutes in relation to the Act."

§ 95-134. Advisory Council.

(a) There is hereby established a State Advisory Council on Occupational Safety and Health consisting of 11 members, appointed by the Commissioner, composed of three representatives from management, three representatives from labor, four representatives of the public sector with knowledge of occupational safety and occupational health professions and one representative of the public sector with knowledge of migrant labor. The Commissioner shall designate one of the members from the public sector as chairman and all members of the State Advisory Council shall be selected insofar as possible upon the basis of their experience and competence in the field of occupational safety and health.

(b) The Council shall advise, consult with, and make recommendations to the Commissioner on matters relating to the administration of this Article. The Council shall hold no fewer than two meetings during each calendar year. All meetings of the Advisory Council shall be open to the public and a transcript shall be kept and made available for public inspection.

(c) The Director shall furnish to the Advisory Council such secretarial, clerical and other services as he deems necessary to conduct the business of the Advisory Council. The members of the Advisory Council shall be compensated for reasonable expenses incurred, including necessary time spent in traveling to and from their place of residence within the State to the place of meeting, and mileage and subsistence as allowed to State officials. The members of the Advisory Council shall be compensated in accordance with Chapter 138 of the General Statutes.

(d) In addition to its other duties, the Advisory Council shall assist the Commissioner in formulating and setting standards under the provisions of this Article. For this purpose the Commissioner may appoint persons qualified by experience and affiliation to present the viewpoint of the employers involved, persons similarly qualified to present the viewpoint of the workers involved, and some persons to represent the health and safety agencies of the State. The Commissioner for this purpose may include representatives or professional organizations of technicians or professionals specializing in occupational safety or health. Such persons appointed for temporary purposes may be paid such per diem and expenses of attending meetings as provided in Chapter 138 of the General Statutes. (1973, c. 295, s. 9; 1977, c. 806; 1983, c. 717, ss. 17, 18.)

§ 95-135. North Carolina Occupational Safety and Health Review Commission.

(a) The North Carolina Occupational Safety and Health Review Commission is hereby established. The Commission shall be composed of three members from among persons who, by reason of training, education or experience, are qualified to carry out the functions of the Commission under this Article. The Governor shall appoint the members of the Commission and name one of the members as chairman of the Commission. The terms of the members of the Commission shall be six years except that the members of the Commission first taking office shall serve, as designated by the Governor at the time of appointment, one for a term of two years, one for a term of four years, and the member of the Commission designated as chairman shall serve for a term of six years. Any vacancy caused by the death, resignation, or removal of a member prior to the expiration of the term for which he was appointed shall be filled by the Governor for the remainder of the unexpired term. The Governor shall fill all vacancies occurring by reason of the expiration of the term of any members of the Commission.

(b) The Commission shall hear and issue decisions on appeals entered from citations and abatement periods and from all types of penalties. Appeals from orders of the Director dealing with conditions or practices that constitute imminent danger shall not be stayed by the Commission until after full and adequate hearing. The Commission in the discharge of its duties under this Article is authorized and empowered to administer oaths and affirmations and institute motions, cause the taking of depositions, interrogatories, certify to official acts, and issue subpoenas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda, and other records deemed necessary as evidence in connection with any appeal or proceeding for review before the Commission.

(c) The Commission shall meet at least once each calendar quarter but it may hold call meetings or hearings upon at least three days' notice to each member by the chairman and at such time and place as the chairman may fix. The chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission and shall appoint such hearing examiners and other employees as he deems necessary to assist in the performance of the Commission's functions and fix the compensation of such employees with the approval of the Governor. The assignment and removal of hearing examiners shall be made by the Commission, and any hearing examiner may be removed for misfeasance, malfeasance, misconduct, immoral conduct, incompetency, the commission of any crime, or for any other good and adequate reason as found by the Commission. The Commission shall give notice to such hearing examiner, along with written allegations as to the charges against him, and the same shall be heard by the Commission, and its decision shall be final. The compensation of the members of the Commission shall be on a per diem basis and shall be fixed by the Governor. The chairman of the Commission may be paid a higher rate of compensation than the other two members of the Commission. For the purpose of carrying out its duties and functions under this Article, two members of the Commission shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members of the Commission. On matters properly before the Commission the chairman may issue temporary orders, subpoenas, and other temporary types of orders subject to the subsequent review of the Commission. The issuance of subpoenas, orders to take depositions, orders requiring interrogatories and other procedural matters of evidence issued by the chairman shall not be subject to review.

(d) Every official act of the Commission shall be entered of record and its hearings and records shall be open to the public. The Commission is authorized and empowered to make such procedural rules as are necessary for the orderly transaction of its proceedings. Unless the Commission adopts a different rule, the proceedings, as nearly as possible, shall be in accordance with the Rules of Civil Procedure, G.S. 1A-1. The Commission may order testimony to be taken by deposition in any proceeding pending before it at any stage of such proceeding. Any person, firm or corporation, and its agents or officials, may be compelled to appear and testify and produce like documentary evidence before the Commission. Witnesses whose depositions are taken under this section, and the persons taking such depositions, shall be entitled to the same fees as are paid for like services in the courts of the State.

(e) The rules of procedure prescribed or adopted by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this section.

(f) Any member of the Commission may be removed by the Governor for inefficiency, neglect of duty, or any misfeasance or malfeasance in office. Before such removal the Governor shall give notice of hearing and state the allegations against the member of the Commission, and the same shall be heard by the Governor, and his decision shall be final. The principal office of the Commission shall be in Raleigh, North Carolina, but whenever it deems that the convenience of the public or of the parties may be promoted, or delay or expense may be minimized, the Commission may hold hearings or conduct other proceedings at any place in the State.

(g) In case of a contumacy, failure or refusal of any person to testify before the Commission, give any type of evidence, or to produce any books, records, papers, correspondence, memoranda or other records, such person upon such failure to obey the orders of the Commission may be punished for contempt or any other matter involving contempt as set forth and described by the general laws of the State. The Commission shall issue no order for contempt without first finding the facts involved in the proceeding. Witnesses appearing before the Commission shall be entitled to the same fees as those paid for the services of said witnesses in the courts of the State, and all such fees shall be taxed against the interested parties according to the judgment and discretion of the Commission.

(h) The Director shall consult with the chairman of the Commission with respect to the preparation and presentation to the Commission for adoption of all necessary forms or citations, notices of all kinds, forms of stop orders, all forms and orders imposing penalties and all forms of notices or applications for review by the Commission, and any and all other procedural papers and documents necessary for the administration of the Article as applied to employers and employees and for all procedures and proceedings brought before the Commission for review.

(i) A hearing examiner appointed by the chairman of the Commission shall hear, and make a determination upon, any proceeding instituted before the Commission and may hear any motion in connection therewith, assigned to the hearing examiner, and shall make a report of the determination which constitutes the hearing examiner's final disposition of the proceedings. A copy of the report of the hearing examiner shall be furnished to the Director and all interested parties involved in any appeal or any proceeding before the hearing examiner for the hearing examiner's determination. The report of the hearing examiner shall become the final order of the Commission 30 days from the date of the report as determined by the hearing examiner, unless within the 30-day period any member of the Commission had directed that the report shall be reviewed by the entire Commission as a whole. Upon application for review of any report or determination of a hearing examiner, before the 30-day period expires, the Commission shall schedule the matter for hearing, on the record, except the Commission may allow the introduction of newly discovered evidence, or in its discretion the taking of further evidence upon any question or issue. All interested parties to the original hearing shall be notified of the date, time and place of the hearing and shall be allowed to appear in person or by attorney at the hearing. Upon review of the report and determination by the hearing examiner the Commission may adopt, modify or vacate the report of the hearing examiner and notify the interested parties. The report of the hearing examiner, and the report, decision, or determination of the Commission upon review shall be in writing and shall include findings of fact, conclusions of law, and the reasons or bases for them, on all the material issues of fact, law, or discretion presented on the record. The report, decision or determination of the Commission upon review shall be final unless further appeal is made to the courts under the provisions of Chapter 150B of the General Statutes, as amended, entitled: "Judicial Review of Decisions of Certain Administrative Agencies."

(j) Repealed by Session Laws 1993, c. 300, s. 1. (1973, c. 295, s. 10; c. 1331, s. 3; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 955, ss. 6, 7; 1987, c. 827, s. 1; 1987 (Reg. Sess., 1988), c. 1111, s. 10; 1993, c. 300, s. 1; c. 474, s. 1; 2005-133, ss. 1, 5; 2006-203, s. 21.)

Editor's Note. — Subsection (j) of this section, concerning appeals from citations and abatement periods and penalties involving agricultural employers, was repealed by Session Laws 1993, c. 300, s. 1. For current similar provisions, see G.S. 95-137(b).

"Judicial Review of Decisions of Certain Administrative Agencies," referred to in subsection (i), is the title of former Article 33 of Chapter 143. Chapter 150B is entitled the "Administrative Procedure Act."

Session Laws 2005-133, s. 1, as amended by Session Laws 2006-226, s. 30, effective June 29, 2005, provides: "Under the Occupational Safety and Health Act of North Carolina, the name of the Safety and Health Review Board is changed to the North Carolina Occupational Safety and Health Review Commission. The Revisor of Statutes is authorized to substitute the term 'Commission' for the term 'Board' wherever that term appears in the General Statutes in relation to the Act. The Revisor of Statutes is also authorized to insert the words 'North Carolina Occupational' in front of the phrase 'Safety and Health Review Commission' wherever that phrase appears in the General Statutes in relation to the Act."

Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — Session Laws 2006-203, s. 21, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, deleted the last sentence in subsection (c), which reads "Prior to taking any action under this subsection to set compensation, the Governor may consult with the Advisory Budget Commission."

Legal Periodicals. — For article, "Proving Violations or Proving Affirmative Defenses Under the Occupational Safety and Health Act of North Carolina," see 18 N.C. Cent. L.J. 99 (1989).

CASE NOTES

Board Complied with Authority. — In an appeal from a decision of a hearing examiner that respondent's violation of the Occupational Safety and Health Act was not repeated and serious and merited no penalty, the Safety and Health Review Board [now the Occupational Safety and Health Review Commission] complied with its function and authority to adopt, modify or vacate the order of the hearing examiner where the board's order restated the findings of fact made by the hearing examiner almost verbatim, narrated some of the evidence, and made additional findings, and where the decision portion of the order modified the order of the hearing examiner so as to conclude that the cited violation was repeated and serious and justified a penalty of $2,500. Brooks v. McWhirter Grading Co., 49 N.C. App. 352, 271 S.E.2d 568 (1980), rev'd on other grounds, 303 N.C. 573, 281 S.E.2d 24 (1981).

Cited in Brooks v. McWhirter Grading Co., 303 N.C. 573, 281 S.E.2d 24 (1981); Associated Mechanical Contractors v. Payne, 342 N.C. 825, 467 S.E.2d 398 (1996).

§ 95-136. Inspections.

(a) In order to carry out the purposes of this Article, the Commissioner or Director, or their duly authorized agents, upon presenting appropriate credentials to the owner, operator, or agent in charge, are authorized:

(1) To enter without delay, and at any reasonable time, any factory, plant, establishment, construction site, or other area, work place or environment where work is being performed by an employee of an employer; and

(2) To inspect and investigate during regular working hours, and at other reasonable times, and within reasonable limits, and in a reasonable manner, any such place of employment and all pertinent conditions, processes, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

(3) The Commissioner or Director, or their duly authorized agents, shall reinspect any place of employment where a willful serious violation was found to exist during the previous inspection and a final Order has been entered.

(b) In making his inspections and investigations under this Article, the Commissioner may issue subpoenas to require the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be reimbursed for all travel and other necessary expenses which shall be claimed and paid in accordance with the prevailing travel regulations of the State. In case of a failure or refusal of any person to obey a subpoena under this section, the district judge or superior court judge of the county in which the inspection or investigation is conducted shall have jurisdiction upon the application of the Commissioner to issue an order requiring such person to appear and testify or produce evidence as the case may require, and any failure to obey such order of the court may be punished by such court as contempt thereof.

(c) Subject to regulations issued by the Commissioner a representative of the employer and an employee authorized by the employees shall be given an opportunity to consult with or to accompany the Commissioner, Director, or their authorized agents, during the physical inspection of any work place described under subsection (a) for the purpose of aiding such inspection. Where there is no authorized employee representative, the Commissioner, Director, or their authorized agents, shall consult with a reasonable number of employees concerning matters of health and safety in the work place.

(d)(1) Any employees or an employee representative of the employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice of such violation or danger to the Commissioner or Director. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by employees or the employee representatives of the employees, and a copy shall be provided the employer or his agent no later than at the time of inspection. Upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy of any record published, released or made available pursuant to subsection (e) of this section. If upon receipt of such notification the Commissioner or Director determines there are reasonable grounds to believe that such violation or danger exists, the Commissioner or Director or their authorized agents shall promptly make a special investigation in accordance with the provisions of this section as soon as practicable to determine if such violation or danger exists. If the Commissioner or

Director determines there are not reasonable grounds to believe that a violation or danger exists he shall notify the employees or representatives of the employees, in writing, of such determination.

(2) Prior to, during and after any inspection of a work place, any employees or representative of employees employed in such work place may notify the inspecting Commissioner, Director, or their agents, in writing, of any violation of this Article which they have reason to believe exists in such work place. The Commissioner shall, by regulation, establish procedures for informal review of any refusal by a representative of the Commissioner or Director to issue a citation with respect to any such alleged violation and shall furnish the employees or representatives of employees requesting such review a written statement of the reason for the Commissioner's or Director's final disposition of the case.

(e) The Commissioner is authorized to compile, analyze, and publish, in summary or detailed form, all reports or information obtained under this section. Files and other records relating to investigations and enforcement proceedings pursuant to this Article shall not be subject to inspection and examination as authorized by G.S. 132-6 while such investigations and proceedings are pending, except that, subject to the provisions of subsection (e1) of this section, an employer cited under the provisions of this Article is entitled to receive a copy of the official inspection report which is the basis for citations received by the employer following the issuance of citations.

(e1) Upon the written request of and at the expense of the requesting party, official inspection reports of inspections conducted pursuant to this Article shall be available for release in accordance with the provisions contained in this subsection and subsection (e) of this section. The names of witnesses or complainants, and any information within statements taken from witnesses or complainants during the course of inspections or investigations conducted pursuant to this Article that would name or otherwise identify the witnesses or complainants, shall not be released to any employer or third party and shall be redacted from any copy of the official inspection report provided to the employer or third party. Witness statements that are in the handwriting of the witness or complainant shall, upon the request of and at the expense of the requesting party, be transcribed so that information that would not name or otherwise identify the witness may be released. A witness or complainant may, however, sign a written release permitting the Commissioner to provide information specified in the release to any persons or entities designated in the release. Nothing in this section shall be construed to prohibit the use of the name or statement of a witness or complainant by the Commissioner in enforcement proceedings or hearings held pursuant to this Article. The Commissioner shall make available to the employer 10 days prior to a scheduled enforcement hearing unredacted copies of: (i) the witness statements the Commissioner intends to use at the enforcement hearing, (ii) the statements of witnesses the Commissioner intends to call to testify, or (iii) the statements of witnesses whom the Commissioner does not intend to use that might support an employer's affirmative defense or otherwise exonerate the employer; provided a written request for the statement or statements is received by the Commissioner no later than 12 days prior to the enforcement hearing. If the request for an unredacted copy of the witness statement or statements is received less than 12 days before a hearing, the statement or statements shall be made available as soon as practicable. The Commissioner may permit the use of names and statements of witnesses and complainants and information obtained during the course of inspections or investigations conducted pursuant to this Article by public officials in the performance of their public duties.

(f)(1) Inspections conducted under this section shall be accomplished without advance notice, subject to the exception in subdivision (2) below this subsection.

(2) The Commissioner or Director may authorize the giving to any employer or employee advance notice of an inspection only when the giving of such notice is essential to the effectiveness of such inspection, and in keeping with regulations issued by the Commissioner.

(g) The Commissioner shall prescribe such rules and regulations as he may deem necessary to carry out his responsibilities under this Article, including rules and regulations dealing with the inspection of an employer's establishment. (1973, c. 295, s. 11; 1993, c. 317, ss. 1, 2; 1999-364, ss. 1, 2; 2003-174, s. 1.)

Legal Periodicals. — For survey of 1979 constitutional law, see 58 N.C.L. Rev. 1326 (1980).

For article, "Proving Violations or Proving Affirmative Defenses Under the Occupational Safety and Health Act of North Carolina," see 18 N.C. Cent. L.J. 99 (1989).

CASE NOTES

Constitutionality. — Subsection (a) of this section is essentially identical to § 8(a) of the Federal Occupational Safety and Health Act of 1970, 29 U.S.C. § 657(a), which the United States Supreme Court found unconstitutional in Marshall v. Barlow's, Inc., 436 U.S. 307, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978). Gooden v. Brooks, 39 N.C. App. 519, 251 S.E.2d 698, appeal dismissed, 298 N.C. 806, 261 S.E.2d 919 (1979), cert. denied, 454 U.S. 1097, 102 S. Ct. 670, 70 L. Ed. 2d 638 (1981).

Subsection (a) of this section violates the U.S. Const., Amends. I and XIV to the extent it authorizes warrantless searches. Gooden v. Brooks, 39 N.C. App. 519, 251 S.E.2d 698, appeal dismissed, 298 N.C. 806, 261 S.E.2d 919 (1979), cert. denied, 454 U.S. 1097, 102 S. Ct. 670, 70 L. Ed. 2d 638 (1981).

Ex parte warrant proceedings are authorized under the rules and regulations of the federal Occupational Safety and Health Act and this Article and have been judicially approved by case law. Brooks v. Butler, 70 N.C. App. 681, 321 S.E.2d 440 (1984), cert. denied, 313 N.C. 327, 329 S.E.2d 385 (1985).

Probable cause for an administration inspection warrant may be based on (1) specific evidence of an existing violation, or (2) a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular establishment. In order to meet the requirements of the second standard, an applicant for an inspection warrant must show that: (1) there exists a legally authorized inspection program which naturally included the property; (2) the general administrative enforcement plan is based on reasonable legislative or administrative standards; and (3) the administrative standards are being applied to the particular establishment on a neutral basis. Brooks v. Butler, 70 N.C. App. 681, 321 S.E.2d 440 (1984), cert. denied, 313 N.C. 327, 329 S.E.2d 385 (1985).

The fact that the warrant application fails to state that affiant has no higher priority inspection pending does not invalidate the warrant. Brooks v. Butler, 70 N.C. App. 681, 321 S.E.2d 440 (1984), cert. denied, 313 N.C. 327, 329 S.E.2d 385 (1985).

Warrant Not Overbroad. — A warrant authorizing inspection of "all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials, and all other things. . ." is not overbroad. A warrant authorizing a general inspection of an industry naturally contemplates a comprehensive inspection, since the location of possible violations is unknown. Brooks v. Butler, 70 N.C. App. 681, 321 S.E.2d 440 (1984), cert. denied, 313 N.C. 327, 329 S.E.2d 385 (1985).

Cited in Brooks v. Taylor Tobacco Enters. Inc., 39 N.C. App. 529, 251 S.E.2d 656 (1979); Brooks v. Taylor Tobacco Enters. Inc., 298 N.C. 759, 260 S.E.2d 419 (1979).

§ 95-136.1. Special emphasis inspection program.

(a) As used in this section, a "special emphasis inspection" is an inspection by the Department's occupational safety and health division that is scheduled because of an employer's high frequency of violations of safety and health laws or because of an employer's high risk or high rate of work-related fatalities or work-related serious injuries or illnesses.

(b) The Department shall develop and implement a special emphasis inspection program that targets for special emphasis inspection employers who:

(1) Have a high rate of serious or willful violations of any standard, rule, order, or other requirement under this Article, or of regulations prescribed pursuant to the Federal Occupational Safety and Health Act of 1970, in a one-year period;

(2) Have a high rate of work-related deaths, or a high rate of work-related serious injuries or illnesses, in a one-year period; or

(3) Are engaged in a type of industry determined by the Department to be at high risk for serious or fatal work-related injuries or illnesses.

(4) Repealed by Session Laws 1997-443, s. 17(b).

To identify an employer for a special emphasis inspection, the Department shall use the most current data available from its own database and from other sources, including State departments, divisions, boards, commissions, and other State entities. The Department shall ensure that every employer targeted for a special emphasis inspection is inspected at least one time within the two-year period following targeting of the employer by the Department. The Department shall update its special emphasis inspection records at least annually.

(c) The Director shall make information about the special emphasis inspection program available prior to the date of implementation of the program.

(d) The Department shall by March 1, 1995, and annually thereafter, report to the Joint Legislative Commission on Governmental Operations and the Fiscal Research Division of the General Assembly on the impact of the special emphasis inspection program on safety and health compliance and enforcement. (1991 (Reg. Sess., 1992), c. 924, s. 1; 1997-443, s. 17(b).)

§ 95-137. Issuance of citations.

(a) If, upon inspection or investigation, the Director or his authorized representative has reasonable grounds to believe that an employer has not fulfilled his duties as prescribed in this Article, or has violated any standard, regulation, rule or order promulgated under this Article, he shall with reasonable promptness issue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provisions of the act, standards, rules and regulations, or orders alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The Director may prescribe procedures for the issuance of a notice in lieu of a citation with respect to de minimus violations which have no direct or immediate relationship to safety or health. Each citation or notice in lieu of citation issued under this section, or a copy or copies thereof, shall be prominently posted, as prescribed in regulations issued by the Director, at or near such place a violation referred to in the citation occurred.

(b) Procedure for Enforcement. —

(1) If, after an inspection or investigation, the Director issues a citation under any provisions of this Article, the Director shall, within a reasonable time after the termination of such inspection or investigation, notify the employer by certified mail with return receipt, by signature confirmation as provided by the U.S. Postal [Service], by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) with delivery receipt, or via hand delivery of any penalty, if any, the Director has recommended to the Commissioner to be

proposed under the provisions of this Article and that the employer has 15 working days within which to notify the Director that the employer wishes to:

a. Contest the citation or proposed assessment of penalty; or

b. Request an informal conference.

Following an informal conference, unless the employer and Department have entered into a settlement agreement, the Director shall send the employer an amended citation or notice of no change. The employer has 15 working days from the receipt of the amended citation or notice of no change to notify the Director that the employer wishes to contest the citation or proposed assessment of penalty, whether or not amended. If, within 15 working days from the receipt of the notice issued by the Director, the employer fails to notify the Director that the employer requires an informal conference to be held or intends to contest the citation or proposed assessment of penalty, and no notice is filed by any employee or representative of employees under the provisions of this Article within such time, the citation and the assessment as proposed to the Commissioner shall be deemed final and not subject to review by any court.

(2) If the Director has reason to believe that an employer has failed to correct a violation for which a citation has been issued within the period permitted for its correction (which period shall not begin to run until the entry of a final order by the Commission in case of any review proceedings under this Article initiated by the employer in good faith and not solely for a delay or avoidance of penalties), the Director shall notify the employer by certified mail with return receipt, by signature confirmation as provided by the U.S. Postal Service, by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) with delivery receipt, or via hand delivery of such failure and of the penalty proposed to be assessed under this Article by reason of such failure and that the employer has 15 working days within which to notify the Director that the employer wishes to contest the Director's notification of the proposed assessment of penalty. If, within 15 working days from the receipt of notification issued by the Director, an employer fails to notify the Director that the employer intends to contest the notification or proposed recommendation of penalty, the notification and the proposed assessment made by the Director shall be final and not subject to review by any court.

(3) No citation may be issued under this section after the expiration of six months following the occurrence of any violation.

(4) If an employer notifies the Director that the employer intends to contest a citation issued under the provisions of this Article or notification issued under the provisions of this Article, or if, within 15 working days of the receipt of a citation under this Article, any employee or representative thereof files a notice with the Director alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Director shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing. The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Director's citation or the proposed penalty fixed by the Commissioner, or directing other appropriate relief, and such order shall become final 30 days after its issuance. Upon showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that an abatement has not been completed because of factors beyond the employer's reasonable control, the Director, after

an opportunity for a hearing as provided in this Article, shall issue an order affirming or modifying the abatement requirements in such citation. The rules of procedure prescribed by the chairman of the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this section.

(5) Repealed by Session Laws 1993, c. 300, s. 2.

(6) Each local unit of government shall report each violation for which it is issued a citation to its local governing board at its next public meeting and to its workers compensation insurance carrier or to the risk pool of which it is a member pursuant to Article 23 of Chapter 58 of the General Statutes. (1973, c. 295, s. 12; 1987 (Reg. Sess., 1988), c. 1111, s. 11; 1991 (Reg. Sess., 1992), c. 1020, ss. 2, 3; 1993, c. 300, s. 2; 2003-308, s. 6; 2005-133, ss. 6, 7; 2007-231, s. 10.)

Editor's Note. — This section was amended by Session Laws 2007-231, s. 10, in the coded bill drafting format provided by G.S. 120-20.1. In subdivision (b)(1), the word "Service" was inserted without coding. Subdivision (b)(1) has been set out in the form above at the direction of the Revisor of Statutes.

Session Laws 2005-133, s. 1, as amended by Session Laws 2006-226, s. 30, effective June 29, 2005, provides: "Under the Occupational Safety and Health Act of North Carolina, the name of the Safety and Health Review Board is changed to the North Carolina Occupational Safety and Health Review Commission. The Revisor of Statutes is authorized to substitute the term 'Commission' for the term 'Board' wherever that term appears in the General Statutes in relation to the Act. The Revisor of Statutes is also authorized to insert the words 'North Carolina Occupational' in front of the phrase 'Safety and Health Review Commission' wherever that phrase appears in the General Statutes in relation to the Act."

Effect of Amendments. — Session Laws 2007-231, s. 10, effective July 18, 2007, substituted "mail with return receipt, by signature confirmation as provided by the U.S. Postal Service" for "mail," in subdivisions (b)(1) and (b)(2).

Legal Periodicals. — For article, "Proving Violations or Proving Affirmative Defenses Under the Occupational Safety and Health Act of North Carolina," see 18 N.C. Cent. L.J. 99 (1989).

CASE NOTES

Constitutionality. — See House of Raeford Farms, Inc. v. Brooks, 63 N.C. App. 106, 304 S.E.2d 619 (1983), cert. denied, 310 N.C. 153, 311 S.E.2d 291 (1984).

Violations of Occupational Safety and Health Act. — The General Assembly determined that the State and its agencies can be issued citations for violations of the Occupational Safety and Health Act which are enforceable by proceedings before the Safety and Health Review Board [now the Occupational Safety and Health Review Commission]. Brooks v. North Carolina DOT, 115 N.C. App. 163, 443 S.E.2d 897, cert. denied, 338 N.C. 308, 451 S.E.2d 632 (1994).

For cases construing notice provision contained in the Federal Occupational Safety and Health Act of 1970 (29 U.S.C. § 659(a)), see House of Raeford Farms, Inc. v. Brooks, 63 N.C. App. 106, 304 S.E.2d 619 (1983), cert. denied, 310 N.C. 153, 311 S.E.2d 291 (1984).

Cited in O.S. Steel Erectors v. Brooks, 84 N.C. App. 630, 353 S.E.2d 869 (1987); Associated Mechanical Contractors v. Payne, 342 N.C. 825, 467 S.E.2d 398 (1996).

§ 95-138. Civil penalties.

(a) The Commissioner, upon recommendation of the Director, or the North Carolina Occupational Safety and Health Review Commission in the case of an appeal, shall have the authority to assess penalties against any employer who violates the requirements of this Article, or any standard, rule, or order adopted under this Article, as follows:

(1) A minimum penalty of five thousand dollars ($5,000) to a maximum penalty of seventy thousand dollars ($70,000) may be assessed for each willful or repeat violation.

(2) A penalty of up to seven thousand dollars ($7,000) shall be assessed for each serious violation.

(2a) A penalty of up to seven thousand dollars ($7,000) may be assessed for each violation that is adjudged not to be of a serious nature.

(3) A penalty of up to seven thousand dollars ($7,000) may be assessed against an employer who fails to correct and abate a violation, within the period allowed for its correction and abatement, which period shall not begin to run until the date of the final Order of the Commission in the case of any appeal proceedings in this Article initiated by the employer in good faith and not solely for the delay of avoidance of penalties. The assessment shall be made to apply to each day during which the failure or violation continues.

(4) A penalty of up to seven thousand dollars ($7,000) shall be assessed for violating the posting requirements, as required under the provisions of this Article.

(b) The Commissioner shall adopt uniform standards that the Commissioner, the Commission, and the hearing examiner shall apply when determining appropriateness of the penalty. The following factors shall be used in determining whether a penalty is appropriate:

(1) Size of the business of the employer being charged.

(2) The gravity of the violation.

(3) The good faith of the employer.

(4) The record of previous violations; provided that for purposes of determining repeat violations, only the record within the previous three years is applicable.

The report of the hearing examiner and the report, decision, or determination of the Commission on appeal shall specify the standards applied in determining the reduction or affirmation of the penalty assessed by the Commissioner.

(c) The clear proceeds of all civil penalties and interest recovered by the Commissioner, together with the costs thereof, shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1973, c. 295, s. 13; 1987 (Reg. Sess., 1988), c. 1111, s. 12; 1989 (Reg. Sess., 1990), c. 844; 1991, c. 329, s. 1; c. 761, s. 17; 1993, c. 474, s. 2; 1998-215, s. 111; 2004-203, s. 39(a); 2005-133, s. 8; 2006-39, s. 3.)

Editor's Note. — Session Laws 2005-133, s. 1, as amended by Session Laws 2006-226, s. 30, effective June 29, 2005, provides: "Under the Occupational Safety and Health Act of North Carolina, the name of the Safety and Health Review Board is changed to the North Carolina Occupational Safety and Health Review Commission. The Revisor of Statutes is authorized to substitute the term 'Commission' for the term 'Board' wherever that term appears in the General Statutes in relation to the Act. The Revisor of Statutes is also authorized to insert the words 'North Carolina Occupational' in front of the phrase 'Safety and Health Review Commission' wherever that phrase appears in the General Statutes in relation to the Act."

Effect of Amendments. — Session Laws 2006-39, s. 3, effective June 30, 2006, in the introductory paragraph of subsection (a), substituted "shall have the authority to assess" for "may assess" preceding "penalties against any" and substituted "adopted under" for "promulgated pursuant to" following "or any standard, rule, or order"; added "may be assessed" following "seventy thousand dollars ($70,000)" in subdivision (a)(1); rewrote subdivision (a)(2); added subdivision (a)(2a); in subdivision (a)(3), rewrote the first sentence and added the last sentence; and rewrote subdivision (a)(4).

Legal Periodicals. — For article, "Proving Violations or Proving Affirmative Defenses Under the Occupational Safety and Health Act of North Carolina," see 18 N.C. Cent. L.J. 99 (1989).

For a survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2252 (1997).

CASE NOTES

When Act Is Willful. — An act is willful when there exists a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another or some duty assumed by contract or imposed by law. Prevette v. Clark Equip. Co., 62 N.C. App. 272, 302 S.E.2d 639 (1983).

What Constitutes "Repeated" Violation. — In order for a violation to be repeated, it must be against the same employer and it must also be substantially similar to prior violations. Brooks v. McWhirter Grading Co., 303 N.C. 573, 281 S.E.2d 24 (1981).

A subsequent OSHA violation by the same employer substantially similar to a prior violation or violations is a "repeated" violation only if the employer should have known of the standard by virtue of the prior citation or citations. Factors which should be considered in determining whether the employer should have known of the standard are the extent to which the condition was obviously unsafe, the proximity in time to the prior citation, whether management or key employees had changed between citations, and the number of prior substantially similar violations. Brooks v. McWhirter Grading Co., 303 N.C. 573, 281 S.E.2d 24 (1981).

Where two alleged OSHA violations are of different subsections of the same standard and involve the same hazard, the second violation can form the basis of the citation for a "repeated" violation. Brooks v. McWhirter Grading Co., 303 N.C. 573, 281 S.E.2d 24 (1981).

Burden of Showing "Serious" Violation. — In order to establish a serious OSHA violation under this section, the Commissioner of Labor must show by substantial evidence that the violation created a possibility of an accident, a substantially probable result of which was death or serious physical injury. Brooks v. McWhirter Grading Co., 303 N.C. 573, 281 S.E.2d 24 (1981).

Violation of OSHA Rule Not Negligence Per Se. — Since a willful violation of an Occupational Safety and Health Act rule constitutes a misdemeanor only if said violation causes the death of an employee, and for all other violations, the sanction is a possible civil penalty assessed by the Commissioner, the adopted OSHA regulations are not penal in nature, and, therefore, a violation does not constitute negligence per se. Cowan v. Laughridge Constr. Co., 57 N.C. App. 321, 291 S.E.2d 287 (1982).

Fine of $1800 for a "willful-serious" violation in allowing an employee to work on steel beams 30 feet off the ground without safety nets or a safety belt was well within the established guidelines for a violation of this nature. O.S. Steel Erectors v. Brooks, 84 N.C. App. 630, 353 S.E.2d 869 (1987).

§ 95-139. Criminal penalties.

Any employer who willfully violates any standard, rule, regulation or order promulgated pursuant to the authority of this Article, and said violation causes the death of any employee, shall be guilty of a Class 2 misdemeanor, which may include a fine of not more than ten thousand dollars ($10,000); except that if the conviction is for a violation committed after a first conviction of such person, the employer shall be guilty of a Class 1 misdemeanor which may include a fine of not more than twenty thousand dollars ($20,000). This section shall not prevent any prosecuting officer of the State of North Carolina from proceeding against such employer on a prosecution charging any degree of willful or culpable homicide. Any person who gives advance notice of any inspection to be conducted under this Article, without authority from the Commissioner, Director, or any of their agents to whom such authority has been delegated, shall be guilty of a Class 2 misdemeanor. Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or any other document filed or required to be maintained pursuant to this Article, shall be guilty of a Class 2 misdemeanor, which may include a fine of not more than ten thousand dollars ($10,000). Whoever shall commit any kind of assault upon or whoever kills a person engaged in or on account of the performance of investigative, inspection, or law-enforcement functions shall be subject to prosecution under the general criminal laws of the State and upon such charges as the proper prosecuting officer shall charge or allege. (1973, c. 295, s. 14; 1993, c. 539, s. 671; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Violation of OSHA Rule Not Negligence Per Se. — Since a willful violation of an Occupational Safety and Health Act rule constitutes a misdemeanor only if said violation causes the death of an employee, and for all other violations, the sanction is a possible civil penalty assessed by the Commissioner, the adopted OSHA regulations are not penal in nature, and, therefore, a violation does not constitute negligence per se. Cowan v. Laughridge Constr. Co., 57 N.C. App. 321, 291 S.E.2d 287 (1982).

§ 95-140. Procedures to counteract imminent dangers.

(a) The superior courts of this State shall have jurisdiction, upon petition of the Commissioner, to restrain any conditions or practices in any place of employment which are such that a danger exists, which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Article. Any order issued under this section may require such steps to be taken as may be necessary to avoid, correct, or remove such imminent danger and prohibit the employment or presence of any individual in locations or under conditions where such imminent danger exists, except those individuals whose presence is necessary to avoid, correct or remove such imminent danger or to maintain the capacity of a continuous process operation to assume normal operations without a complete cessation of operations, or where a cessation of operations is necessary to permit such to be accomplished in a safe and orderly manner.

(b) Upon the filing of any such petition the superior court shall, without the necessity of showing an adequate remedy at law, have jurisdiction to grant injunctive relief or temporary restraining order pending the outcome of an enforcement proceeding pursuant to this Article. The proceeding shall be as provided under the statutes and Rules of Civil Procedure of this State except that no temporary restraining order issued without notice shall be effective for a period longer than five days.

(c) Whenever and as soon as an inspector concludes that conditions or practices described in this section exist in any place of employment, he shall inform the affected employees and employers of the danger and that he is recommending to the Commissioner that relief be sought. If the Commissioner arbitrarily or capriciously fails to seek relief under this section, any employee who may be injured by reason of such failure, or the representative of such employee, may bring an action against the Commissioner in the superior court of the district in which the imminent danger is alleged to exist or the employer has its principal office or place of business, for a writ of mandamus to compel the Commissioner to seek such an order for such relief as may be appropriate. (1973, c. 295, s. 15.)

Editor's Note. — The Rules of Civil Procedure are found in G.S. 1A-1.

§ 95-141. Judicial review.

Any person or party in interest who has exhausted all administrative remedies available under this Article and who is aggrieved by a final decision in a contested case is entitled to judicial review in accordance with Article 4 of Chapter 150B of the General Statutes. The Commissioner may file in the office of the clerk of the superior court of the county wherein the person, firm or corporation under order resides, or, if a corporation is involved, in the county wherein the corporation maintains its principal place of business, or in the county wherein the violation occurred, a certified copy of a final order of the

Commissioner unappealed from, or of a final order of the Commissioner affirmed upon appeal. Whereupon, the clerk of said court shall enter judgment in accordance therewith and notify the parties. Such judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though said judgment had been rendered in a suit duly heard and determined by the superior court of the General Court of Justice. (1973, c. 295, s. 16; c. 1331, s. 3; 1987, c. 827, s. 265.)

Legal Periodicals. — For article, "Proving Violations or Proving Affirmative Defenses Under the Occupational Safety and Health Act of North Carolina," see 18 N.C. Cent. L.J. 99 (1989).

CASE NOTES

Judicial review of Occupational Safety and Health Act (OSHA) Review Board decisions is under the Administrative Procedure Act (Article 4 of Chapter 150B). Brooks v. Austin Berryhill Fabricators, Inc., 102 N.C. App. 212, 401 S.E.2d 795 (1991).

Cited in Brooks v. McWhirter Grading Co., 303 N.C. 573, 281 S.E.2d 24 (1981); House of Raeford Farms, Inc. v. Brooks, 63 N.C. App. 106, 304 S.E.2d 619 (1983); Daniel Constr. Co. v. Brooks, 73 N.C. App. 426, 326 S.E.2d 339 (1985); O.S. Steel Erectors v. Brooks, 84 N.C. App. 630, 353 S.E.2d 869 (1987); Brooks v. Dover Elevator Co., 94 N.C. App. 139, 379 S.E.2d 707 (1989); Brooks v. BCF Piping, Inc., 109 N.C. App. 26, 426 S.E.2d 282 (1993); Associated Mechanical Contractors v. Payne, 342 N.C. 825, 467 S.E.2d 398 (1996); Yates Constr. Co. v. Commissioner of Labor, 126 N.C. App. 147, 484 S.E.2d 430 (1997).

§ 95-142. Legal representation of the Department of Labor.

It shall be the duty of the Attorney General to represent the Department of Labor or designate some member of his staff to represent them in all actions or proceedings in connection with this Article. (1973, c. 295, s. 17.)

§ 95-143. Record keeping and reporting.

(a) Each employer shall make available to the Commissioner, or his agents, in such manner as the Commissioner shall require, copies of the same records and reports regarding his activities relating to this Article as are required to be made, kept, or preserved by section 8(c) of the Federal Occupational Safety and Health Act of 1970 (P.L. 91-596) and regulations made pursuant thereto.

(b) Each employer shall make, keep and preserve and make available to the Commissioner such records regarding his activities relating to this Article as the Commissioner may prescribe by regulation as necessary and appropriate for the enforcement of this Article or for developing information regarding the causes and prevention of occupational accidents and illnesses. In order to carry out the provisions of this section such regulations may include provisions requiring employers to conduct periodic inspections. The Commissioner shall also issue regulations requiring that employers, through posting of notices or other appropriate means, keep the employees informed of their protections and obligations under this Article, including the provisions of applicable standards. The Commissioner shall prescribe regulations requiring employers to maintain accurate records of, and to make reports at least annually on, work-related deaths, injuries and illnesses other than minor injuries requiring only first-aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job.

(c) The Commissioner shall issue regulations requiring employers to maintain accurate records of employee exposure to potentially toxic materials of [or] harmful physical agents which are required to be monitored or measured under this Article. Such regulations shall provide employees or their representatives with an opportunity to observe such monitoring or measuring, and to have access to the records thereof. Such regulations shall also make appropriate provisions for each employee or former employee to have access to such records as will indicate his own exposure to toxic materials or harmful physical agents. Each employer shall promptly notify any employee who has been or is being exposed to toxic materials or harmful physical agents in concentrations or at levels which exceed those prescribed by an applicable safety and health standard promulgated under this Article and shall inform any employee who is being thus exposed of the corrective action being taken.

(d) Any information obtained by the Commissioner or his duly authorized agents under this Article shall be obtained with a minimum burden upon employers, especially those operating small businesses. Unnecessary duplication of efforts in obtaining information shall be reduced to the maximum extent feasible. (1973, c. 295, s. 18; 1991 (Reg. Sess., 1992), c. 894, s. 1.)

§ 95-144. Statistics.

(a) In order to further the purposes of this Article, the Commissioner shall develop and maintain an effective program of collection, compilation, and analysis of occupational safety and health statistics. The Commissioner shall compile accurate statistics on work injuries and illnesses which shall include all disabling, serious or significant injuries or illnesses, whether or not involving loss of time from work, other than minor injuries requiring only first-aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job. On the basis of records made and kept pursuant to the provisions of this Article, employers shall file such reports with the Commissioner as he shall prescribe by regulations and as may be necessary to carry out his functions.

(b) A listing of employment by area and industry of employers who have an assigned account number by the Employment Security Commission shall be supplied annually to the Commissioner by the Employment Security Commission of this State. The listing of employment by area and industry shall contain at least the following: employer name; Employment Security Commission account number; indication of whether multiple or a single report unit; number of reporting units; average employment; establishment size code; geographical area; any four-digit code; and any other information deemed necessary by the Commissioner to meet federal reporting requirements. (1973, c. 295, s. 19.)

§ 95-145. Reports to the Secretary.

(a) The Commissioner shall require employers in the State to make reports to the Secretary in the same manner and to the same extent as if the plan in force under this Article were not in effect, and

(b) The Commissioner shall make such reports to the Secretary in such form and containing such information as the Secretary from time to time shall require. (1973, c. 295, s. 20.)

§ 95-146. Continuation and effectiveness of this Article.

The Commissioner shall from time to time furnish to the Secretary information and assurances that this Article is being administered by adequate methods and by standards and enforcement procedures which are and will continue to be as effective as federal standards. (1973, c. 295, s. 21.)

§ 95-147. Training and employee education.

(a) The Commissioner, after consultation with appropriate departments and agencies of the State and subdivisions of government, shall conduct, directly or by grants or contracts, (i) education programs to provide an adequate supply of qualified personnel to carry out the purposes of this Article, and (ii) informational, educational and training programs on the importance of and proper use of adequate safety and health equipment to encourage voluntary compliance.

(b) The Commissioner is also authorized to conduct, directly or by grants or contracts, short-term training of personnel engaged in work related to the Commissioner's responsibilities under this Article.

(c) The Commissioner shall provide employers and employees programs covering recognition, avoidance and prevention of unsafe and unhealthful working conditions in places of employment and shall advise employers and employees, or their representatives, [of] effective means to prevent occupational injuries and illnesses. (1973, c. 295, s. 22.)

§ 95-148. Safety and health programs of State agencies and local governments.

It shall be the responsibility of each administrative department, commission, board, division or other agency of the State and of counties, cities, towns and subdivisions of government to establish and maintain an effective and comprehensive occupational safety and health program which is consistent with the standards and regulations promulgated under this Article. The head of each agency shall:

(1) Provide safe and healthful places and conditions of employment, consistent with the standards and regulations promulgated by this Article;
(2) Acquire, maintain, and require the use of safety equipment, personal protective equipment, and devices reasonably necessary to protect employees;
(3) Consult with and encourage employees to cooperate in achieving safe and healthful working conditions;
(4) Keep adequate records of all occupational accidents and illnesses for proper evaluation and corrective action;
(5) Consult with the Commissioner as to the adequacy as to form and content of records kept pursuant to this section;
(6) Make an annual report to the Commissioner with respect to occupational accidents and injuries and the agency's program under this section.

The Commissioner shall transmit annually to the Governor and the General Assembly a report of the activities of the State agency and instrumentalities under this section. If the Commissioner has reason to believe that any local government program or program of any agency of the State is ineffective, he shall, after unsuccessfully seeking by negotiations to abate such failure, include this in his annual report to the Governor and the General Assembly, together with the reasons therefor, and may recommend legislation intended to correct such condition.

The Commissioner shall have access to the records and reports kept and filed by State agencies and instrumentalities pursuant to this section unless such records and reports are required to be kept secret in the interest of national defense, in which case the Commissioner shall have access to such information as will not jeopardize national defense.

Employees of any agency or department covered under this section are afforded the same rights and protections as granted employees in the private sector.

This section shall not apply to volunteer fire departments not a part of any municipality.

Any municipality with a population of 10,000 or less may exclude its fire department from the operation of this section by a resolution of the governing body of the municipality, except that the resolution may not exclude those firefighters who are employees of the municipality.

The North Carolina Fire and Rescue Commission shall recommend regulations and standards for fire departments. (1973, c. 295, s. 23; 1983, c. 164; 1985, c. 544; 1989, c. 750, s. 3; 1991 (Reg. Sess., 1992), c. 1020, s. 1.)

Legal Periodicals. — For comment, "From Andrews to Woodson and Beyond: The Development of the Intentional Tort Exception to the Exclusive Remedy Provision—Rescuing North Carolina Workers from Treacherous Waters," see 20 N.C. Cent. L.J. 164 (1992).

§ 95-149. Authority to enter into contracts with other State agencies and subdivisions of government.

The Commissioner may enter into contracts with the Department of Health and Human Services or any other State officer or State agency or State instrumentality, or any municipality, county, or other political subdivision of the State, for the enforcement, administration, and any other application of the provisions of this Article. (1973, c. 295, s. 24; 1989, c. 727, s. 24; 1997-443, s. 11A.35.)

§ 95-150. Assurance of adequate funds to enforce Article.

The Commissioner shall submit to the General Assembly a budget and request for appropriations to adequately administer this Article which shall be sufficient to give satisfactory assurance that this State will devote adequate funds to the administration and enforcement of the standards herein provided and the proper administration of this Article as required by federal standards. (1973, c. 295, s. 25.)

§ 95-151. Discrimination.

No employer, employee, or any other person related to the administration of this Article shall be discriminated against in any work, procedure, or employment by reason of sex, race, ethnic origin, or by reason of religious affiliation. (1973, c. 295, s. 26.)

§ 95-152. Confidentiality of trade secrets.

All information reported to or otherwise obtained by the Commissioner or his agents or representatives in connection with any inspection or proceeding under this Article which contains or which might reveal a trade secret shall be considered confidential, as provided by section 1905 of Title 18 of U.S.C., except as to carrying out this Article or when it is relevant in any proceeding under this Article. In any such proceeding the Commissioner, the Commission, or the court shall issue such orders as may be appropriate to protect the confidentiality of trade secrets. (1973, c. 295, s. 27; 2005-133, s. 9.)

Editor's Note. — Session Laws 2005-133, s. 1, as amended by Session Laws 2006-226, s. 30, effective June 29, 2005, provides: "Under the Occupational Safety and Health Act of North Carolina, the name of the Safety and Health Review Board is changed to the North Carolina Occupational Safety and Health Review Commission. The Revisor of Statutes is authorized to substitute the term 'Commission' for the term 'Board' wherever that term appears in the General Statutes in relation to the Act. The Revisor of Statutes is also authorized to insert the words 'North Carolina Occupational' in front of the phrase 'Safety and Health Review Commission' wherever that phrase appears in the General Statutes in relation to the Act."

§ 95-153: Reserved for future codification purposes.

§ 95-154. Authorization for similar safety and health federal-state programs.

Consistent with the requirements and conditions provided in this Article the State, upon the recommendation of the Commissioner of Labor and approval of the Governor, may enter into agreements or arrangements with other federal agencies for the purpose of administering occupational safety and health measures for such employees and employers within the State of North Carolina as may be covered by such federal safety and health statutes. (1973, c. 295, s. 29.)

§ 95-155. Construction of Article and severability.

This Article shall receive a liberal construction to the end that the safety and health of the employees of the State may be effectuated and protected. If any provision of this Article or the application thereof to any person or circumstance is held to be invalid, such invalidity shall not affect other provisions or applications of the Article which can be given effect without the invalid provision or application, and to this end the provisions of this Article are severable. (1973, c. 295, s. 30.)

§§ 95-156 through 95-160: Reserved for future codification purposes.

Article 17.

The Uniform Wage Payment Law of North Carolina.

§§ 95-161 through 95-172: Repealed by Session Laws 1979, c. 839, s. 2.

Cross References. — For present statute covering the subject matter of the repealed sections, see G.S. 95-25.1 et seq.

Article 18.

Identification of Toxic or Hazardous Substances.

Part 1. General Provisions.

§ 95-173. Short title.

This Article shall be cited as the Hazardous Chemicals Right to Know Act. (1985, c. 775, s. 1.)

Editor's Note. — Session Laws 2007-107, s. 4.1(a), effective July 1, 2007, provides: "Task Force Established. — There is established the Regulation of Hazardous Materials Facilities Task Force."

Session Laws 2007-107, s. 4.1(b), provides: "Definitions. — As used in this section 'hazardous material' means hazardous materials, as defined in G.S. 166A-21, hazardous waste, as defined in G.S. 130A-290, hazardous substances, as defined in G.S. 143-215.77, and hazardous chemicals, as defined in G.S. 95-174."

Session Laws 2007-107, s. 4.1(c), provides:

"Membership. — The Task Force shall consist of 15 members as follows:

"(1) The Secretary of Environment and Natural Resources or the Secretary's designee.

"(2) The Commissioner of Insurance or the Commissioner's designee.

"(3) Three persons appointed by the General Assembly upon recommendation of the Speaker of the House of Representatives, one of whom shall be a member of the North Carolina Association of Fire Marshals and one of whom shall be a fire marshal or inspector from the western region of the State.

"(4) Three persons appointed by the General Assembly upon recommendation of the President Pro Tempore of the Senate, one of whom shall be a member of the North Carolina Fire Chiefs Association and one of whom shall be a fire marshal or inspector from the eastern region of the State.

"(5) A member from one of the seven North Carolina Regional Response Teams for Hazardous Materials Response appointed by the Governor.

"(6) A fire marshal or inspector from the central region of the State appointed by the Governor.

"(7) Two members of the Building Code Council appointed by the Chair of the Council.

"(8) A person who is engaged in an industrial manufacturing process that uses hazardous chemicals, hazardous materials, or hazardous substances, or that generates hazardous waste appointed by the President of the Manufacturers and Chemical Industry Council of North Carolina.

"(9) An owner or operator of a commercial hazardous waste facility appointed by the Governor.

"(10) A member of the general public appointed by the Governor."

Session Laws 2007-107, s. 4.1(d), effective July 1, 2007, provides: "Appointments. — Appointments to the Task Force shall be made no later than 1 September 2007. A vacancy in the Task Force or as chair of the Task Force resulting from the resignation of a member or otherwise shall be filled in the same manner in which the original appointment was made."

Session Laws 2007-107, s. 4.1(e), effective July 1, 2007, provides: "Chair; Quorum; Meetings. — The President Pro Tempore of the Senate and the Speaker of the House of Representatives shall each designate one member to serve as cochair of the Task Force. The cochairs shall call the initial meeting of the Task Force on or before 1 October 2007. A majority of the members of the Task Force shall constitute a quorum. The Task Force may meet in the Legislative Building or the Legislative Office Building upon the approval of the Legislative Services Commission."

Session Laws 2007-107, s. 4.1(f), as amended by Session Laws 2007-495, s. 15(f), provides: "Duties of Task Force. — The Task Force shall study issues related to the treatment, storage, and disposal of hazardous materials and shall review all current fire code regulations regarding the commercial treatment, storage, and disposal of hazardous materials to ensure that the Code addresses the needs and safety of the citizens of the State. In particular, the Task Force shall:

"(1) Review the facts and issues related to the Environmental Quality Industrial Services facility fire in Apex, North Carolina, on 5 October 2006. The Task Force shall review the investigation report and determine whether the fire could have been prevented by additional, or more specific, State regulations.

"(2) Analyze all fire inspection or investigation reports of fires that have occurred at commercial facilities that treat, store, or dispose of hazardous materials within the past 10 years and determine if there is a trend in violations.

"(3) Review the current State Building Code with respect to allowable hazardous materials quantities and determine if the State Building Code should be amended to provide for an additional classification of mixed waste or unidentifiable materials.

"(4) Analyze the current definitions of high hazard facilities and high hazardous Group H classifications in the State Building Code and determine whether commercial facilities that treat, store, or dispose of hazardous materials should be classified so that mixed wastes and unidentifiable materials can be easily identified.

"(5) Review the current annual fire inspection process at permitted commercial hazardous waste facilities, as defined in G.S. 130A-295.01, that are treatment, storage, and disposal facilities to determine how the annual fire inspection can be conducted in collaboration with the inspection and permitting process of the Department of Environment and Natural Resources.

"(6) Review the sprinkler requirements under Section 903.2.4 of the State Building Code for facilities used to collect, store, process, treat, recycle, recover, or dispose of hazardous substance, as defined in 29 Code of Federal Regulations § 1910.120 (a)(3) (1 July 2006 Edition), and determine whether sprinkler design criteria and coverage should be amended.

"(7) Review the fire alarm requirements under Section 903.2.4 of the State Building Code and determine whether the facilities used to collect, store, process, treat, recycle, recover, or dispose of hazardous substance, as defined in 29 Code of Federal Regulations § 1910.120 (a)(3) (1 July 2006 Edition), should have a full fire alarm system or, in the alternative, full staffing as recommended by the Department of Environment and Natural Resources. If the

Task Force determines that relevant facilities should have full staffing, the Task Force shall recommend the level of knowledge and training that should be required of the staff.

"(8) Determine when any rules recommended by the Task Force should become effective for existing commercial hazardous waste facilities."

Session Laws 2007-107, s. 4.1(g), provides: "Expenses of Members. — Members of the Task Force shall receive per diem, subsistence, and travel allowances in accordance with G.S. 120-3.1, 138-5, or 138-6, as appropriate."

Session Laws 2007-107, s. 4.1(h), provides: "Staff. — Upon the prior approval of the Legislative Services Commission, the Legislative Services Officer may assign professional and clerical staff and other services and supplies, as needed, for the Task Force to carry out its duties in an effective manner."

Session Laws 2007-107, s. 4.1(i), provides: "Cooperation by Government Agencies. — The Task Force may call upon any department, agency, institution, or officer of the State or any political subdivision thereof for facilities, data, or other assistance."

Session Laws 2007-107, s. 4.1(j), provides: "Report. — The Task Force shall submit a report of its findings and recommendations, including legislative proposals, to the 2008 Regular Session of the 2007 General Assembly, the Governor, the North Carolina Building Code Council, and the Environmental Review Commission on or before 1 April 2008. The Task Force shall terminate upon filing its report."

Session Laws 2007-107, s. 4.1(k), provides: "North Carolina Building Code Council to Adopt Rules. — The North Carolina Building Code Council shall adopt rules or amend the State Building Code to implement the recommendations of the Regulation of Hazardous Materials Facilities Task Force. In particular, the Building Code Council shall adopt rules or amend the State Building Code to require that hazardous materials are classified and identified in a manner that provides State and local inspectors with sufficient information to identify all potential risks to the citizens of the State."

Session Laws 2007-107, s. 5.1(a), effective July 1, 2007, provides: "The Division of Information Technology Services of the Department of Environment and Natural Resources, in collaboration with the Division of Emergency Management of the Department of Crime Control and Public Safety, shall establish a Tier II Hazardous Chemicals Inventory Database and Web-based access application that will accept uploads of Tier II data from local government systems acting as partners in the project and from the University of Texas at Dallas E-Plan repository until all Tier II hazardous chemical inventory is in the database. The database shall include data on sites listed in the planned Toxic Release Inventory exchange and the Department's existing Facilities Registry System. The Facilities Registry System is a database of facilities for which the Department has environmental concerns, including facilities that are subject to an environmental permit for water, air, waste, land quality, wetlands, public water supply, wastewater treatment, and other environmental permits. The database shall be connected via Web services to the North Carolina Exchange Node. The purposes of this database are to provide a one-stop, real-time information source for all hazardous and toxic materials release sites and all sites that are subject to an environmental permit in order to enhance the operational effectiveness of the Department of Environment and Natural Resources, the Division of Emergency Management of the Department of Crime Control and Public Safety, first responders and emergency management officials, local government officials, and any others with a role in emergency management or planning; to remove the burden of data reentry in multiple systems; to reduce the dependence on paper submissions for Tier II reporting; to extend the Network for the Exchange Node community; and to reuse information already deployed at the Department. The Tier II Hazardous Chemicals Inventory Database and Web-based access application shall be maintained by the Division of Emergency Management of the Department of Crime Control and Public Safety."

Legal Periodicals. — For note, "The Hazardous Chemicals Right-to-Know Act: Letting the Public Know What's Next Door," see 64 N.C.L. Rev. 1330 (1986).

§ 95-174. Definitions.

(a) "Chemical manufacturer" shall mean a manufacturing facility classified in Standard Industrial Classification (SIC) Codes 20 through 39 where chemicals are produced for use or distribution in North Carolina.

(b) "Chemical name" shall mean the scientific designation of a chemical in accordance with the nomenclature system developed by the International Union of Pure and Applied Chemistry (IUPAC), or the Chemical Abstracts Service (CAS) rules of nomenclature or a name which will clearly identify the chemical for the purpose of conducting a hazard evaluation.

(c) “Common name” shall mean any designation or identification such as a code name, code number, trade name, brand name or generic name used to identify a chemical other than by its chemical name.

(d) “Distributor” shall mean any business, other than a chemical manufacturer or importer, which supplies hazardous chemicals to other distributors or to purchasers.

(e) “Employee” shall mean any person who is employed by an employer under normal operating conditions.

(f) “Employer” means a person engaged in business who has employees, including the State and its political subdivisions but excluding an individual whose only employees are domestic workers or casual laborers who are hired to work at the individual’s residence.

(g) “Facility” shall mean one or more establishments, factories, or buildings located at one contiguous site in North Carolina.

(h) “Fire Chief” shall mean Fire Chief or Fire Marshall, or Emergency Response Coordinator in the absence of a Fire Chief or Fire Marshall for the appropriate local fire department.

(i) Repealed by Session Laws 1987, c. 489, s. 1.

(j) “Fire Department” shall mean the fire department having jurisdiction over the facility.

(k) “Hazardous chemical” shall mean any element, chemical compound or mixture of elements and/or compounds which is a physical hazard or health hazard as defined in subsection (c) of the OSHNC Standard or a hazardous substance as defined in standards adopted by the Occupational Safety and Health Division of the North Carolina Department of Labor in Title 13, Chapter 7 of the North Carolina Administrative Code (13 NCAC 7).

(*l*) “Hazardous Substance List” shall mean the list required by G.S. 95-191.

(m) “Hazardous substance trade secret” means any formula, plan, pattern, device, process, production information, or compilation of information, which is not patented, which is known only to the employer, the employer’s licensees, the employer’s employees, and certain other individuals, and which is used or developed for use in the employer’s business, and which gives the employer possessing it the opportunity to obtain a competitive advantage over businesses who do not possess it, or the secrecy of which is certified by an appropriate official of the federal government as necessary for national defense purposes. The chemical name and Chemical Abstracts Service number of a substance shall be considered a trade secret only if the employer can establish that the identity or composition of the substance cannot be readily ascertained without undue expense by analytical techniques, laboratory procedures, or other lawful means available to a competitor.

(n) “Label” shall mean any written, printed, or graphic material displayed on or affixed to containers of hazardous chemicals.

(o) “Manufacturing facility” shall mean a facility classified in SIC Codes 20 through 39 which manufactures or uses a hazardous chemical or chemicals in North Carolina.

(p) “Material Safety Data Sheets” or “MSDS” shall mean chemical information sheets adopted by the Occupational Safety and Health Division of the North Carolina Department of Labor in Title 13, Chapter 7 of the North Carolina Administrative Code (13 NCAC 7).

(q) “Nonmanufacturing facility” shall mean any facility in North Carolina other than a facility in SIC Code 20 through 39, the State of North Carolina (and its political subdivisions) and volunteer emergency service organizations whose members may be exposed to chemical hazards during emergency situations.

(r) “OSHNC Standard” shall mean the current Hazard Communication Standard adopted by the Occupational Safety and Health Division of North

Carolina Department of Labor in Title 13, Chapter 7 of the North Carolina Administrative Code (13 NCAC 7).

(s) "Storage and Container" shall have the ordinary meaning however it does not include pipes used in the transfer of substances or the fuel tanks of self propelled internal combustion vehicles. (1985, c. 775, s. 1; 1987, c. 489, ss. 1, 2; 1998-217, ss. 28-30.)

§§ 95-175 through 95-190: Reserved for future codification purposes.

Part 2. Public Safety and Emergency Response Right to Know.

§ 95-191. Hazardous Substance List.

(a) All employers who manufacture, process, use, store, or produce hazardous chemicals, shall compile and maintain a Hazardous Substance List which shall contain the following information for each hazardous chemical stored in the facility in quantities of 55 gallons or 500 pounds, whichever is greater:

(1) The chemical name or the common name used on the MSDS or container label;

(2) The maximum amount of the chemical stored at the facility at any time during a year, using the following ranges:

Class A, which shall include quantities of less than 55 gallons or 500 pounds;

Class B, which shall include quantities of between 55 gallons to 550 gallons, and quantities of between 500 pounds and 5,000 pounds; and

Class C, which shall include quantities of between 550 gallons and 5500 gallons, and quantities between 5,000 pounds and 50,000 pounds; and

Class D, which shall include quantities of greater than 5500 gallons or 50,000 pounds; and

(3) The area in the facility in which the hazardous chemical is normally stored and to what extent the chemical may be stored at altered temperature or pressure.

(b) The Hazardous Substance List shall be updated quarterly if necessary, but not less often than annually; however, if a chemical is deleted from, or added to, the Hazardous Substance List, or if the quantity changes sufficiently to cause the chemical to be in a different class as defined in subsection (a) of this section, the employer shall update the Hazardous Substance List to reflect those changes as soon as practicable, but in any event within 30 days of such change.

(b1) In lieu of the information required by subdivisions (a)(1) through (a)(3), employers may substitute the information specified in section 312(d)(2) of the Superfund Amendments and Reauthorization Act of 1986, P.L. 99-499.

(c) The Hazardous Substance List may be prepared for the facility as a whole, or for each area in a facility where hazardous chemicals are stored, at the option of the employer but shall include only chemicals used or stored in North Carolina. (1985, c. 775, s. 1; 1987, c. 489, s. 3.)

§ 95-192. Material safety data sheets.

(a) Chemical manufacturers and distributors shall provide material safety data sheets (MSDS's) to manufacturing and nonmanufacturing purchasers of hazardous chemicals in North Carolina for each hazardous chemical purchased.

(b) Employers shall maintain the most current MSDS received from manufacturers or distributors for each hazardous chemical purchased. If an MSDS has not been provided by the manufacturer or distributor for chemicals on the Hazardous Substance List at the time the chemicals are received at the facility, the employer shall request one in writing from the manufacturer or distributor within 30 days after receipt of the chemical. If the employer does not receive an MSDS within 30 days after his written request, he shall notify the Commissioner of Labor of the failure by manufacturer or distributor to provide the MSDS. (1985, c. 775, s. 1.)

§ 95-193. Labels.

Existing labels on incoming containers of hazardous chemicals shall not be removed or defaced. All containers of hazardous substances must be clearly designated as hazardous. (1985, c. 775, s. 1.)

§ 95-194. Emergency information.

(a) An employer who normally stores at a facility any hazardous chemical in an amount of at least 55 gallons or 500 pounds, whichever is greater, shall provide the Fire Chief of the Fire Department having jurisdiction over the facility, in writing, (i) the name(s) and telephone number(s) of knowledgeable representative(s) of the employer who can be contacted for further information or in case of an emergency and (ii) a copy of the Hazardous Substance List.

(b) Each employer shall provide a copy of the Hazardous Substance List to the Fire Chief. The employer shall notify the Fire Chief in writing of any updates that occur in the previously submitted Hazardous Substance List as provided in G.S. 95-191(b).

(c) The Fire Chief or his representative, upon request, shall be permitted on-site inspections at reasonable times of the chemicals located at the facility on the Hazardous Substance List for the sole purpose of preplanning Fire Department activities in the case of an emergency and insuring by inspection the usefulness and accuracy of the Hazardous Substance List and labels.

(d) Employers shall provide to the Fire Chief, upon written request of the Fire Chief, a copy of the MSDS for any chemical on the Hazardous Substance List.

(e) Upon written request of the Fire Chief, an employer shall prepare an emergency response plan for the facility that includes facility evacuation procedures, a list of emergency equipment available at the facility, and copies of other emergency response plans, such as the contingency plan required under rules governing the management of hazardous waste adopted pursuant to Article 9 of Chapter 130A of the General Statutes. A copy of the emergency response plan or any prefire plan or emergency response plan required under applicable North Carolina or federal statute or rule or regulation shall, upon written request by the Fire Chief, be given to the Fire Chief.

(f) The Fire Chief shall make information from the Hazardous Substance List, the emergency response plan, and MSDS's available to members of the Fire Department having jurisdiction over the facility and to personnel responsible for preplanning emergency response, police, medical or fire activities, but shall not otherwise distribute or disclose (or allow the disclosure of) information not available to the public under G.S. 95-208. Such persons receiving such information shall not disclose the information received and shall use such information only for the purpose of preplanning emergency response, police, medical or fire activities.

(g) Any knowing distribution or disclosure (or permitted disclosure) of any information referred to in subsection (f) of this section in any manner except as specifically permitted under that subsection (f) shall be punishable as a Class 1 misdemeanor. Restrictions concerning confidentiality or nondisclosure of information under this Article 18 shall be exemptions from the Public Records Act contained in Chapter 132 of the General Statutes, and such information shall not be disclosed notwithstanding the provisions of Chapter 132 of the General Statutes. (1985, c. 775, s. 1; 1987, c. 489, ss. 4-6; 1993, c. 539, s. 672; 1994, Ex. Sess., c. 24, s. 14(c); 2002-165, s. 1.2.)

§ 95-195. Complaints, investigations, penalties.

(a) Complaints of violations of this Part shall be filed in writing with the Commissioner of Labor. Such complaints received in writing from any Fire Chief relating to alleged violations of this Part shall be investigated in a timely manner by the Commissioner of Labor or his designated representative.

(b) Duly designated representatives of the Commissioner of Labor, upon presentation of appropriate credentials to the employer, shall have the right of entry into any facility at reasonable times to inspect and investigate complaints within reasonable limits, and in a reasonable manner. Following the investigation, the Commissioner shall make appropriate findings. Either the employer or the person complaining of a violation may request an administrative hearing pursuant to Chapter 150B of the General Statutes. This request for an administrative hearing shall be submitted to the Commissioner of Labor within 14 days following the Commissioner making his findings. The Commissioner shall within 30 days of receiving the request hold an administrative hearing in accordance with Article 3 of Chapter 150B of the General Statutes.

(c) If the Commissioner of Labor finds that the employer violated this Article, the Commissioner shall order the employer to comply within 14 days following receipt of written notification of the violation. Employers not complying within 14 days following receipt of written notification of a violation shall be subject to civil penalties of not more than one thousand dollars ($1,000) per violation imposed by the Commissioner of Labor. There shall be a separate offense for each day the violation continues. The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(d) Any order by the Commissioner under subsection (b) or (c) of this section shall be subject to judicial review as provided under Article 4 of Chapter 150B of the General Statutes. (1985, c. 775, s. 1; 1987, c. 489, s. 7; 1998-215, s. 112.)

§ 95-196. Employee rights.

No employer shall discharge, or cause to be discharged, or otherwise discipline or in any manner discriminate against an employee at the facility because the employee has assisted the Commissioner of Labor or his representative or the Fire Chief or his representative who may make or is making an inspection under G.S. 95-194(c) or G.S. 95-195(b), or has testified or is about to testify in any proceeding under this Article, or has used the provisions of G.S. 95-208. (1985, c. 775, s. 1.)

Legal Periodicals. — For article, "North Carolina Employment Law After *Coman*: Reaffirming Basic Rights in the Workplace," see 24 Wake Forest L. Rev. 905 (1989).

§ 95-197. Withholding hazardous substance trade secret information.

(a) An employer who believes that all or any part of the information required under G.S. 95-191, 95-192, 95-194(b) or 95-194(d) is a hazardous substance trade secret may withhold the information, provided that (i) hazard information on chemicals the identity of which is claimed as a hazardous substance trade secret is provided to the Fire Chief who shall hold it in confidence and (ii) the employer claims that the information is a hazardous substance trade secret.

(b) Any person in North Carolina may request in writing that the Commissioner of Labor review in camera an employer's hazardous substance trade secret claim. If the Commissioner of Labor finds that the claim is other than completely valid, this finding shall be appealable under subsection (d) of this section. If the Commissioner of Labor finds that the claim is valid, he shall then determine whether the nonconfidential information is sufficient for the Fire Chief to fulfill the responsibilities of his office. If the Commissioner of Labor finds that the information is not sufficient, he shall direct the employer to supplement the information with such other information as will provide the Fire Chief with sufficient information to fulfill the responsibilities of his office, but this finding shall be appealable under subsection (d) of this section.

(c) The Commissioner of Labor and the Fire Chief shall protect from disclosure any or all information coming into either or both of their possession when such information is marked by the employer as confidential, and they shall return all information so marked to the employer at the conclusion of their determination by the Commissioner of Labor. Any person who has access to any hazardous substance trade secret solely pursuant to this section and who discloses it knowing it to be a hazardous substance trade secret to any person not authorized to receive it shall be guilty of a Class I felony, and if knowingly or negligently disclosed to any person not authorized, shall be subject to civil action for damages and injunction by the owner of the hazardous substance trade secret, including, without limitation, actions under Article 24 of Chapter 66 of the General Statutes.

(d) The employer, Fire Chief, or person making the original request who is an aggrieved party shall have 30 days after receipt of notification by the Commissioner of his findings under subsection (b) to request an administrative hearing on the determination. Any such hearing shall be held in a manner similar to that provided for in G.S. Chapter 150B, Article 3 and the decision upon the request of any aggrieved party shall be subject to the judicial review provided for by G.S. Chapter 150B, Article 4, provided that these administrative and judicial hearings shall be conducted in camera to assure the confidentiality of the information being reviewed. (1985, c. 775, s. 1; 1987, c. 827, s. 1; 1993, c. 539, s. 1290; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 95-198. Medical emergency and nonemergency situations.

(a) Where a treating health care provider determines that a medical emergency exists and the specific chemical identity of a hazardous chemical is necessary for emergency or first-aid treatment, the chemical manufacturer, importer, or employer shall immediately disclose the specific chemical identity of a hazardous substance trade secret substance to that treating physician or nurse, regardless of the existence of written statement of need or a confidentiality agreement. The chemical manufacturer, importer, or employer may require a written statement of need and a confidentiality agreement as soon as circumstances permit. The confidentiality agreement (i) may restrict the use of the information to the health purposes indicated in a written statement of need; (ii) may provide for appropriate legal remedies in the event of a breach of the agreement, including stipulation of a reasonable pre-estimate of likely damages; and (iii) may not include requirements for the posting of a penalty bond. The parties are not precluded from pursuing noncontractual remedies to the extent permitted by law.

(b) In nonemergency situations, a chemical manufacturer, importer, or employer shall, upon request, disclose a specific chemical identity, otherwise permitted to be withheld under this section, to a responsible party, as defined in the standards adopted in Title 13, Subchapter 7F of the North Carolina Administrative Code (13 NCAC 7F), providing medical or other occupational health services to exposed persons if the request is in writing and states the medical need for the information. The employer may require that the responsible party sign a confidentiality agreement prior to release of the information. The parties are not precluded from pursuing noncontractual remedies to the extent permitted by law.

(c) If the chemical manufacturer, importer or employer denies a written request for hazardous substance trade secret release, or does not provide this information within 30 days, the Department of Labor shall initiate the trade secret claim determination process under G.S. 95-197. (1985, c. 775, s. 1; 1998-217, s. 31.)

§§ 95-199 through 95-207: Reserved for future codification purposes.

Part 3. Community Right to Know.

§ 95-208. Community information on hazardous chemicals.

(a) Any person in North Carolina may request in writing from the employer a list of chemicals used or stored at the facility. The request shall include the name and address of the person making the request and a statement of the purpose for the request. If the person is requesting the list on behalf of or for the use of an organization, partnership, or corporation, he shall also disclose the name and business address of such organization, partnership, or corporation. The request may include, at the option of the employer, a statement to the effect that the information will be used only for the purpose stated. The employer shall furnish to the person making the request a list containing, at a minimum, all chemicals included on the Hazardous Substance List, the class of each chemical as defined in G.S. 95-191(a)(2), and an MSDS for each chemical for which an MSDS is available and is requested. Whenever an employer has withheld a chemical under the provisions of G.S. 95-197 from the information provided under G.S. 95-208, the employer must state that the information is being withheld and, upon request, must provide the MSDS for the chemical. Additional information may be furnished to the person making the request at the option of the employer. The employer shall provide, at a fee not to exceed the cost of reproducing the materials, the materials requested within 10 working days of the date the employer receives the written request for information.

(b) If the employer fails or refuses to provide the information required under subsection (a) of this section, the person requesting the information may request in writing that the Commissioner of Labor review the request. The Commissioner of Labor may conduct an investigation in the same manner as provided in G.S. 95-195(b). Following the investigation, the Commissioner shall make appropriate findings. Either the employer or the person making the initial request may request an administrative hearing pursuant to Chapter 150B of the General Statutes. This request for an administrative hearing shall be submitted to the Commissioner of Labor within 30 days following the Commissioner making his findings. The Commissioner of Labor shall within 30 days of receiving the request hold an administrative hearing to consider the request for information under subsection (a) of this section. This hearing shall be held as provided for in G.S. Chapter 150B, Article 3. If the Commissioner of Labor finds that the request complies with the requirements of subsection (a) of this section, the Commissioner of Labor shall direct that the employer provide to the person making the request a list containing, at a minimum, all chemicals used or stored at the facility included on the Hazardous Substance List, the class of each chemical as defined in G.S. 95-191(a)(2), and an MSDS for each chemical for which an MSDS is available and is requested and may in his discretion assess civil penalties as provided in G.S. 95-195(c); provided that it shall be a defense to such disclosure if the employer proves that the information has been requested directly or indirectly by, or in behalf of, a competitor of the employer, or that such information is a Hazardous Substance Trade Secret, or that the request did not comply with the requirements of subsection (a) of this section.

(c) Any order by the Commissioner of Labor under subsection (b) of this section shall be subject to judicial review as provided under G.S. Chapter 150B, Article 4. (1985, c. 775, s. 1; 1987, c. 827, s. 1.)

§§ **95-209 through 95-215:** Reserved for future codification purposes.

Part 4. Implementation.

§ 95-216. Exemptions.

Notwithstanding any language to the contrary, the provisions of this Article shall not apply to chemicals in or on the following:

(1) Hazardous substances while being transported in interstate commerce into or through this State;

(2) Products intended for personal consumption by employees in the facilities;

(3) Retail food sale establishments and all other retail trade establishments in Standard Industrial Classification Codes 53 through 59, exclusive of processing and repair areas, except that the employer must comply with the provisions of G.S. 95-194(a)(i);

(4) Any food, food additive, color additive, drug or cosmetic as such terms are defined in the Federal Food, Drug and Cosmetic Act (21 U.S.C. 301 et seq.);

(5) A laboratory under the direct supervision or guidance of a technically qualified individual provided that:
  a. Labels on containers of incoming chemicals shall not be removed or defaced;
  b. MSDS's received by the laboratory shall be maintained and made accessible to employees and students;
  c. The laboratory is not used primarily to produce hazardous chemicals in bulk for commercial purposes; and
  d. The laboratory operator complies with the provisions of G.S. 95-194(a)(i);

(6) Any farming operation which employs 10 or fewer full-time employees, except that if any hazardous chemical in an amount in excess of 55 gallons or 500 pounds, whichever is greater, is normally stored at the farming operation, the employer must comply with the provisions of G.S. 95-194(a)(i); and

(7) Any distilled spirits, tobacco, and untreated wood products; and

(8) Medicines used directly in patient care in health care facilities and health care facility laboratories. (1985, c. 775, s. 1; 1987, c. 489, s. 8.)

§ 95-217. Preemption of local regulations.

It is the intent of the General Assembly to prescribe this uniform system for the disclosure of information regarding the use or storage of hazardous chemicals. To that end, all units of local government in the State are preempted from exercising their powers to require disclosure, directly or indirectly, of information regarding the use or storage of hazardous chemicals by employers to any members of the public, or to any branch or agent of State or local government in any manner other than as provided for in this Article. This section does not preempt the enforcement of the provisions of any nationally recognized fire code that may be adopted by a unit of local government. (1985, c. 775, s. 1; 1987, c. 489, s. 9.)

§ 95-218. Severability.

The provisions of this Article are severable, and if any phrase, clause, sentence, or provision of this Article, or the application of any such phrase, clause, sentence or provision to any person, business entity or circumstances, other than those to which it was held invalid shall not be affected thereby. (1985, c. 775, s. 1.)

§§ 95-219 through 95-221: Reserved for future codification purposes.

Article 19.

Migrant Housing Act of North Carolina.

§ 95-222. Short title; legislative purpose.

(a) This Article may be cited as the "Migrant Housing Act of North Carolina."

(b) It is the purpose and policy of the General Assembly to conform migrant housing standards to, as much as reasonably possible, the Occupational Safety and Health Act of North Carolina, and to ensure safe and healthy migrant housing conditions. The General Assembly finds that the general welfare of the State requires the enactment of this law under the police power of the State. (1989, c. 91, s. 2.)

Cross References. — For the Occupational Safety and Health Act, see G.S. 95-126 et seq.

Editor's Note. — Session Laws 1989, c. 91, which enacted this Article, in s. 5 provided that if funds were appropriated for the 1989-1990 fiscal year to implement the provisions of ss. 1, 2, and 3 of the act, ss. 1, 2, and 3 would become effective January 1, 1990, but that the act would not be construed to obligate the General Assembly to make any appropriation to implement the provisions of the act. Such an appropriation was made by Session Laws 1989, c. 752, s. 164.

CASE NOTES

Former Laws Did Not Trigger Constitutional Protections. — The North Carolina migrant housing laws and regulations in former G.S. 130A-238 et seq. were not sufficiently mandatory in nature to trigger constitutional protections for migrant farmworkers; the state regulations requiring inspection and certification of private migrant housing facilities did not affect the migrant workers' liberty and the statutory and regulatory commands did not hinder efforts by private farmers to provide safe housing for their workers. Edwards v. Johnston County Health Dep't, 885 F.2d 1215 (4th Cir. 1989), decided under prior law.

§ 95-223. Definitions.

As used in this Article, unless the context requires otherwise:

(1) "Agricultural employment" means employment in any service or activity included within the provisions of Section 3(f) of the Fair Labor Standards Act of 1938, or section 3121(g) of the Internal Revenue Code of 1986; and the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state and including the harvesting of Christmas trees, and the harvesting of saltwater crabs;

(2) "Commissioner" means the Commissioner of Labor of North Carolina;

(3) "Day" means a calendar day;

(3a) "Director" means the Director of the Agricultural Safety and Health Bureau, who is the agent designated by the Commissioner to assist in the administration of this Article.

(4) "Established federal standard" means those standards as set out in, and interpretations issued by, the Secretary of the United States Department of Labor in 29 C.F.R. 1910.142, as amended;

(5) "Migrant" means an individual, and his dependents, who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence;

(6) "Migrant housing" means any facility, structure, real property, or other unit that is established, operated, or used as living quarters for migrants;

(7) "Operator" means any person who owns or controls migrant housing; and

(8) "Person" means an individual, partnership, association, joint stock company, corporation, trust, or legal representative;

(9) "Substantive violation" means a violation of a safety and health standard, including those that provide fire prevention, and adequate and sanitary supply of water, plumbing maintenance, structurally sound construction of buildings, effective maintenance of those buildings, provision of adequate heat as weather conditions require, and reasonable protection for inhabitants from insects and rodents. A substantive violation does not include technical or procedural violations of safety and health standards. (1989, c. 91, s. 2; 1993, c. 300, s. 3; 2007-548, s. 1.)

Effect of Amendments. — Session Laws 2007-548, s. 1, effective August 31, 2007, added subdivision (3a).

§ 95-224. Scope; powers and duties.

(a) The provisions of this Article shall apply to all operators and migrants except:

(1) Any person who, in the ordinary course of that person's business, regularly provides housing on a commercial basis to the general public; and who provides housing to migrants of the same character and on the same or comparable terms and conditions as those provided to the general public; or

(2) A housing unit owned by one or more of the occupants and occupied solely by a family unit.

(b) The Commissioner shall have the following powers and duties under this Article:

(1) To delegate to the Director the powers, duties, and responsibilities necessary to ensure safe and healthy migrant housing conditions.
(2) To supervise the Director.
(3) To issue preoccupancy certificates to certify that housing for migrant workers has been found to be in compliance with this Article.
(4) To conduct postoccupancy inspections of migrant housing in accordance with the provisions of G.S. 95-226(g). (1989, c. 91, s. 2; 2007-548, s. 2.)

Effect of Amendments. — Session Laws 2007-548, s. 2, effective August 31, 2007, added "powers and duties" to the section heading; designated the former first paragraph as subsection (a); and added subsection (b).

§ 95-225. Adoption of standards and interpretations.

(a) Unless otherwise provided, all established federal standards are adopted and shall be enforced by the Department of Labor of North Carolina.

(b) The Commissioner shall provide for publication in the North Carolina Register any modification by the federal government of the established federal standards within 30 days of their adoption.

(c) For the protection of the public health, the Commission for Public Health shall adopt and the Department of Environment and Natural Resources shall enforce rules that establish water quality and water sanitation standards for migrant housing under this Article.

(d) The requirements for the collection, treatment, and disposal of sewage, as provided in Article 11 of Chapter 130A, and the rules adopted pursuant to that Article shall apply to migrant housing.

(e) Whenever the outside temperature falls below 50 degrees Fahrenheit and the migrant housing is occupied, heating equipment shall be provided and operable. Regardless of outside temperature, this equipment must be capable of maintaining living areas of 65 degrees Fahrenheit. If housing is to be occupied from May 15 until September 1 only, no heating equipment shall be required at the time of preoccupancy inspection.

(f) All migrant housing shall comply with the standards regarding fire safety for migrant housing as adopted by the Commission for Public Health and in effect on January 1, 1989.

(g) For purposes of this Article, the established federal standard provided in 29 C.F.R. 1910.142(i) does not apply. The following standards shall apply to migrant housing:
(1) Food preparation facilities and eating areas shall be provided and maintained in a clean and sanitary manner;
(2) A kitchen facility shall be provided with an operable stove with at least one burner per five people, and in no event with less than two burners; an operable refrigerator with .75 cubic feet per person minimum; a table; and a sink with running hot and cold water;
(3) Surfaces with which food or drink come in contact shall be easily accessible for cleaning, and shall be nontoxic, resistant to corrosion, nonabsorbent, and free of open crevices;
(4) Acceptable storage facilities shall be provided and shall be kept clean and free of vermin; and
(5) All food service facilities, other than those where migrants procure and prepare food for their own or their family's consumption, shall comply with the standards regarding kitchen and dining room facilities for migrant housing, as adopted by the Commission for Public Health and in effect on January 1, 1989.

(h) Each migrant shall be provided with a bed that shall include a mattress in good repair with a clean cover. The Department of Labor of North Carolina inspector shall determine the condition of the mattress and cover during the preoccupancy inspection. If the mattress or cover is damaged beyond normal wear and tear during the migrant's occupancy of the housing, the operator may charge the migrant the reasonable cost of replacing the mattress or cover. (1989, c. 91, s. 2; c. 727, s. 220; 1997-443, s. 11A.36; 2007-182, s. 2; 2007-548, s. 3.)

Effect of Amendments. — Session Laws 2007-182, s. 2, effective July 5, 2007, substituted "Commission for Public Health" for "Commission for Health Services" in subsections (c) and (f), and in subdivision (g)(5).

Session Laws 2007-548, s. 3, effective August 31, 2007, added subsection (h).

§ 95-226. Application for inspection.

(a) Except as provided in subsection (f) of this section, every operator shall request a preoccupancy inspection at least 45 days prior to the anticipated date of occupancy by applying directly to the Department of Labor of North Carolina or to the local health department. Upon receipt of an application by the Department of Labor of North Carolina, the Department of Labor of North Carolina shall immediately notify, in writing, the appropriate local health department; and the local health department shall inspect the migrant housing for compliance with G.S. 95-225(c) and (d). Upon receipt of the application by the local health department, the local health department shall immediately notify, in writing, the Department of Labor of North Carolina and shall inspect the migrant housing for compliance with G.S. 95-225(c) and (d).

The local health department shall forward the results of its inspection to the Department of Labor of North Carolina and to the operator. The Department of Labor of North Carolina shall inspect the migrant housing and certify to the operator the results of the inspection.

At the time the Department of Labor of North Carolina conducts a preoccupancy inspection, the Department of Labor of North Carolina shall provide the operator with a copy of the guide for employers on compliance with the Immigration and Nationality Act, 8 U.S.C. § 1101, et seq., as amended, prepared by the United States Department of Justice.

(b) The Department of Labor of North Carolina shall provide local health departments and Agricultural Extension offices with blank copies of forms for applying for preoccupancy inspections.

(c) The application for inspection shall include:

(1) The name, address, and telephone number of the operator;
(2) The location of the migrant housing;
(3) The anticipated number of migrants to be housed in the migrant housing; and
(4) The anticipated dates of occupancy of the migrant housing.

(d) Except as provided in subsections (e) and (f) of this section, an operator may allow the migrant housing to be occupied only if the migrant housing has been certified by the Department of Labor of North Carolina or the United States Department of Labor to be in compliance with all of the standards under this Article, except that an operator may allow migrant housing to be occupied on a provisional basis if the operator applied for a preoccupancy inspection at least 45 days prior to occupancy and the preoccupancy inspection was not conducted by the Department of Labor of North Carolina at least four days prior to the anticipated occupancy. Upon subsequent inspection by the Department of Labor of North Carolina, the provisional occupancy shall be revoked if any deficiencies have not been corrected within the period of time specified by the Department of Labor of North Carolina, or within two days after receipt of written notice provided on-site to the operator. No penalties may be assessed for any violation of this Article which are found during the preoccupancy inspection, unless substantive violations exist during provisional occupancy.

(e) If an operator has applied for an inspection pursuant to this Article and one or more migrants arrives in advance of the arrival date stated in the application, the operator shall notify the Department of Labor of North Carolina within two working days of the occupancy of the migrant housing.

(f) If an operator receives a preoccupancy inspection rating from the Department of Labor of North Carolina of one hundred percent (100%) compliance for a particular migrant housing unit for two consecutive years, in the third year the operator shall have the right to conduct the preoccupancy inspection for that particular migrant housing unit himself or herself. Operators conducting their own preoccupancy inspections pursuant to this subsection shall, at least 45 days prior to occupancy, register the migrant housing with the Department of Labor of North Carolina and notify in writing the appropriate local health department. The local health department shall inspect the migrant housing for compliance with G.S. 95-225(c) and (d). The operator shall request a preoccupancy inspection under subsection (a) of this section in the year following a year when the operator conducted a self-inspection under this subsection.

(g) In addition to any other applicable federal or State law or regulation, the Department may only conduct a postoccupancy inspection of operators:

(1) Who were subject to an annual preoccupancy inspection by the Department of Labor of North Carolina and found not to be in one hundred percent (100%) compliance at that inspection.
(2) Who were assessed a civil penalty by the Department of Labor of North Carolina during the previous calendar year for violations of this Article or pursuant to G.S. 95-136(a)(3).
(3) Who did not undergo a preoccupancy inspection, unless the operator conducted a self-inspection pursuant to subsection (f) of this section.
(4) In response to a referral from a federal, State, county, or local government official or any person with firsthand knowledge of an alleged violation of this Article or of an alleged safety or health hazard whom the Department of Labor of North Carolina deems to have provided a credible referral. (1989, c. 91, s. 2; 2007-548, ss. 3.1, 3.2, 4.)

Effect of Amendments. — Session Laws 2007-548, ss. 3.1-4, effective August 31, 2007, in subsection (a), added "Except as provided in subsection (f) of this section" to the beginning of the first paragraph, added the last paragraph; in subsection (d), substituted "in subsections (e) and (f) of this section" for "in subsection (e) of this section," made a stylistic change; and added subsections (f) and (g).

§ 95-227. Enforcement.

(a) For the purpose of enforcing the standards provided by this Article, the provisions of G.S. 95-129, G.S. 95-130 and G.S. 95-136 through G.S. 95-142 shall apply under this Article in a similar manner as they apply to places of employment under OSHANC; however, G.S. 95-129(4), 95-130(2), and 95-130(6) do not apply to migrant housing. For the purposes of this Article, the term:

(1) "Employer" in G.S. 95-129, G.S. 95-130 and G.S. 95-136 through G.S. 95-142 shall be construed to mean an operator.
(2) "Employee" shall be construed to mean a migrant.
(3) Repealed by Session Laws 2007-548, s. 5, effective August 31, 2007.

(b) The Commissioner may establish a new division to enforce this Article.

(c) The Department of Labor of North Carolina shall maintain a list of operators and the physical address of their migrant housing units, number of beds, and the date of the annual preoccupancy inspection and certification.

(d) The Department of Labor of North Carolina shall maintain a summary of any inspections filed annually with the Division that enforce this Article, including the number and type of citations issued and the violations found, if any.

(e) The Commissioner shall report no later than May 1 of each year to the Chairpersons of the Senate Appropriations Committee on Natural and Economic Resources and the Chairpersons of the House of Representatives Appropriations Subcommittee on Natural and Economic Resources regarding the number of annual preoccupancy certifications issued, the number of operators with one hundred percent (100%) compliance at the preoccupancy inspection, the number of postoccupancy inspections conducted by the Department of Labor of North Carolina, the number and type of citations and fines issued, the total number of migrant worker beds in the State, and the identification of operators who fail to apply for or obtain permits to operate migrant housing pursuant to this Article. (1989, c. 91, s. 2; 1997-35, s. 1; 2007-548, s. 5.)

Editor's Note. — Session Laws 2007-548, s. 7, provides: "The first report required by G.S. 95-227(f)[(e)], as enacted by Section 5 of this act, is due no later than May 1, 2008."

Effect of Amendments. — Session Laws 2007-548, s. 5, effective August 31, 2007, inserted the subsection (a) and (b) designations and made stylistic changes; deleted former subdivision (3) defining "Director"; and added subsections (c) through (e).

§ 95-228. Waiver of rights.

Agreements entered into by migrants to waive or to modify their rights under this Article shall be deemed void as contrary to public policy. A waiver or modification of rights by the Department of Labor of North Carolina shall be valid under this Article. (1989, c. 91, s. 2.)

§ 95-229. Construction of Article; severability.

This Article shall be liberally construed to the end that the safety and health of the migrants of this State may be effectuated and protected.

The provisions of this Article are severable, and if any provision of this Article is held invalid by a court of competent jurisdiction, the invalidity may not affect other provisions of the Article, which can be given effect without the invalid provision. (1989, c. 91, s. 2.)

§ 95-229.1. Actions upon finding uninhabitable migrant housing.

If the Department of Labor of North Carolina determines that housing provided to migrants under this Article is uninhabitable, but is not reasonably expected to cause death or serious physical harm, the migrants shall be allowed to remain in the housing for a reasonable period, not to exceed 14 days, while the operator locates alternative housing or makes necessary repairs to make the housing habitable. No additional civil penalties arising from the condition of the housing shall be levied against the operator during the 14-day period after the housing has been determined to be uninhabitable in which the migrants are allowed to remain in the housing. The alternative housing shall be provided at the same rate or less than the rate paid by the migrants for the uninhabitable housing. If the Director determines, after recommendation by an inspector, that housing provided to migrants could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated, the migrants shall not be allowed to stay in the housing, and alternative housing shall be provided by the operator at the same rate or less than the rate paid by the migrants for the uninhabitable housing. (2007-548, s. 5.1.)

Editor's Note. — This section was enacted as G.S. 95-299.1 by Session Laws 2007-548, s. 5.1. It has been renumbered as this section at the direction of the Revisor of Statutes.

Session Laws 2007-548, s. 6, provides: "The North Carolina Housing Finance Agency shall study (i) the need for low-cost financing for the construction and rehabilitation of migrant housing in North Carolina and (ii) the feasibility of a program to provide such financing in the State. The Agency shall report its findings no later than July 1, 2008, to the Joint Legislative Commission on Governmental Operations."

Session Laws 2007-548, s. 8, made this section effective August 31, 2007.

ARTICLE 19A.

Overhead High-Voltage Line Safety Act.

§ 95-229.5. Purpose; scope.

The purpose of this Article is to promote the safety and protection of persons engaged in work in the vicinity of high-voltage overhead lines. This Article defines the conditions under which work may be carried on safely and provides for the precautionary safety arrangements to be taken when any person engages in work in proximity to overhead high-voltage lines. (1995 (Reg. Sess., 1996), c. 587, s. 1.)

§ 95-229.6. Definitions.

As used in this Article, unless the context requires otherwise:

(1) "Covered equipment" or "covered items" means any mechanical equipment, hoisting equipment, antenna, or rigging; any part of which is capable of vertical, lateral, or swinging motion that could cause any portion of the equipment or item to come closer than 10 feet to a high-voltage line during erection, construction, operation, or maintenance; including, but not limited to, equipment such as cranes, derricks, power shovels, backhoes, dump trucks, drilling rigs, pile drivers, excavating equipment, hay-loaders, haystackers, combines, irrigation equipment, portable grain augers or elevators, and mechanical cotton pickers. These terms also include items such as handheld tools, ladders, scaffolds, antennas, and outriggers, houses or other structures in transport, and gutters, siding, and other construction materials, the motion or manipulation of which could cause them to come closer than 10 feet to a high-voltage line.

(2) "High-voltage line" means all aboveground electrical conductors of voltage in excess of 600 volts measured between conductor and ground.

(3) "Person" means natural person, firm, business association, company, partnership, corporation, or other legal entity.

(4) "Person responsible for the work to be done" means the person performing or controlling the work that necessitates the precautionary safety measures required by this Article, unless the person performing or controlling the work is under contract or agreement with a governmental entity, in which case "person responsible for the work to be done" means that governmental entity.

(5) "Warning sign" means a weather-resistant sign of not less than five inches by seven inches with at least two panels: a signal panel and a

message panel. The signal panel shall contain the signal word "WARNING" in black lettering and a safety alert symbol consisting of a black triangle with an orange exclamation point, all on an orange background. The message panel shall contain the following words, either in black letters on a white background or white letters on a black background: "UNLAWFUL TO OPERATE THIS EQUIPMENT WITHIN TEN FEET OF OVERHEAD HIGH-VOLTAGE LINES — Contact with power lines can result in death or serious burns." A symbol or pictorial panel may also be added. Such warning sign language, lettering, style, colors, size, and format shall meet the requirements of the American National Standard ANSI Z535.4-1991, Product Safety Signs and Labels, or its successor or such equally effective standard as may be approved for use by the Commissioner of Labor. In the event of a conflict with regard to the appearance or content of the warning sign, the standard approved by the Commissioner of Labor shall take precedence over any description or standard set out in this subdivision. (1995 (Reg. Sess., 1996), c. 587, s. 1; 1998-193, s. 2.)

Legal Periodicals. — See legislative survey, 21 Campbell L. Rev. 323 (1999).

§ 95-229.7. Prohibited activities.

(a) Unless danger of contact with high-voltage lines has been guarded against as provided by G.S. 95-229.8, 95-229.9, and 95-229.10, the following actions are prohibited:

(1) No person shall, individually or through an agent or employee, perform, or require any other person to perform, any work upon any land, building, highway, or other premises that will cause:
   a. Such individual, agent, employee, or other person to be placed within six feet of any overhead high-voltage line; or any part of any tool or material used by the agent, employee, or other person to be brought within six feet of any overhead high-voltage line, or
   b. Any part of any covered equipment or covered item used by the individual, agent, employee, or other person to be brought within 10 feet of any high-voltage line.

(2) No person shall, individually or through an agent or employee or as an agent or employee, erect, construct, operate, maintain, transport, or store any covered equipment or covered item within 10 feet of any high-voltage line, or such greater clearance as may be required under the circumstances by OSHA, except as provided herein. This prohibition shall not apply, however, to covered equipment as defined herein when lawfully driven or transported on public streets and highways in compliance with applicable height restrictions. The required clearance from high-voltage lines shall be not less than four feet when:
   a. Covered equipment as defined herein is lawfully driven or transported on public streets and highways in compliance with the height restriction applicable thereto,
   b. Refuse collection equipment is operating, or
   c. Agricultural equipment is operating.

(3) No person shall, individually or through an agent or employee or as an agent or employee, operate or cause to be operated an airplane or helicopter within 20 feet of a high-voltage line, except that no clearance is specified for licensed aerial applicators that may incidentally pass within the 20-foot limitation during normal operation.

(4) No person shall, individually or through an agent or employee or as an agent or employee, store or cause to be stored any materials that are expected to be moved or handled by covered equipment or any covered item within 10 feet of a high-voltage line.

(5) No person shall, individually or through an agent or employee or as an agent or employee, provide or cause to be provided additional clearance by either (i) raising, moving, or displacing any overhead utility electric lines or (ii) pulling or pushing any pole, guy, or other structural appurtenance.

(6) No person shall, individually or through an agent or employee or as an agent or employee, excavate or cause to be excavated any portion of any foundations of structures, including guy anchors or other structural appurtenances, which support any overhead utility electric lines.

(b) If the high-voltage line has been insulated or de-energized and grounded, in accordance with G.S. 95-229.10, the required clearances specified in subdivisions (1), (2), and (4) of subsection (a) of this section may be reduced to not less than two feet. Under no circumstances shall the line or its covering be contacted. If the line is temporarily raised or moved to accommodate the expected work, without also being insulated or de-energized and grounded, the required clearances from the line, specified in subsection (a) of this section, shall not be reduced. (1995 (Reg. Sess., 1996), c. 587, s. 1; 1998-193, s. 3.)

§ 95-229.8. Warning signs.

(a) No person shall, individually or through an agent or employee or as an agent or employee, operate any covered equipment in the proximity of a high-voltage line unless warning signs are posted and maintained as follows:

(1) A sign shall be located within the equipment and readily visible and legible to the operator of such equipment when at the controls of such equipment; and

(2) Signs shall be located on the outside of equipment so as to be readily visible and legible at 12 feet to other persons engaged in the work operations.

This subsection shall not apply to handheld tools, handheld equipment, and other items which by their size or configuration cannot accommodate the warning signs specified in G.S. 95-229.6(5).

(b) If the Commissioner of Labor determines that a successor, substitute, or additional sign standard may or shall be used in place of the requirements listed in G.S. 95-229.6, a period of not less than 18 months from such determination shall be allowed for any required replacement of signs. (1995 (Reg. Sess., 1996), c. 587, s. 1; 1998-193, s. 4.)

§ 95-229.9. Notification.

(a) When any person desires to carry on any work in closer proximity to any high-voltage line than permitted by G.S. 95-229.7(a), the person responsible for the work to be done shall notify the owner or operator of the high-voltage line prior to the time the work is to be commenced. Such notification shall occur at the earliest practical time; however, such notification shall occur not less than 48 hours, excluding Saturday, Sunday, and legal State and federal holidays, prior to the intended work. In emergency situations, including police, fire, and rescue emergencies, such notification shall occur as soon as possible under the circumstances. In cases where the person or business entity responsible for doing the work is doing so under contract or agreement with a government entity, and the government entity and the owner or operator of the lines have already made satisfactory mutual arrangements, further arrangements for that particular work are not required.

(b) Every notice served by any person on an owner or operator of a high-voltage line shall contain the following information:

(1) The name, address, and telephone number of the individual serving such notice;
(2) The location of the proposed work;
(3) The name, address, and telephone number of the person responsible for the work;
(4) The field telephone number of the site of such work, if one is available;
(5) The type, duration, and extent of the proposed work;
(6) The name of the person for whom the proposed work is being performed;
(7) The time and date of the notice; and
(8) The approximate date and time when the work is to begin.

(c) If the notification required by this Article is made by telephone, a record of the information in subsection (b) of this section shall be maintained by the owner or operator notified and the person giving the notice to document compliance with the requirements of this Article.

(d) Owners or operators of high-voltage lines may form and operate an association providing for mutual receipt of notification of activities close to high-voltage lines in a specified area. In areas where an association is formed, the following shall occur:

(1) Notification to the association shall be effected as set forth in this section.
(2) Owners or operators of high-voltage lines in the area:
    a. May become members of the association;
    b. May participate in and receive the services furnished by the association; and
    c. Shall pay their proportionate share of the cost for the services furnished.
(3) The association whose members or participants have high-voltage lines within a county shall file a list containing the name, address, and telephone number of every member and participating owner or operator of high-voltage lines with the clerk of superior court.
(4) If notification is made by telephone, an adequate record of the information required by subsection (b) of this section shall be maintained by the association to document compliance with the requirements of this Article. (1995 (Reg. Sess., 1996), c. 587, s. 1.)

§ 95-229.10. Precautionary safety arrangements.

(a) Installation or performance of precautionary safety arrangements shall be performed by the owner or operator of high-voltage lines only after mutually satisfactory arrangements have been negotiated between the owner or the operator of the lines, or both, and the person responsible for the work to be done. The negotiations shall proceed promptly and in good faith with the goal of accommodating the requested work consistent with the owner's or operator's service needs and the intent to protect the public from the danger of contact with high-voltage lines as far as is reasonable and cost-effective. The person responsible for the work may perform the work only after satisfactory mutual arrangements, including coordination of work and construction schedules, have been made between the owner or operator of the high-voltage lines and the person responsible for the work. The owners or operators of high-voltage lines shall make the final determination as to which arrangements are most feasible and appropriate under the circumstances; provided, however, that the utility may determine that no arrangements can be made that would allow the proposed work to be carried out in a reasonably safe manner or at reasonable cost taking into account the cost to its customers, and the owner or operator of high-voltage lines may refuse to enter into an agreement on that basis.

(b) The precautionary safety measures shall be appropriate, reasonable, and cost-effective for the work of which the owner or operator of high-voltage lines has received notification. During mutual negotiations, the person responsible for the work may change the notification of intended work to include different or limited work so as to reduce the precautionary safety measures required to accommodate such work. The precautionary safety measures shall not violate the requirements of the current edition of the National Electrical Safety Code.

(c) The owner or operator of the high-voltage lines is not required to provide the precautionary safety arrangements until an agreement for payment has been made; except that, if the amount of payment is in dispute, the owner or operator shall commence with providing precautionary safety measures as if agreement had then been reached and the undisputed amount shall be paid according to the agreement reached as to that amount. If agreement for payment of the disputed amount has not been reached within 14 days from completion of precautionary safety measures, the owner or operator and the person or business entity responsible for doing the work may resolve the dispute by arbitration or other legal means.

(d) Unless otherwise agreed, the owner or operator of the high-voltage lines shall initiate the precautionary safety arrangements agreed upon within five working days after the agreement for payment has been reached as required in subsection (c) of this section, but no earlier than the agreed construction date coordinated between the parties. Once initiated, the owner or operator shall complete the work promptly and without interruption, consistent with the owner's or operator's service needs. Should the owner or operator of the high-voltage lines fail to provide the precautionary safety measures agreed upon in a timely manner, the owner or operator of the high-voltage lines shall be liable for costs or loss of production of the person or business entity requesting assistance to work in close proximity to high-voltage lines, except that no such liability shall exist during times of emergency, such as storm repair and the like.

(e) Precautionary safety arrangements may include:

(1) Placement of temporary mechanical barriers separating and preventing contact between material, equipment, other objects, or persons and high-voltage lines;

(2) Temporary de-energization and grounding;

(3) Temporary relocation or raising of the high-voltage lines; or

(4) Other such measures found to be appropriate in the judgment of the owner or operator of the high-voltage lines.

(f) The actual expense incurred by any owner or operator of high-voltage lines in taking precautionary measures as set out in subsections (a) through (e) of this section, including the wages of its workers involved in making safety arrangements, shall be paid by the person responsible for the work to be done, except if:

(1) Any owner or operator of an overhead high-voltage line has located its facilities within a public highway or street right-of-way and the work is performed by or for the Department of Transportation or a city, county, or town, the actual expenses shall be the responsibility of the owner or operator of the overhead high-voltage lines, unless the owner or operator can provide evidence of prior rights or there is a prior written agreement specifying cost responsibility. However, if it is determined by the Department of Transportation or a city, county, or

town that the temporary safety arrangements are for the sole convenience of its contractor, the actual expense shall be the responsibility of the contractor;

(2) The owner or operator of the high-voltage lines has not installed the line in conformance with an applicable edition of the National Electrical Safety Code. In that case, the liability of the person responsible for the work shall be limited to the amount required to accommodate the work over and above the amount required to bring the installation into compliance with the National Electrical Safety Code; or

(3) In the case of property used for residential purposes, such actual expenses shall be limited to those in excess of one thousand dollars ($1,000). (1995 (Reg. Sess., 1996), c. 587, s. 1.)

§ 95-229.11. Exemptions.

(a) This Article shall not apply to the construction, reconstruction, operation, and maintenance of overhead electrical or communication circuits or conductors and their supporting structures and associated equipment of the following systems, provided that such work on any of the following systems is performed by the employees of the owner or operator of the systems or independent contractors engaged on behalf of the owner or operator of the systems to perform the work, and the owner of the system has a valid joint-use contract or agreement with the owner of the high-voltage lines:

(1) Rail transportation systems;
(2) Electrical generating, transmission, or distribution systems;
(3) Communications systems, including cable television; or
(4) Any other publicly or privately owned system, including traffic signals.

(b) This Article also shall not apply to electrical or communications circuits or conductors on the premises of coal or other mines which are subject to the provisions of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 801, et seq.) and regulations adopted pursuant to that Act by the Mine Safety and Health Administration. (1995 (Reg. Sess., 1996), c. 587, s. 1.)

§ 95-229.12. Application.

Nothing in this Article shall relieve any person from complying with any safety rule, regulation, or statute not imposed by this Article. A violation of this Article shall not constitute negligence or contributory negligence, nor give rise to any cause of action based upon injury to persons or property. An action may be brought by an owner or operator of a high-voltage line to recover the cost of precautionary safety arrangements or for damage to its facilities. Nothing contained in this Article shall be construed to alter, amend, restrict, or limit the liability of any person for violation of that person's duty under law; nor shall any person be relieved from liability as a result of violations of standards under existing law where such violations of existing standards of care are found to be a cause of damage to property, personal injury, or death. (1995 (Reg. Sess., 1996), c. 587, s. 1.)

§ 95-229.13. Severability.

The provisions of this Article are severable. If any part of this Article is declared invalid or unconstitutional, such declaration shall not affect the remainder. (1995 (Reg. Sess., 1996), c. 587, s. 1.)

ARTICLE 20.

Controlled Substance Examination Regulation.

§ 95-230. Purpose.

The General Assembly finds that individuals should be protected from unreliable and inadequate examinations and screening for controlled substances. The General Assembly also finds that employers who test employees for controlled substances shall use reliable and minimally invasive examinations and screenings and be afforded the opportunity to select from a range of cost-effective and advanced drug testing technologies. The purpose of this Article is to establish procedural and other requirements for the administration of controlled substance examinations. (1991, c. 687, s. 1; 2001-487, s. 66(a).)

CASE NOTES

Cited in Garner v. Rentenbach Constructors Inc., 350 N.C. 573, 515 S.E.2d 438 (1999).

§ 95-231. Definitions.

As used in this Article, unless the context clearly requires otherwise:

(1) "Approved laboratory" means a clinical chemistry laboratory which performs controlled substances testing and which has demonstrated satisfactory performance in the forensic urine drug testing programs of the United States Department of Health and Human Services or the College of American Pathologists for the type of tests and controlled substances being evaluated.

(1a) "Controlled substance" is as defined in G.S. 90-87(5) or a metabolite thereof.

(1b) "Controlled substance examination" means all actions related to drug testing for the purpose of determining if an examinee has used controlled substances.

(2) "Examiner" means a person, firm, or corporation, doing business in the State, including State, county, and municipal employers, who is the employer or prospective employer of the examinee and who performs or has performed by an approved laboratory a controlled substance examination.

(3) "Examinee" means an individual who is an employee of the examiner or an applicant for employment with the examiner and who is requested or required by an examiner to submit to a controlled substance examination.

(4) "Screening" means initial controlled substance examination performed for the purpose of determining use of controlled substances by an examinee. (1991, c. 687, s. 1; 1993, c. 213, s. 1.)

CASE NOTES

Cited in Garner v. Rentenbach Constructors Inc., 350 N.C. 573, 515 S.E.2d 438 (1999).

§ 95-232. Procedural requirements for the administration of controlled substance examinations.

(a) An examiner who requests or requires an examinee to submit to a controlled substance examination shall comply with the procedural requirements set forth in this section.

(b) Collection of samples: the collection of samples for examination or screening shall be performed under reasonable and sanitary conditions. Individual dignity shall be preserved to the extent practicable. Samples shall be collected in a manner reasonably calculated to prevent substitution of samples and interference with the collection, examination, or screening of samples. Samples for prospective or current employees may be collected on-site or at an approved laboratory.

(c) Screening test of samples:

(1) Prospective employees: a preliminary screening procedure that utilizes a single-use test device may be used for prospective employees.

(2) Current employees: the screening test of samples for current employees shall only be performed by an approved laboratory.

(c1) Confirmation test of samples: if a preliminary screening procedure or other screening test produces a positive result, an approved laboratory shall confirm that result by a second examination of the sample utilizing gas chromatography with mass spectrometry or an equivalent scientifically accepted method.

(d) Retention of samples: a portion of every sample that produces a confirmed positive examination result shall be preserved by the laboratory that conducts the confirmatory examination for a period of at least 90 days from the time the results of the confirmed positive examination are mailed or otherwise delivered to the examiner.

(e) Chain of custody: the examiner or his agent shall establish procedures regarding chain of custody for sample collection and examination to ensure proper record keeping, handling, labeling, and identification of examination samples.

(f) Retesting of positive samples: the examinee shall have the right to retest a confirmed positive sample at the same or another approved laboratory. The examiner, through the approved laboratory, shall make confirmed positive samples available to the affected examinee, or a designated agent, during the time which the sample is required to be retained. The examinee must request release of the sample in writing specifying to which approved laboratory the sample is to be sent. The examinee incurs all reasonable expenses for chain of custody procedures, shipping, and retesting of positive samples related to this request. (1991, c. 687, s. 1; 1993, c. 213, s. 2; 1995, c. 383, s. 1; 2006-264, s. 52(a).)

Editor's Note. — Session Laws 2006-264, s. 52(b), provides: "This section constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1(a). The Department of Labor shall adopt within 30 days of the effective date of this section temporary rules to clarify when employees who are subject to Article 20 of Chapter 95 of the General Statutes may utilize a preliminary screening procedure involving a single-use test device consistent with this section."

Effect of Amendments. — Session Laws 2006-264, s. 52(a), effective August 27, 2006, added the last sentence in subsection (b); rewrote subsection (c); and in subsection (c1), inserted "if a preliminary screening procedure or other screening test produces a positive result," near the beginning, and substituted "that result" for "any sample that produces a positive result."

CASE NOTES

Effect of Unknowing Use of Nonapproved Laboratory on Discharge of Employee. — The termination of plaintiff's employment based on a positive reading of a drug test did not constitute a wrongful discharge in violation of this section, and failure to use an approved laboratory did not automatically trigger the public policy exception to the employment-at-will doctrine, where plaintiff failed to demonstrate that defendant/employer knew that the laboratory did not qualify as an approved laboratory. Garner v. Rentenbach Constructors Inc., 350 N.C. 573, 515 S.E.2d 438 (1999).

§ 95-233. No duty to examine.

Nothing in this Article shall be construed to place a duty on examiners to conduct controlled substance examinations. (1991, c. 687, s. 1.)

§ 95-234. Violation of controlled substance examination regulations; civil penalty.

(a) Any examiner who violates the provisions of this Article shall be subject to a civil penalty of up to two hundred fifty dollars ($250.00) per affected examinee with the maximum not to exceed one thousand dollars ($1,000) per investigation by the Commissioner of Labor or his authorized representative. In determining the amount of the penalty, the Commissioner shall consider:

(1) The appropriateness of the penalty for the size of the business of the employer charged; and

(2) The gravity of the violation.

The determination by the Commissioner shall be final, unless within 15 days after receipt of notice thereof by certified mail with return receipt, by signature confirmation as provided by the U.S. Postal Service, by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) with delivery receipt, or via hand delivery, the person charged with the violation takes exception to the determination, in which event final determination of the penalty shall be made in an administrative proceeding pursuant to Article 3 of Chapter 150B and which final determination shall be subject to judicial review in a judicial proceeding pursuant to Article 4 of Chapter 150B.

(b) The amount of the penalty when finally determined may be recovered in a civil action brought by the Commissioner in the General Court of Justice.

(c) The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(d) Assessment of penalties under this section shall be subject to a two-year statute of limitations commencing at the time of the occurrence of the violation.

(e) The Commissioner of Labor may adopt, modify, or revoke such rules as are necessary for carrying out the provisions of this Article. The rules adopted shall promote individual dignity and privacy while not posing an undue burden on employers. (1991, c. 687, s. 1; 1993, c. 213, s. 3; 1998-215, s. 113; 2003-308, s. 7; 2007-231, s. 11.)

Effect of Amendments. — Session Laws 2007-231, s. 11, effective July 18, 2007, in the second paragraph of subsection (a), substituted "with return receipt, by signature confirmation as provided by the U.S. Postal Service" for "or" and inserted "or via hand delivery."

CASE NOTES

Cited in Garner v. Rentenbach Constructors Inc., 350 N.C. 573, 515 S.E.2d 438 (1999).

§ 95-235. Certain federal agencies exempted.

The provisions of this Article shall not apply to a controlled substance examination required by the United States Department of Transportation or the United States Nuclear Regulatory Commission. (1993, c. 213, s. 4.)

§§ 95-236 through 95-239: Reserved for future codification purposes.

Article 21.

Retaliatory Employment Discrimination.

§ 95-240. Definitions.

The following definitions apply in this Article:

(1) "Person" means any individual, partnership, association, corporation, business trust, legal representative, the State, a city, town, county, municipality, local agency, or other entity of government.

(2) "Retaliatory action" means the discharge, suspension, demotion, retaliatory relocation of an employee, or other adverse employment action taken against an employee in the terms, conditions, privileges, and benefits of employment. (1991 (Reg. Sess., 1992), c. 1021, s. 1.)

Legal Periodicals. — For note on workers' compensation and retaliatory discharge, see 58 N.C.L. Rev. 629 (1980).

For survey of 1982 law on workers' compensation, see 61 N.C.L. Rev. 1243 (1983).

For article on the doctrine of wrongful discharge in North Carolina and the need for reform, see 10 Campbell L. Rev. 217 (1988).

For article, "North Carolina Employment Law After *Coman*: Reaffirming Basic Rights in the Workplace," see 24 Wake Forest L. Rev. 905 (1989).

For note, "Coman v. Thomas Manufacturing Co.: Recognizing a Public Policy Exception to the at-Will Employment Doctrine," see 68 N.C.L. Rev. 2278 (1990).

For article, "An Analysis of the Retaliatory Employment Discrimination Act and Protected Activity under the Occupational Safety and Health Act of North Carolina," see 15 Campbell L. Rev. 29 (1992).

CASE NOTES

Commissioner of Labor Not a Citizen for Diversity Purposes. — The Commissioner of Labor, in carrying out his statutory duties on behalf of the state, is the alter ego of the state and as such cannot be considered a citizen for diversity purposes. Commissioner of Labor v. Dillard's, Inc., 83 F. Supp. 2d 622 (M.D.N.C. 2000).

Former Employees Not Protected. — "Former employees" are not within the class of persons protected by the Retaliatory Employment Discrimination Act, G.S. 95-240 et seq. Ciancia v. Mission Hosps., Inc., — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 38354 (W.D.N.C. Dec. 28, 2005).

Because plaintiff was not an "employee" at the time the employer committed the acts of which plaintiff complained, plaintiff was not protected by the Retaliatory Employment Discrimination Act (REDA), G.S. 95-240 et seq., and the employer's motion to dismiss plaintiff's REDA claim was granted. Ciancia v. Mission Hosps., Inc., — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 38354 (W.D.N.C. Dec. 28, 2005).

"Adverse Employment Action." — The failure to renew an employment contract constitutes an adverse employment action for purposes of REDA. Johnson v. Trustees of Durham Technical Community College, 139 N.C. App. 676, 535 S.E.2d 357 (2000).

Employee's retaliation claim failed since the employee failed to prove that the supervisor who decided to terminate the employee knew about a complaint he filed with the state's department of occupational safety after being injured on the job. Brown v. Sears Auto. Ctr., 222 F. Supp. 2d 757 (M.D.N.C. 2002).

State department of labor's finding that there was reasonable cause to support the employee's claim of retaliation, while probative, did not bind the court to the same conclusion. Brown v. Sears Auto. Ctr., 222 F. Supp. 2d 757 (M.D.N.C. 2002).

Cited in Pineda-Lopez v. N.C. Growers Ass'n, 151 N.C. App. 587, 566 S.E.2d 162 (2002); Johnson v. Bd. of Trs. of Durham Tech. Cmty. College, 157 N.C. App. 38, 577 S.E.2d 670 (2003); Wiley v. UPS, Inc., 164 N.C. App. 183, 594 S.E.2d 809 (2004); Whitings v. Wolfson Casing Corp., 173 N.C. App. 218, 618 S.E.2d 750, 2005 N.C. App. LEXIS 1916 (2005).

§ 95-241. Discrimination prohibited.

(a) No person shall discriminate or take any retaliatory action against an employee because the employee in good faith does or threatens to do any of the following:

- (1) File a claim or complaint, initiate any inquiry, investigation, inspection, proceeding or other action, or testify or provide information to any person with respect to any of the following:
  - a. Chapter 97 of the General Statutes.
  - b. Article 2A or Article 16 of this Chapter.
  - c. Article 2A of Chapter 74 of the General Statutes.
  - d. G.S. 95-28.1.
  - e. Article 16 of Chapter 127A of the General Statutes.
  - f. G.S. 95-28.1A.
- (2) Cause any of the activities listed in subdivision (1) of this subsection to be initiated on an employee's behalf.
- (3) Exercise any right on behalf of the employee or any other employee afforded by Article 2A or Article 16 of this Chapter or by Article 2A of Chapter 74 of the General Statutes.
- (4) Comply with the provisions of Article 27 of Chapter 7B of the General Statutes.
- (5) Exercise rights under Chapter 50B. Actions brought under this subdivision shall be in accordance with the provisions of G.S. 50B-5.5.

(b) It shall not be a violation of this Article for a person to discharge or take any other unfavorable action with respect to an employee who has engaged in protected activity as set forth under this Article if the person proves by the greater weight of the evidence that it would have taken the same unfavorable action in the absence of the protected activity of the employee. (1991 (Reg. Sess., 1992), c. 1021, s. 1; 1993, c. 423, s. 1; 1997-153, s. 7; 1997-350, s. 3; 1998-202, s. 7; 1999-423, s. 4; 2004-186, s. 18.2.)

CASE NOTES

The public policy behind former G.S. 97-6.1 was to promote an open environment in which employees could pursue their remedies under the Workers' Compensation Act without the fear of retaliation from their employers. Abels v. Renfro Corp., 108 N.C. App. 135, 423 S.E.2d 479 (1992), rev'd on other grounds, 355 N.C. 209, 436 S.E.2d 822 (1993) (decided under former § 97-6.1).

Burden of Proof. — To prove a North Carolina's Retaliatory Employment Discrimination Act case, a plaintiff must show that: (1) he had a workers' compensation claim, (2) defendant took an adverse employment action against him, (3) the workers' compensation claim was a substantial factor in whatever adverse employment action was taken against him, and (4) the adverse action would not have occurred in the absence of the employer's knowledge of the claim. Lilly v. Mastec N. Am., Inc., 302 F. Supp. 2d 471 (M.D.N.C. 2004).

Treatment of Similarly Situated Employees. — In an employee discharge case instituted pursuant to former G.S. 97-6.1 (see now this section), evidence of the employer's treatment of similarly situated employees is admissible to show the employer's motive for discharging the employee. Abels v. Renfro

Corp., 335 N.C. 209, 436 S.E.2d 822 (1993).

Even if the former employee raised an inference of a causal connection between the employee's workers' compensation claims and the termination of employment, the employer established its affirmative defense under G.S. 95-241(b) that the employee would have been terminated regardless of the workers' compensation claims, based on the evidence indicating that the employer's policy of terminating employees after a year's absence, of which the employee was aware, was consistently applied. Wilkerson v. Pilkington N. Am., Inc., 211 F. Supp. 2d 700 (M.D.N.C. 2002).

Removal to Federal Court Improper. — The provisions of this section relating to worker's compensation "arise under" the worker's compensation laws for purposes of 28 U.S.C.S. § 1445(c) and, therefore, the removal to federal court of a case alleging a violation of this section was improper. Arnett v. Leviton Mfg., Inc., 174 F. Supp. 2d 410 (W.D.N.C. 2001).

Employee's state law retaliation claim was remanded to state court because the federal court decided that the claim was so integrally related to state workers compensation law, that it arose under the state retaliatory employment discrimination act, G.S. 95-241 et seq., rather than 28 U.S.C.S. § 1445(c). Wiley v. UPS, 227 F. Supp. 2d 480 (M.D.N.C. 2002).

No Violation of Section Found. — No genuine issue of material fact existed as to whether defendant college took retaliatory action against plaintiff disabled teacher, in violation of this section, where the defendant entered into three new contracts with plaintiff after she filed a workers' compensation claim, and defendant's refusal to renew plaintiff's contract was not closely temporally related to her worker's compensation claim in that it took place over a year after she filed for compensation. Johnson v. Trustees of Durham Technical Community College, 139 N.C. App. 676, 535 S.E.2d 357 (2000).

Former employee failed to show any causal connection between the workers' compensation claims and the employee's termination, since the substantial period between the employee's final claim and the termination lacked the temporal proximity required to raise an inference that the termination was retaliatory. Wilkerson v. Pilkington N. Am., Inc., 211 F. Supp. 2d 700 (M.D.N.C. 2002).

Court of appeals upheld trial court's judgment dismissing an employee's claims that an employer wrongfully terminated the employee because the employee filed a workers' compensation claim and because the employee was an advocate for a nursing home's patients' rights; the employee's claims were speculative and did not present a triable issue of fact. Salter v. E & J Healthcare, Inc., 155 N.C. App. 685, 575 S.E.2d 46 (2003).

Where an employer did not have to make an accommodation for an employee, the failure to return the employee to work was not an adverse employment action under G.S. 95-241(a)(1a), and the employee could not demonstrate that the alleged retaliatory action was taken; therefore, the employer was properly granted summary judgment under G.S. 1A-1, N.C. R. Civ. P. 56(c). Wiley v. UPS, Inc., 164 N.C. App. 183, 594 S.E.2d 809 (2004).

Settlement Negotiations Included Within Protection of North Carolina Retaliatory Employment Discrimination Act. — All aspects of a workers' compensation proceeding are included in the statute, including claims, complaints, inquiries, investigations, inspections, proceedings, other actions, and testifying. Thus, negotiating a settlement falls within the protection of the North Carolina Retaliatory Employment Discrimination Act, and a former employee presented facts sufficient to survive summary judgment on his retaliation claim where he showed that his employer may have conditioned his acceptance of a worker's compensation settlement with a resignation from his job and where he showed that he was told he should stop trying to get his job back because he received as much from his former employer in the settlement as he would receive. Lilly v. Mastec N. Am., Inc., 302 F. Supp. 2d 471 (M.D.N.C. 2004).

Workers' Compensation Claim. — Pursuing one's rights under the North Carolina Workers' Compensation Act, G.S. 97-1 et seq., is a legally protected activity under G.S. 95-241(a)(1)a.; public policy is violated for purposes of the public policy exception to the at-will employment doctrine when an employee is fired in contravention of express policy declarations contained in the North Carolina General Statutes, and the statutory remedy available for violation of this public policy does not diminish the rights or remedies of any employee at common law under G.S. 95-244. Brackett v. SGL Carbon Corp., 158 N.C. App. 252, 580 S.E.2d 757 (2003).

Dismissal of the employee's claim for wrongful discharge in violation of public policy and her claim under North Carolina's Retaliatory Employment Discrimination Act (REDA), G.S. 95-240 et. seq., was reversed because the employee provided evidence that established that the employer admitted the employee was terminated for pursuing workers' compensation rights. Tarrant v. Freeway Foods of Greensboro, Inc., 163 N.C. App. 504, 593 S.E.2d 808, 2004 N.C. App. LEXIS 409 (2004), cert. denied, 358 N.C. 739, 603 S.E.2d 126 (2004).

Pertinent inquiry under the Seagraves test is not focused on determining whether an employer may fire an injured employee for misconduct unrelated to his injuries; it is clear that an employer may do so pursuant to G.S. 95-241(b).

Rather, the relevant question is determining whether, upon firing an injured employee for such misconduct, an employer can nevertheless be held responsible for continuing to pay injury benefits to the terminated employee. McRae v. Toastmaster, Inc., 358 N.C. 488, 597 S.E.2d 695, 2004 N.C. LEXIS 656 (2004).

Decision of the North Carolina Industrial Commission, finding that a claimant was terminated from his employment due to his disability, was upheld on appeal because the employer failed to show that the claimant made threats at work to have justified his termination. Workman v. Rutherford Elec. Mbrshp. Corp., 170 N.C. App. 481, 613 S.E.2d 243, 2005 N.C. App. LEXIS 1077 (2005).

Summary Judgment Inappropriate. — Where the employee was allegedly fired for reporting violations to Occupational Safety and Health Administration and the Environmental Protection Agency, and there were issues of fact as to whether there was a causal connection between the protected activity and his firing, which was allegedly a retaliatory discharge in violation of the Retaliatory Employment Discrimination Act, G.S. 95-241, summary judgment was inappropriate. Bumgardner v. Spotless Enters., 287 F. Supp. 2d 630 (W.D.N.C. 2003).

Applied in Ciancia v. Mission Hosps., Inc., — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 38354 (W.D.N.C. Dec. 28, 2005).

Cited in Abels v. Renfro Corp., 126 N.C. App. 800, 486 S.E.2d 735 (1997); Commissioner of Labor v. Dillard's, Inc., 83 F. Supp. 2d 622 (M.D.N.C. 2000); Smallwood v. Perdue Farms, Inc., — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 3770 (E.D.N.C. Feb. 21, 2000).

§ 95-242. Complaint; investigation; conciliation.

(a) An employee allegedly aggrieved by a violation of G.S. 95- 241 may file a written complaint with the Commissioner of Labor alleging the violation. The complaint shall be filed within 180 days of the alleged violation. Within 20 days following receipt of the complaint, the Commissioner shall forward a copy of the complaint to the person alleged to have committed the violation and shall initiate an investigation. If the Commissioner determines after the investigation that there is not reasonable cause to believe that the allegation is true, the Commissioner shall dismiss the complaint, promptly notify the employee and the respondent, and issue a right-to-sue letter to the employee that will enable the employee to bring a civil action pursuant to G.S. 95-243. If the Commissioner determines after investigation that there is reasonable cause to believe that the allegation is true, the Commissioner shall attempt to eliminate the alleged violation by informal methods which may consist of conference, conciliation, and persuasion. The Commissioner shall make a determination as soon as possible and, in any event, not later than 90 days after the filing of the complaint.

(b) If the Commissioner is unable to resolve the alleged violation through the informal methods, the Commissioner shall notify the parties in writing that conciliation efforts have failed. The Commissioner shall then either file a civil action on behalf of the employee pursuant to G.S. 95-243 or issue a right-to-sue letter to the employee enabling the employee to bring a civil action pursuant to G.S. 95-243.

(c) An employee may make a written request to the Commissioner for a right-to-sue letter after 180 days following the filing of a complaint if the Commissioner has not issued a notice of conciliation failure and has not commenced an action pursuant to G.S. 95-242.

(d) Nothing said or done during the use of the informal methods described in subsection (a) of this section may be made public by the Commissioner or used as evidence in a subsequent proceeding under this Article without the written consent of the persons concerned.

(e) The Commissioner's files and the Commissioner's other records relating to investigations and enforcement proceedings pursuant to this Article shall not be subject to inspection and examination as authorized by G.S. 132-6 while such investigations and proceedings are open or pending in the trial court division.

(f) In making inspections and investigations under this Article, the Commissioner or his duly authorized agents may, in addition to exercising the authority granted in G.S. 95-4, issue subpoenas to require the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be reimbursed for all travel and other necessary expenses which shall be claimed and paid in accordance with the prevailing travel reimbursement requirements of the State. In the case of failure or refusal of any person to obey a subpoena under this Article, the district court judge or superior court judge of the county in which the inspection or investigation is conducted shall, upon the application of the Commissioner, have jurisdiction to issue an order requiring compliance. (1991 (Reg. Sess., 1992), c. 1021, s. 1; 1993, c. 423, s. 2.)

CASE NOTES

Timeliness of Claims. — Acts of the employer alleged by the former employee to be retaliatory which did not occur within 180 days of filing the written complaint as required under G.S. 95-242(a) could only be considered as evidence that the employee's termination was retaliatory and not as separate retaliatory acts in their own right. Wilkerson v. Pilkington N. Am., Inc., 211 F. Supp. 2d 700 (M.D.N.C. 2002).

Time of Determination of Merit of Complaint. — Subsection (a) requires that the Commissioner of Labor make a determination as to the merit of a complaint within 90 days, but fails to provide a result in the event that the Commissioner fails to do so; thus, this statutory time period is of a directory, not jurisdictional nature. Commissioner of Labor v. House of Raeford Farms, Inc., 124 N.C. App. 349, 477 S.E.2d 230 (1996).

Trial court properly dismissed a North Carolina Retaliatory Employment Discrimination Act, G.S. 95-240 et seq., complaint under G.S. 1A-1, Rule 12(b)(6), where the right-to-sue letter from the North Carolina Department of Labor (NCDOL) stated that the administrative complaint to the NCDOL was untimely under G.S. 95-242(a). Brackett v. SGL Carbon Corp., 158 N.C. App. 252, 580 S.E.2d 757 (2003).

Time Limitation Is Mandatory. — Although there is no express statutory consequence for failing to meet the 180-day time limit set forth in G.S. 95-242(a), case law precedent indicates the limit is a mandatory one. Brackett v. SGL Carbon Corp., 158 N.C. App. 252, 580 S.E.2d 757 (2003).

Right-to-Sue Letter. — Where an employee referred in a complaint for a violation of the North Carolina Retaliatory Employment Discrimination Act, G.S. 95-240 et seq., to the administrative complaint and/or right-to-sue letter from the North Carolina Department of Labor, which were not attached to the complaint, and they formed the procedural basis for the complaint, the trial court did not convert the employer's motion to dismiss under G.S. 1A-1, Rule 12(b)(6), into one for summary judgment under G.S. 1A-1, Rule 56 by considering the unattached documents. Brackett v. SGL Carbon Corp., 158 N.C. App. 252, 580 S.E.2d 757 (2003).

Applicability to Claims by North Carolina Servicemember. — A North Carolina National Guard servicemember who alleged wrongful termination because of a National Guard obligation could initiate an action under the procedures set forth in the Retaliatory Employment Discrimination Act, G.S. 95. Lederer v. Hargraves Tech. Corp., 256 F. Supp. 2d 467, 2003 U.S. Dist. LEXIS 5895 (W.D.N.C. 2003).

Cited in Commissioner of Labor v. Dillard's, Inc., 83 F. Supp. 2d 622 (M.D.N.C. 2000); Arnett v. Leviton Mfg., Inc., 174 F. Supp. 2d 410 (W.D.N.C. 2001); Badgett v. Fed. Express Corp., 378 F. Supp. 2d 613, 2005 U.S. Dist. LEXIS 19307 (M.D.N.C. Apr. 7, 2005).

§ 95-243. Civil action.

(a) An employee who has been issued a right-to-sue letter or the Commissioner of Labor may commence a civil action in the superior court of the county where the violation occurred, where the complainant resides, or where the respondent resides or has his principal place of business.

(b) A civil action under this section shall be commenced by an employee within 90 days of the date upon which the right-to-sue letter was issued or by the Commissioner within 90 days of the date on which the Commissioner notifies the parties in writing that conciliation efforts have failed.

(c) The employee or the Commissioner may seek and the court may award any or all of the following types of relief:

(1) An injunction to enjoin continued violation of this Article.

(2) Reinstatement of the employee to the same position held before the retaliatory action or discrimination or to an equivalent position.

(3) Reinstatement of full fringe benefits and seniority rights.

(4) Compensation for lost wages, lost benefits, and other economic losses that were proximately caused by the retaliatory action or discrimination.

If in an action under this Article the court finds that the employee was injured by a willful violation of G.S. 95-241, the court shall treble the amount awarded under subdivision (4) of this subsection.

The court may award to the plaintiff and assess against the defendant the reasonable costs and expenses, including attorneys' fees, of the plaintiff in bringing an action pursuant to this section. If the court determines that the plaintiff's action is frivolous, it may award to the defendant and assess against the plaintiff the reasonable costs and expenses, including attorneys' fees, of the defendant in defending the action brought pursuant to this section.

(d) Parties to a civil action brought pursuant to this section shall have the right to a jury trial as provided under G.S. 1A-1, Rules of Civil Procedure.

(e) An employee may only bring an action under this section when he has been issued a right-to-sue letter by the Commissioner. (1991 (Reg. Sess., 1992), c. 1021, s. 1.)

CASE NOTES

Failure to Meet Delayed Service Requirements. — Statute of limitations barred plaintiff's retaliatory employment discrimination claim under this section, when he failed to meet the requirements of delayed service under G.S. 1A-1, Rule 3(a). Telesca v. SAS Inst. Inc., 133 N.C. App. 653, 516 S.E.2d 397, 1999 N.C. App. LEXIS 612, cert. denied, 351 N.C. 120, 540 S.E.2d 749 (1999).

Commencement of Civil Action. — Under G.S. 1-52(2), a civil action must be commenced within three years upon a liability created by statute, unless some other time is mentioned in the statute creating it; G.S. 1-52(2) is inapplicable to claims under the North Carolina Retaliatory Employment Discrimination Act, G.S. 95-240 et seq. Brackett v. SGL Carbon Corp., 158 N.C. App. 252, 580 S.E.2d 757 (2003).

Right-to-Sue Letter Required. — Under G.S. 95-243(e), without a right-to-sue letter issued by the North Carolina Commissioner of Labor, a plaintiff may not file a civil action for an alleged violation of the North Carolina Retaliatory Employment Discrimination Act, G.S. 95-240 et seq. Brackett v. SGL Carbon Corp., 158 N.C. App. 252, 580 S.E.2d 757 (2003).

Time Limitation Mandatory. — Ninety-day limit provided by G.S. 95-243 has been interpreted as mandatory, although the statute contains no express consequence for failure to meet the deadline; in addition, 42 U.S.C.S. § 2000e-5(e) uses similar language to describe the time for filing charges of employment discrimination under Title VII of the Civil Rights Act of 1964. Brackett v. SGL Carbon Corp., 158 N.C. App. 252, 580 S.E.2d 757 (2003).

Cited in Commissioner of Labor v. Dillard's, Inc., 83 F. Supp. 2d 622 (M.D.N.C. 2000); Arnett v. Leviton Mfg., Inc., 174 F. Supp. 2d 410 (W.D.N.C. 2001); Lederer v. Hargraves Tech. Corp., 256 F. Supp. 2d 467, 2003 U.S. Dist. LEXIS 5895 (W.D.N.C. 2003); Whitings v. Wolfson Casing Corp., 173 N.C. App. 218, 618 S.E.2d 750, 2005 N.C. App. LEXIS 1916 (2005).

§ 95-244. Effect of Article on other rights.

Nothing in this Article shall be deemed to diminish the rights or remedies of any employee under any collective bargaining agreement, employment contract, other statutory rights or remedies, or at common law. (1991 (Reg. Sess., 1992), c. 1021, s. 1.)

CASE NOTES

Workers' Compensation Claim Does Not Diminish Rights. — Pursuing one's rights under the North Carolina Workers' Compensation Act, G.S. 97-1 et seq., is a legally protected activity under G.S. 95-241(a)(1)a.; public policy is violated for purposes of the public policy exception to the at-will employment doctrine when an employee is fired in contravention of express policy declarations contained in the North Carolina General Statutes, and the statutory remedy available for violation of this public policy does not diminish the rights or remedies of any employee at common law under G.S. 95-244. Brackett v. SGL Carbon Corp., 158 N.C. App. 252, 580 S.E.2d 757 (2003).

Applied in Salter v. E & J Healthcare, Inc., 155 N.C. App. 685, 575 S.E.2d 46 (2003).

Cited in Arnett v. Leviton Mfg., Inc., 174 F. Supp. 2d 410 (W.D.N.C. 2001).

§ 95-245. Rules.

The Commissioner may adopt rules needed to implement this Article pursuant to the provisions of Chapter 150B of the General Statutes. (1993, c. 423, s. 3.)

CASE NOTES

Deference to Commissioner's Interpretation. — Based upon the plain language of the Retaliatory Employment Discrimination Act, G.S. 95-240 et seq., the state and federal court decisions construing the Act, and the purpose of the Act as expressed by the North Carolina Court of Appeals, the Commissioner of Labor impermissibly defined "employee" to include "former employees," and the court declined to follow the Commissioner's definition. Ciancia v. Mission Hosps., Inc., — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 38354 (W.D.N.C. Dec. 28, 2005).

§§ 95-246 through 95-249: Reserved for future codification purposes.

ARTICLE 22.

Safety and Health Programs and Committees.

§ 95-250. Definitions.

The following definitions shall apply in this Article:

(1) "Experience rate modifier" means the numerical modification applied by the Rate Bureau to an experience rating for use in determining workers' compensation premiums.

(2) "Worksite" means a single physical location where business is conducted or where operations are performed by employees of an employer.

The definitions of Article 16 of this Chapter shall also apply to this Article, except that "employee" for the purposes of G.S. 95-252(a), 95-252(c)(1)b., 95-255, and 95-256 means an employee employed for some portion of a working day in each of 20 or more calendar weeks in the current or preceding calendar year. (1991 (Reg. Sess., 1992), c. 962, s. 1.)

Legal Periodicals. — For comment, "From Andrews to Woodson and Beyond: The Development of the Intentional Tort Exception to the Exclusive Remedy Provision—Rescuing North Carolina Workers from Treacherous Waters," see 20 N.C. Cent. L.J. 164 (1992).

§ 95-251. Safety and health programs.

(a) Establishment of safety and health programs.

(1) Except as provided in subdivision (2) of this subsection, each employer with an experience rate modifier of 1.5 or greater shall, in accordance with this section, establish and carry out a safety and health program

to reduce or eliminate hazards and to prevent injuries and illnesses to employees.

(2) Employers with an experience rate modifier of 1.5 or greater which provide temporary help services shall, in accordance with this section, establish and implement a safety and health program to reduce or eliminate hazards and to prevent injuries and illnesses to its full-time employees permanently located at the employer's worksite. Employers which provide temporary help services shall not be required to establish and implement a safety and health program under this section for its employees assigned to a client's worksite. This subdivision shall not apply to employee leasing companies.

(3) The Commissioner may modify the application of the requirements of this section to classes of employers where the Commissioner determines that, in light of the nature of the risks faced by the employees of these employers, such a modification would not reduce the employees' safety and health protection.

(b) Safety and health program requirements. A safety and health program established and implemented under this section shall be a written program that shall include at least all of the following:

(1) Methods and procedures for identifying, evaluating, and documenting safety and health hazards.

(2) Methods and procedures for correcting the safety and health hazards identified under subdivision (1) of this subsection.

(3) Methods and procedures for investigating work-related fatalities, injuries, and illnesses.

(4) Methods and procedures for providing occupational safety and health services, including emergency response and first aid procedures.

(5) Methods and procedures for employee participation in the implementation of the safety and health program.

(6) Methods and procedures for responding to the recommendations of the safety and health committee, where applicable.

(7) Methods and procedures for providing safety and health training and education to employees and to members of any safety and health committee established under G.S. 95-252.

(8) The designation of a representative of the employer who has the qualifications and responsibility to identify safety and health hazards and the authority to initiate corrective action where appropriate.

(9) In the case of a worksite where employees of two or more employers work, procedures for each employer to protect employees at the worksite from hazards under the employer's control, including procedures to provide information on safety and health hazards to other employers and employees at the worksite.

(10) Any other provisions as the Commissioner requires to effectuate the purposes of this section.

(c) No loss of pay. The time during which employees are participating in training and education activities under this section shall be considered as hours worked for purposes of wages, benefits, and other terms and conditions of employment. The training and education shall be provided by an employer at no cost to the employees of the employer. (1991 (Reg. Sess., 1992), c. 962, s. 1.)

§ 95-252. Safety and health committees required.

(a) Establishment of safety and health committees. Except as provided in subsection (b) of this section, each employer with 11 or more employees and an experience rate modifier of 1.5 or greater shall provide for the establishment of safety and health committees and the selection of employee safety and health representatives in accordance with this section.

(b) Temporary help services. Temporary employees of employers which provide temporary help services shall not be counted as part of the 11 or more employees needed to establish a safety and health committee under this section, and employers which provide temporary help services shall not be required to establish a safety and health committee under this section for its employees assigned to a client's worksite. This subsection shall not apply to employee leasing companies.

(c) Safety and health committee requirements.

(1) In general. Each employer covered by this section shall establish a safety and health committee at each worksite of the employer, except as provided as follows:
  a. An employer covered by this section whose employees do not primarily report to or work at a fixed location is required to have only one safety and health committee to represent all employees.
  b. A safety and health committee is not required at a covered employer's worksite with less than 11 employees.
  c. The Commissioner may, by rule, modify the application of this subdivision to worksites where employees of more than one employer are employed.

(2) Membership. Each safety and health committee shall consist of:
  a. The employee safety and health representatives selected or appointed under subsection (d) of this section.
  b. As determined appropriate by the employer, employer representatives, the number of which may not exceed the number of employee representatives.

(3) Chairpersons. Each safety and health committee shall be cochaired by:
  a. A representative selected by the employer.
  b. A representative selected by the employee members of the committee.

(4) Rights. Each safety and health committee shall, within reasonable limits and in a reasonable manner, exercise the following rights:
  a. Review any safety and health program established by the employer under G.S. 95-251.
  b. Review incidents involving work-related fatalities, injuries and illnesses, and complaints by employees regarding safety or health hazards.
  c. Review, upon the request of the committee or upon the request of the employer representatives or employee representatives of the committee, the employer's work injury and illness records, other than personally identifiable medical information, and other reports or documents relating to occupational safety and health.
  d. Conduct inspections of the worksite at least once every three months and in response to complaints by employees or committee members regarding safety or health hazards.
  e. Conduct interviews with employees in conjunction with inspections of the worksite.
  f. Conduct meetings, at least once every three months, and maintain written minutes of the meetings.
  g. Observe the measurement of employee exposure to toxic materials and harmful physical agents.
  h. Establish procedures for exercising the rights of the committee.
  i. Make recommendations on behalf of the committee, and in making recommendations, permit any members of the committee to submit separate views to the employer for improvements in the

employer's safety and health program and for the correction of hazards to employee safety or health, except that recommendations shall be advisory only and the employer shall retain full authority to manage the worksite.

j. Accompany, upon request, the Commissioner or the Commissioner's representative during any physical inspection of the worksite.

(5) Time for committee activities. The employer shall permit members of the committee established under this section to take the time from work reasonably necessary to exercise the rights of the committee without suffering any loss of pay or benefits for time spent on duties of the committee.

(d) Employee safety and health representatives.

(1) In general. Safety and health committees established under this section shall include:

a. One employee safety and health representative where the average number of nonmanagerial employees of the employer at the worksite during the preceding year was more than 10, but less than 50.

b. Two employee safety and health representatives where the average number of nonmanagerial employees of the employer at the worksite during the preceding year was 50 or more, but less than 100.

c. An additional employee safety and health representative for each additional 100 such employees at the worksite, up to a maximum of six employee safety and health representatives.

d. Where an employer's employees do not primarily report to or work at a fixed location or at worksites where employees of more than one employer are employed, a number of employee safety and health representatives as determined by the Commissioner by rule.

(2) Selection. Employee safety and health representatives shall be selected by and from among the employer's nonmanagerial employees in accordance with rules adopted by the Commissioner. The rules adopted by the Commissioner may provide for different methods of selection of employee safety and health representatives at worksites with no bargaining representative, worksites with one bargaining representative, and worksites with more than one bargaining representative. (1991 (Reg. Sess., 1992), c. 962, s. 1.)

§ 95-253. Additional rights.

The rights and remedies provided to employees and employee safety and health representatives under this Article are in addition to, and not in lieu of, any other rights and remedies provided by contract or by other applicable law and are not intended to alter or affect those other rights and remedies. (1991 (Reg. Sess., 1992), c. 962, s. 1.)

§ 95-254. Rules.

(a) Safety and health programs. Not later than one year after July 15, 1992, the Commissioner shall adopt final rules concerning the establishment and implementation of employer safety and health programs under G.S. 95-251. Rules adopted shall include provisions for the training and education of employees and safety and health committee members. These rules shall include at least all of the following:

(1) Provision for the training and education of employees, including safety and health committee members, in a manner that is readily under-

standable by the employees, concerning safety and health hazards, control measures, the employer's safety and health program, employee rights, and applicable laws and regulations.

(2) Provision for the training and education of the safety and health committee concerning methods and procedures for hazard recognition and control, the conduct of worksite safety and health inspections, the rights of the safety and health committee, and other information necessary to enable the members to carry out the activities of the committee under G.S. 95-252.

(3) Requirement that training and education be provided to new employees at the time of employment and to safety and health committee members at the time of selection.

(4) Requirement that refresher training be provided on at least an annual basis and that additional training be provided to employees and to safety and health committee members when there are changes in conditions or operations that may expose employees to new or different safety or health hazards or when there are changes in safety and health rules or standards under Article 16 of this Chapter that apply to the employer.

(b) Safety and health committees. Not later than one year after July 15, 1992, the Commissioner shall adopt final rules for the establishment and operation of safety and health committees under G.S. 95-252. The rules shall include provisions concerning at least the following:

(1) The establishment of such committees by an employer whose employees do not primarily report to or work at a fixed location.

(2) The establishment of committees at worksites where employees of more than one employer are employed.

(3) The employer's obligation to enable the committee to function properly and effectively, including the provision of facilities and materials necessary for the committee to conduct its activities, and the maintenance of records and minutes developed by the committee.

(4) The provision for different methods of selection of employee safety and health representatives at worksites with no bargaining representative, worksites with one bargaining representative, and worksites with more than one bargaining representative. (1991 (Reg. Sess., 1992), c. 962, s. 1.)

§ 95-255. Reports.

(a) Upon the final adoption of all rules required to be adopted by the Commissioner under this Article, the Commissioner shall determine, based on information provided by the North Carolina Rate Bureau, the employers with an experience rate modifier of 1.5 or greater and shall notify these employers of the applicability of G.S. 95-251 and the potential applicability of G.S. 95-252.

(b) Within 60 days of notification by the Commissioner, the employer shall certify on forms provided by the Commissioner that he meets the requirements of G.S. 95-251 and, if applicable, the requirements of G.S. 95-252.

(c) The Commissioner shall notify an employer when his experience rate modifier falls below 1.5. An employer subject to the provisions of G.S. 95-252 shall notify the Commissioner if he no longer employs 11 or more employees and has discontinued or will discontinue the safety and health committee. (1991 (Reg. Sess., 1992), c. 962, s. 1.)

§ 95-255.1. Technical assistance.

Employers notified pursuant to G.S. 95-255(a) shall be offered technical assistance from the Division of Occupational Safety and Health to reduce injuries and illnesses in their workplaces. (1997-443, s. 17(a).)

§ 95-256. Penalties.

(a) The Commissioner may levy a civil penalty, not to exceed the amounts listed as follows, for a violation of this Article:

Employers with 10 or less employees	$ 2,000
Employers with 11-50 employees	$ 5,000
Employers with 51-100 employees	$10,000
Employers with more than 100 employees	$25,000.

(b) The Commissioner, in determining the amount of the penalty, shall consider the nature of the violation, whether it is a first or subsequent violation, and the steps taken by the employer to remedy the violation upon discovery of the violation.

(c) An employer may appeal a penalty levied by the Commissioner pursuant to this section to the North Carolina Occupational Safety and Health Review Commission subject to the procedures and requirements applicable to contested penalties under Article 16 of this Chapter. The determination of the Commission shall be final unless further appeal is made to the courts under the provisions of Chapter 150B of the General Statutes.

(d) All civil penalties and interest recovered by the Commissioner, together with any costs, shall be paid into the General Fund of the State. (1991 (Reg. Sess., 1992), c. 962, s. 1; 2005-133, s. 1; 2006-226, s. 30.)

Editor's Note. — Session Laws 2005-133, s. 1, as amended by Session Laws 2006-226, s. 30, effective June 29, 2005, provides: "Under the Occupational Safety and Health Act of North Carolina, the name of the Safety and Health Review Board is changed to the North Carolina Occupational Safety and Health Review Commission. The Revisor of Statutes is authorized to substitute the term 'Commission' for the term 'Board' wherever that term appears in the General Statutes in relation to the Act. The Revisor of Statutes is also authorized to insert the words 'North Carolina Occupational' in front of the phrase 'Safety and Health Review Commission' wherever that phrase appears in the General Statutes in relation to the Act."

Effect of Amendments. — Session Laws 2005-133, s. 1, as amended by Session Laws 2006-226, s. 30, effective June 29, 2005, inserted "North Carolina Occupational" preceding "Safety and Health Review Commission" in subsection (c).

§§ 95-257 through 95-259: Reserved for future codification purposes.

Article 23.

Workplace Violence Prevention.

§ 95-260. Definitions.

The following definitions apply in this Article:

(1) Civil no-contact order. — An order granted under this Article, which includes a remedy authorized by G.S. 95-264.

(2) Employer. — Any person or entity that employs one or more employees. Employer also includes the State of North Carolina and its political subdivisions.

(3) Unlawful conduct. — Unlawful conduct means the commission of one or more of the following acts upon an employee, but does not include acts of self-defense or defense of others:

a. Attempting to cause bodily injury or intentionally causing bodily injury.

b. Willfully, and on more than one occasion, following, being in the presence of, or otherwise harassing, as defined in G.S. 14-277.3, without legal purpose and with the intent to place the employee in reasonable fear for the employee's safety.

c. Willfully threatening, orally, in writing, or by any other means, to physically injure the employee in a manner and under circumstances that would cause a reasonable person to believe that the threat is likely to be carried out and that actually causes the employee to believe that the threat will be carried out. (2004-165, s. 1.)

§ 95-261. Civil no-contact orders; persons protected.

An action for a civil no-contact order may be filed as a civil action in district court by an employer on behalf of an employee who has suffered unlawful conduct from any individual that can reasonably be construed to be carried out, or to have been carried out, at the employee's workplace. The employee that is the subject of unlawful conduct shall be consulted prior to seeking an injunction under this Article in order to determine whether any safety concerns exist in relation to the employee's participation in the process. Employees who are targets of unlawful conduct who are unwilling to participate in the process under this Article shall not face disciplinary action based on their level of participation or cooperation. (2004-165, s. 1.)

§ 95-262. Commencement of action; venue.

(a) An action for a civil no-contact order is commenced by filing a verified complaint for a civil no-contact order in any civil district court or by filing a motion in any existing civil action.

(b) A complaint or motion for a civil no-contact order shall be filed in the county where the unlawful conduct took place. (2004-165, s. 1.)

§ 95-263. Process for action for no-contact order.

(a) Any action for a civil no-contact order requires that a separate summons be issued and served. The summons issued pursuant to this Article shall require the respondent to answer within 10 days of the date of service. Attachments to the summons shall include the verified complaint for the civil no-contact order and any temporary civil no-contact order that has been issued and the notice of hearing on the temporary civil no-contact order.

(b) Service of the summons and attachments shall be by the sheriff by personal delivery in accordance with Rule 4 of the Rules of Civil Procedure, and if the respondent cannot with due diligence be served by the sheriff by personal delivery, the respondent may be served by publication by the complainant in accordance with Rule 4(j1) of the Rules of Civil Procedure.

(c) The court may enter a civil no-contact order by default for the remedy sought in the complaint if the respondent has been served in accordance with this section and fails to answer as directed, or fails to appear on any subsequent appearance or hearing date agreed to by the parties or set by the court. (2004-165, s. 1.)

§ 95-264. Civil no-contact order; remedy.

(a) Upon a finding that the employee has suffered unlawful conduct committed by the respondent, the court may issue a temporary or permanent civil no-contact order. In determining whether or not to issue a civil no-contact order, the court shall not require physical injury to the employee or injury to the employer's property.

(b) The court may grant one or more of the following forms of relief in its orders under this Article:

(1) Order the respondent not to visit, assault, molest, or otherwise interfere with the employer or the employer's employee at the employer's workplace, or otherwise interfere with the employer's operations.
(2) Order the respondent to cease stalking the employer's employee at the employer's workplace.
(3) Order the respondent to cease harassment of the employer or the employer's employee at the employer's workplace.
(4) Order the respondent not to abuse or injure the employer, including the employer's property, or the employer's employee at the employer's workplace.
(5) Order the respondent not to contact by telephone, written communication, or electronic means the employer or the employer's employee at the employer's workplace.
(6) Order other relief deemed necessary and appropriate by the court.

(c) A civil no-contact order shall include the following notice, printed in conspicuous type: "A knowing violation of a civil no-contact order shall be punishable as contempt of court which may result in a fine or imprisonment." (2004-165, s. 1.)

§ 95-265. Temporary civil no-contact order; court holidays and evenings.

(a) A temporary civil no-contact order may be granted ex parte, without written or oral notice to the respondent, only if both of the following are shown:
(1) It clearly appears from specific facts shown by a verified complaint or affidavit that immediate injury, loss, or damage will result to the complainant, or the complainant's employee before the respondent can be heard in opposition.
(2) Either one of the following:
  a. The complainant certifies to the court in writing the efforts, if any, that have been made to give the notice and the reasons supporting the claim that notice should not be required.
  b. The complainant certified to the court that there is good cause to grant the remedy because the harm that the remedy is intended to prevent would likely occur if the respondent were given any prior notice of the complainant's efforts to obtain judicial relief.

(b) Every temporary civil no-contact order granted without notice shall:
(1) Be endorsed with the date and hour of issuance.
(2) Be filed immediately in the clerk's office and entered of record.
(3) Define the injury, state why it is irreparable and why the order was granted without notice.
(4) Expire by its terms within such time after entry, not to exceed 10 days.
(5) Give notice of the date of hearing on the temporary order as provided in G.S. 95-267(a).

(c) If the respondent appears in court for the hearing for a temporary order, the respondent may elect to file a general appearance and testify. Any resulting order may be a temporary order, governed by this section. Notwithstanding the requirements of this section, if all requirements of G.S. 95-266 have been met, the court may issue a permanent order.

(d) When the court is not in session, the complainant may file a complaint for a temporary order before any judge or magistrate designated to grant relief under this Article. If the judge or magistrate finds that there is an immediate and present danger of abuse against the complainant or employee of the complainant and that the complainant has satisfied the prerequisites set forth in subsection (a) of this section, the judge or magistrate may issue a temporary civil no-contact order. The chief district court judge may designate for each county at least one judge or magistrate to be reasonably available to issue temporary civil no-contact orders when the court is not in session. (2004-165, s. 1; 2006-264, s. 9.)

Editor's Note. — The bracketed language in sub-subdivision (a)(2)b. was added at the direction of the Revisor of Statutes.

Effect of Amendments. — Session Laws 2006-264, s. 9, effective August 27, 2006, substituted "likely occur" for "like occur" near the middle of subdivision (a)(2)b.

§ 95-266. Permanent civil no-contact order.

Upon a finding that the employee has suffered unlawful conduct committed by the respondent, a permanent civil no-contact order may issue if the court additionally finds that process was properly served on the respondent, the respondent has answered the complaint and notice of hearing was given, or the respondent is in default. No permanent civil no-contact order shall be issued without notice to the respondent. (2004-165, s. 1.)

§ 95-267. Duration; extension of orders.

(a) A temporary civil no-contact order shall be effective for not more than 10 days as the court fixes, unless within the time so fixed the temporary civil no-contact order, for good cause shown, is extended for a like period or a longer period if the respondent consents. The reasons for the extension shall be stated in the temporary order. In case a temporary civil no-contact order is granted without notice and a motion for a permanent civil no-contact order is made, it shall be set down for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character. When the motion for a permanent civil no-contact order comes on for hearing, the complainant may proceed with a motion for a permanent civil no-contact order, and, if the complainant fails to do so, the judge shall dissolve the temporary civil no-contact order. On two days' notice to the complainant or on such shorter notice to that party as the judge may prescribe, the respondent may appear and move its dissolution or modification. In that event the judge shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(b) A permanent civil no-contact order shall be effective for a fixed period of time not to exceed one year.

(c) Any temporary or permanent order may be extended one or more times, as required, provided that the requirements of G.S. 95-265 or G.S. 95-266, as appropriate, are satisfied. The court may renew a temporary or permanent order, including an order that previously has been renewed, upon a motion by the complainant filed before the expiration of the current order. The court may renew the order for good cause. The commission of an act of unlawful conduct by the respondent after entry of the current order is not required for an order to be renewed. If the motion for extension is uncontested and the complainant seeks no modification of the order, the order may be extended if the complainant's motion or affidavit states that there has been no material change in relevant circumstances since entry of the order and states the reason for the requested extension. Extensions may be granted only in open court and not under the provisions of G.S. 95-265(d).

(d) Any civil no-contact order expiring on a court holiday shall expire at the close of the next court business day. (2004-165, s. 1.)

§ 95-268. Notice of orders.

(a) The clerk of court shall deliver on the same day that a civil no-contact order is issued a certified copy of that order to the sheriff.

(b) Unless the respondent was present in court when the order was issued, the sheriff shall serve that order upon the respondent and file proof of service in the manner provided for service of process in civil proceedings. If process has not yet been served upon the respondent, it shall be served with the order.

(c) A copy of the order shall be issued promptly to and retained by the police department of the municipality of the employer's workplace. If the employer's workplace is not located in a municipality or in a municipality with no police department, copies shall be issued promptly to and retained by the sheriff and the county police department, if any, of the county in which the employer's workplace is located.

(d) Any order extending, modifying, or revoking any civil no-contact order shall be recorded, issued, and served in accordance with the provisions of this Article. (2004-165, s. 1.)

§ 95-269. Violation of valid order.

A violation of an order entered pursuant to this Article is punishable as contempt of court. (2004-165, s. 1.)

§ 95-270. Employment discrimination unlawful.

(a) No employer shall discharge, demote, deny a promotion, or discipline an employee because the employee took reasonable time off from work to obtain or attempt to obtain relief under Chapter 50B or Chapter 50C. An employee who is absent from the workplace shall follow the employer's usual time-off policy or procedure, including advance notice to the employer, when required by the employer's usual procedures, unless an emergency prevents the employee from doing so. An employer may require documentation of any emergency that prevented the employee from complying in advance with the employer's usual time-off policy or procedure, or any other information available to the employee which supports the employee's reason for being absent from the workplace.

(b) The Commissioner of Labor shall enforce the provisions of this section according to Article 21 of Chapter 95 of the General Statutes, including the rules and regulations issued pursuant to the Article. (2004-165, s. 1.)

§ 95-271. Scope of Article; other remedies available.

This Article does not expand, diminish, alter, or modify any duty of any employer to provide a safe workplace for employees and other persons. This Article does not limit the ability of an employer, employee, or victim to pursue any other civil or criminal remedy provided by law. This Article does not apply in circumstances where an employee or representative of employees is engaged in union organizing, union activity, a labor dispute, or any activity or action protected by the National Labor Relations Act, 29 U.S.C. § 151, et seq. Nothing in this Article is intended to change the National Labor Relations Act's preemptive regulation of legally protected activities, nor to change the right of the State and its courts to regulate activities not protected by the National Labor Relations Act. (2004-165, s. 1; 2004-199, s. 58.)

Chapter 96.

Employment Security.

Article 1.

Employment Security Commission.

Sec.
96-1. Title.
96-1.1 through 96-1.5. [Repealed.]
96-2. Declaration of State public policy.
96-3. Employment Security Commission.
96-4. Administration.
96-5. Employment Security Administration Fund.
96-6. Unemployment Insurance Fund.
96-6.1. (Repealed effective with respect to calendar quarters beginning on or after January 1, 2011) Training and reemployment contribution.
96-7. Representation in court.

Article 2.

Unemployment Insurance Division.

96-8. Definitions.
96-9. Contributions.
96-10. Collection of contributions.
96-11. Period, election, and termination of employer's coverage.
96-12. Benefits.
96-12.01. Extended benefits.
96-12.1. Extended base period for certain job related injuries.
96-13. Benefit eligibility conditions.
96-14. Disqualification for benefits.
96-15. Claims for benefits.
96-15.1. Protection of witnesses from discharge, demotion, or intimidation.
96-15.2. Protection of witness before the Employment Security Commission.
96-16. Seasonal pursuits.
96-17. Protection of rights and benefits; attorney representation; prohibited fees; deductions for child support obligations.
96-18. Penalties.
Sec.
96-19. Enforcement of Employment Security Law discontinued upon repeal or invalidation of federal acts; suspension of enforcement provisions contested.

Article 3.

Employment Service Division.

96-20. Duties of Division; conformance to Wagner-Peyser Act; organization; director; employees.
96-21. Duties concerning veterans and worker profiling.
96-22. Employment of and assistance to minors.
96-23. [Repealed.]
96-24. Local offices; cooperation with United States service; financial aid from United States.
96-25. Acceptance and use of donations.
96-26. Cooperation of towns, townships, and counties with Division.
96-27. Method of handling employment service funds.
96-28. [Repealed.]
96-29. Openings listed by State agencies.

Article 4.

Job Training, Education, and Placement Information Management.

96-30. Findings and purpose.
96-31. Definitions.
96-32. Common follow-up information management system created.
96-33. State agencies required to provide information and data.
96-34. Prohibitions on use of information collected.
96-35. Reports on common follow-up system activities.

ARTICLE 1.

Employment Security Commission.

§ 96-1. Title.

This Chapter shall be known and may be cited as the "Employment Security Law." Any reference to the Unemployment Compensation Commission shall be deemed a reference to the Employment Security Commission and all powers, duties, funds, records, etc., of the Unemployment Compensation Commission are transferred to the Employment Security Commission. (Ex. Sess., 1936, c. 1, s. 1; 1947, c. 598, s. 1; 1977, c. 727, s. 1.)

Cross References. — As to the inapplicability of this chapter to prisoners working pursuant to G.S. 162-58, see G.S. 162-61.

Legal Periodicals. — For article discussing unemployment compensation, see 15 N.C.L. Rev. 377 (1937).

For discussion of the 1939 and 1947 amendments to this Chapter, see 17 N.C.L. Rev. 415 (1939), and 25 N.C.L. Rev. 415 (1947).

For explanation of the purposes and effects of the 1957 amendments to this Chapter, see 36 N.C.L. Rev. 53 (1957).

For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For note on unemployment compensation and the labor dispute disqualification, see 16 Wake Forest L. Rev. 472 (1980).

For comment discussing unemployment compensation in light of Intercraft Indus. Corp. v. Morrison, 305 N.C. 373, 289 S.E.2d 357 (1982), see 18 Wake Forest L. Rev. 921 (1982).

For survey of 1982 administrative law, see 61 N.C.L. Rev. 961 (1983).

For note, "Employment Discrimination — The Supreme Court Liberates Title VII Mixed-Motive Cases from the Procrustean Bed of the McDonnell Douglas/Burdine Pretext Model — Price Waterhouse v. Hopkins," see 25 Wake Forest L. Rev. 345 (1990).

CASE NOTES

One of the major purposes of the Employment Security Act was to provide a fund by systematic accumulations during periods of employment to be retained and used for the benefit of persons furloughed from their jobs through no fault of their own. In re Abernathy, 259 N.C. 190, 130 S.E.2d 292, appeal dismissed and cert. denied, 375 U.S. 161, 84 S. Ct. 274, 11 L. Ed. 2d 261 (1963).

The General Assembly may determine the scope of this Chapter, and the definitions and tests prescribed will be applied by the courts in accordance with the legislative intent. Unemployment Comp. Comm'n v. City Ice & Coal Co., 216 N.C. 6, 3 S.E.2d 290 (1939).

Construction in Favor of Applicants. — The Employment Security Act is to be liberally construed in favor of applicants. Marlow v. North Carolina Emp. Sec. Comm'n, 127 N.C. App. 734, 493 S.E.2d 302 (1997), cert. denied, 347 N.C. 577, 502 S.E.2d 595 (1998).

Construction in Favor of Validity. — The intent of the legislature to provide a wide scope in the application of this Chapter to mitigate the economic evils of unemployment and to bring within its provisions employments therein defined beyond the scope of existing definitions or categories is apparent from the language used, and all doubts as to constitutionality should be resolved in favor of the validity of the Chapter and all its provisions. State ex rel. Unemployment Comp. Comm'n v. J.M. Willis Barber & Beauty Shop, 219 N.C. 709, 15 S.E.2d 4 (1941).

The "Employment Security Law" must be construed to promote and not to defeat the legislative policy as declared in this Chapter, and the courts will not construe the Chapter in such manner as to discourage parties from entering into contracts designed to lessen the hardships incident to termination of employment. In re Tyson, 253 N.C. 662, 117 S.E.2d 854 (1961).

Weight to Be Given Federal Construction. — Our State Unemployment Compensation Act (now Employment Security Law) was passed pursuant to a plan national in scope, and therefore serious consideration is to be given to the construction placed upon similar language of the federal statute by the Commissioner of Internal Revenue, but the interpretation of the Act is finally for our courts, and neither the ruling of the Commissioner nor that of the State Unemployment Compensation Commission (now Employment Security Commission) is conclusive. Unemployment Comp. Comm'n v. Wachovia Bank & Trust Co., 215 N.C. 491, 2 S.E.2d 592 (1939).

Illustrative Cases. — The Commission's findings of fact, which were in conflict over when the discharge actually occurred, could not support the finding that the misconduct occurred after employee was discharged. Bagwell & Bagwell, Inc. v. Blanton, 124 N.C. App. 538, 478 S.E.2d 25 (1996).

Cited in B-C Remedy Co. v. Unemployment Comp. Comm'n, 226 N.C. 52, 36 S.E.2d 733, 163 A.L.R. 773 (1946); Blue Jeans Corp. v. Amalgamated Clothing Workers of Am., 4 N.C. App. 245, 166 S.E.2d 698 (1969); Boyland v. Southern Structures, Inc., 172 N.C. App. 108, 615 S.E.2d 919, 2005 N.C. App. LEXIS 1434 (2005).

§§ 96-1.1 through 96-1.5: Repealed by Session Laws 1977, c. 727, ss. 2-6.

§ 96-2. Declaration of State public policy.

As a guide to the interpretation and application of this Chapter, the public policy of this State is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this State. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The legislature, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this State require the enactment of this measure, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own. (Ex. Sess. 1936, c. 1, s. 2.)

Legal Periodicals. — For survey of 1976 administrative law, see 55 N.C.L. Rev. 898 (1977).

For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For note on unemployment compensation and the labor dispute disqualification, see 16 Wake Forest L. Rev. 472 (1980).

CASE NOTES

Legislative Intent. — The legislature has sought to provide aid to those out of work through no fault of their own. In re Scaringelli, 39 N.C. App. 648, 251 S.E.2d 728 (1979).

The matter of policy is in the exclusive province of the legislature and the courts will not interfere therewith unless the provisions relating thereto have no reasonable relations to the end sought to be accomplished. In re Steelman, 219 N.C. 306, 13 S.E.2d 544, 135 A.L.R. 929 (1941), applying provisions seeking to make State neutral in labor disputes.

Provisions of G.S. 96-14 Prevail over General Policy of this Section. — A specific ground for disqualifying an employee from unemployment benefits in G.S. 96-14, "when applicable," prevails over the general policy in this section of providing benefits to workers who are "unemployed through no fault of their own." Lynch v. PPG Indus., 105 N.C. App. 223, 412 S.E.2d 163 (1992).

Construction in Favor of Granting Claims. — Statutory provisions allowing disqualification from benefits must be strictly construed in favor of granting claims. Marlow v. North Carolina Emp. Sec. Comm'n, 127 N.C. App. 734, 493 S.E.2d 302 (1997), cert. denied, 347 N.C. 577, 502 S.E.2d 595 (1998).

Design of Employment Security Law. — See In re Watson, 273 N.C. 629, 161 S.E.2d 1 (1968).

The Employment Security Act was designed to provide protection against economic insecurity due to unemployment and should be liberally construed in favor of applicants. Eason v. Gould, Inc., 66 N.C. App. 260, 311 S.E.2d 372 (1984), aff'd, 312 N.C. 618, 324 S.E.2d 223 (1985).

The Employment Security Act was not designed to provide the payment of benefits to a person who is physically unable to work or who, for any other personal reason, would at no time be in a position to accept any employment if it were tendered to him, however capable and industrious such person may be. Milliken & Co. v. Griffin, 65 N.C. App. 492, 309 S.E.2d 733 (1983), cert. denied, 311 N.C. 402, 319 S.E.2d 272 (1984).

The section must be construed to provide benefits to one who becomes involuntarily unemployed, who is physically able to work, who is available for work at suitable employment, and who, although actively seeking work, is unable to find such employment through no fault of his or her own. Barnes v. Singer Co., 324 N.C. 213, 376 S.E.2d 756 (1989).

This Act does not contemplate penalizing workers who choose in favor of their own health, safety or ethical standards and against an affirmative or de facto policy of the employer to the contrary. Ray v. Broyhill Furn. Indus., 81 N.C. App. 586, 344 S.E.2d 798 (1986).

Strict Construction. — Sections of this

Chapter imposing disqualifications for its benefits should be strictly construed in favor of the claimant and should not be enlarged by implication or by adding to one disqualifying provision words found only in another. In re Watson, 273 N.C. 629, 161 S.E.2d 1 (1968).

Disqualification for benefits under the statute must be strictly construed in favor of the claimant and the employer has the burden to show that the claimant is disqualified from receiving benefits. Barnes v. Singer Co., 324 N.C. 213, 376 S.E.2d 756 (1989).

"Through No Fault of Their Own". — See In re Watson, 273 N.C. 629, 161 S.E.2d 1 (1968).

For discussion of whether a person who loses his employment for health reasons has left involuntarily with good cause attributable to the employer, see Milliken & Co. v. Griffin, 65 N.C. App. 492, 309 S.E.2d 733 (1983), cert. denied, 311 N.C. 402, 319 S.E.2d 272 (1984).

Nowhere in the act is the word "work" defined. In re Scaringelli, 39 N.C. App. 648, 251 S.E.2d 728 (1979).

G.S. 96-14 Prevails over This Section. — G.S. 96-14, which sets out the specific grounds for disqualification of benefits, will prevail over the general policy provisions of this section. In re Usery, 31 N.C. App. 703, 230 S.E.2d 585 (1976), cert. denied, 292 N.C. 265, 233 S.E.2d 396 (1977).

Applied in In re Beatty, 286 N.C. 226, 210 S.E.2d 193 (1974); Collins v. B & G Pie Co., 59 N.C. App. 341, 296 S.E.2d 809 (1982).

Cited in Bradshaw v. Administrative Office of Courts, 83 N.C. App. 237, 349 S.E.2d 621 (1986); Poteat v. Employment Sec. Comm'n, 319 N.C. 201, 353 S.E.2d 219 (1987); Watson v. Employment Sec. Comm'n, 111 N.C. App. 410, 432 S.E.2d 399 (1993).

§ 96-3. Employment Security Commission.

(a) Organization. — There is hereby created a commission to be known as the Employment Security Commission of North Carolina. The Commission shall consist of seven members to be appointed by the Governor on or before July 1, 1941. The Governor shall have the power to designate the member of said Commission who shall act as the chairman thereof. The chairman of the Commission shall not engage in any other business, vocation or employment. Three members of the Commission shall be appointed by the Governor to serve for a term of two years. Three members shall be appointed to serve for a term of four years, and upon the expiration of the respective terms, the successors of said members shall be appointed for a term of four years each, thereafter, and the member of said Commission designated by the Governor as chairman shall serve at the pleasure of the Governor. Any member appointed to fill a vacancy occurring in any of the appointments made by the Governor prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term. The Governor may at any time after notice and hearing, remove any Commissioner for gross inefficiency, neglect of duty, malfeasance, misfeasance, or nonfeasance in office.

(b) Divisions. — The Commission shall establish two coordinate divisions: the North Carolina State Employment Service Division, created pursuant to G.S. 96-20, and the Unemployment Insurance Division. Each division shall be responsible for the discharge of its distinctive functions. Each division shall be a separate administrative unit with respect to personnel and duties, except insofar as the Commission may find that such separation is impracticable. Notwithstanding any other provision of this Chapter, administrative organization of the agency shall be in accordance with that which the Commission finds most desirable in order to perform the duties and functions of the agency.

(c) Salaries. — **(Effective until appointment of next chairman of the Employment Security Commission)** The chairman of the Employment Security Commission of North Carolina, appointed by the Governor, shall be paid from the Employment Security Administration Fund a salary payable on a monthly basis, which salary shall be fixed by the General Assembly in the Current Operations Appropriations Act; and the members of the Commission, other than the chairman, shall each receive the same amount per diem for their services as is provided for the members of other State boards, commissions, and committees who receive compensation for their services as such,

G.S. 96-3(c) is set out twice. See notes.

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including necessary time spent in traveling to and from his place of residence within the State to the place of meeting while engaged in the discharge of the duties of his office and his actual traveling expenses, the same to be paid from the aforesaid fund. Notwithstanding G.S. 138-4, the chairman of the Employment Security Commission shall not accrue longevity pay.

(c) Salaries. — **(Effective upon the appointment of the next Chairman of the Employment Security Commission)** The chairman of the Employment Security Commission of North Carolina, appointed by the Governor, shall be paid from the Employment Security Administration Fund a salary payable on a monthly basis, which salary shall be the same as the salary fixed by the General Assembly in the Current Operations Appropriations Act for the Secretary of Commerce, and the members of the Commission, other than the chairman, shall each receive the same amount per diem for their services as is provided for the members of other State boards, commissions, and committees who receive compensation for their services as such, including necessary time spent in traveling to and from his place of residence within the State to the place of meeting while engaged in the discharge of the duties of his office and his actual traveling expenses, the same to be paid from the aforesaid fund.

(d) Quorum. — The chairman or his designee and three members of the Commission shall constitute a quorum. (Ex. Sess. 1936, c. 1, s. 10; 1941, c. 108, s. 10; c. 279, ss. 1-3; 1943, c. 377, s. 15; 1947, c. 598, s. 1; 1953, c. 401, s. 1; 1957, c. 541, s. 5; 1965, c. 795, s. 1; 1977, c. 727, s. 7; 1979, c. 660, s. 1; 1981, c. 354; 1983, c. 717, s. 19; 1983 (Reg. Sess., 1984), c. 1034, s. 164; 1987, c. 103, s. 1; 1996, 2nd Ex. Sess., c. 18, s. 28.2(c); 1997-443, s. 33.3; 2005-276, ss. 29.20A(a), 29.20A(b).)

Subsection (c) Set Out Twice. — The first version of subsection (c) set out above is effective until appointment of next chairman of the Employment Security Commission. The second version of subsection (c) set out above is effective upon the appointment of the next Chairman of the Employment Security Commission.

Editor's Note. — Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.5 is a severability clause.

Effect of Amendments. — Session Laws 2005-276, s. 29.20A(b), effective September 1, 2005, and continuing until the appointment of the next Chairman of the Employment Security Commission of North Carolina, added the last sentence in subsection (c).

Session Laws 2005-276, s. 29.20A(a), effective upon the appointment of the next Chairman of the Employment Security Commission of North Carolina, in subsection (c), inserted "the same as the salary" and "for the Secretary of Commerce" and made a minor punctuation change.

CASE NOTES

Commission Is State Agency. — The Commission is an agency created by statute for a public purpose and is an agency of the State. Prudential Ins. Co. of Am. v. Powell, 217 N.C. 495, 8 S.E.2d 619 (1940).

§ 96-4. Administration.

(a) Duties and Powers of Commission. — It shall be the duty of the Commission to administer this Chapter. The Commission shall meet at least once in each 60 days and may hold special meetings at any time at the call of the chairman or any three members of the Commission, and the Commission shall have power and authority to adopt, amend, or rescind such rules and regulations, to employ such persons, make such expenditures, require such reports, make such investigations, and take such other action as it deems necessary or suitable in the administration of this Chapter. Such rules and regulations shall be effective upon publication in the manner, not inconsistent with the provisions of this Chapter, which the Commission shall prescribe. The Commission shall determine its own organization and methods of procedure in accordance with the provisions of this Chapter, and shall have an official seal which shall be judicially noticed. The chairman of said Commission shall, except as otherwise provided by the Commission, be vested with all authority of the Commission, including the authority to conduct hearings and make decisions and determinations, when the Commission is not in session and shall execute all orders, rules and regulations established by said Commission. Not later than November 20 preceding the meeting of the General Assembly, the Commission shall submit to the Governor a report covering the administration and operation of this Chapter during the preceding biennium, and shall make such recommendation for amendments to this Chapter as the Commission deems proper. Such report shall include a balance sheet of the moneys in the fund in which there shall be provided, if possible, a reserve against the liability in future years to pay benefits in excess of the then current contributions, which reserve shall be set up by the Commission in accordance with accepted actuarial principles on the basis of statistics of employment, business activity, and other relevant factors for the longest possible period. Whenever the Commission believes that a change in contribution or benefit rates will become necessary to protect the solvency of the fund, it shall promptly so inform the Governor and the legislature, and make recommendations with respect thereto.

(b) Regulations and General and Special Rules. — General and special rules may be adopted, amended, or rescinded by the Commission only after public hearing or opportunity to be heard thereon, of which proper notice has been given by mail to the last known address in cases of special rules, or by publication as herein provided, and by one publication as herein provided as to general rules. The Commission shall not take final action on a general or special rule that has a substantial economic impact, as defined in G.S. 150B-21.4(b1), until 60 days after the Office of State Budget and Management has prepared a fiscal note for the rule. General rules shall become effective 10 days after filing with the Secretary of State and publication in one or more newspapers of general circulation in this State. Special rules shall become effective 10 days after notification to or mailing to the last known address of the individuals or concerns affected thereby. Before the adoption, amendment, or repeal of any permanent regulation, the Commission shall publish notice of the public hearing and offer any person an opportunity to present data, opinions, and arguments. The notice shall be published in one or more newspapers of general circulation in this State at least 10 days before the public hearing and at least 20 days prior to the proposed effective date of the proposed permanent regulation. The published notice of public hearing shall include the time and place of the public hearing; a statement of the manner in which data, opinions, and arguments may be submitted to or before the Commission; a statement of the terms or substance of the proposed regulation; a statement of whether a fiscal note has been or will be prepared for the proposed regulation; and the proposed effective date of the regulation. Any permanent regulation adopted after following the above procedure shall become effective on its effective date and after it is published in the manner provided for in subsection (c) as well as such additional publication as the Commission deems appropriate. Additionally, the Commission shall provide notice of adoption by mail to the last known addresses of all persons who submitted data, opinions, or arguments to the Commission with respect to the regulation. Temporary regulations may be adopted, amended, or rescinded by the Commission and shall become effective in the manner and at the time prescribed by the Commission but shall remain in force for no longer than 120 days.

(c) Publication. — The Commission shall cause to be printed for distribution to the public the text of this Chapter, the Commission's regulations and general rules, and any other material the Commission deems relevant and suitable, and shall furnish the same to any person upon application therefor. All publications printed shall comply with the requirements of G.S. 143-170.1.

(d) Personnel. — Subject to other provisions of this Chapter, the Commission is authorized to appoint, fix the compensation, and prescribe the duties and powers of such officers, accountants, attorneys, experts, and other persons as may be necessary in the performance of its duties. It shall provide for the holding of examinations to determine the qualifications of applicants for the positions so classified, and except for temporary appointments not to exceed six months in duration, shall appoint its personnel on the basis of efficiency and fitness as determined in such examinations. All positions shall be filled by persons selected and appointed on a nonpartisan merit basis. The Commission may delegate to any such person so appointed such power and authority as it deems reasonable and proper for the effective administration of this Chapter, and may, in its discretion, bond any person handling moneys or signing checks hereunder.

(e) Advisory Councils. — The Governor shall appoint a State Advisory Council composed of men and women representing employers, employees, and the general public, in equal numbers. The Chairman of the Commission shall be a member of the State Advisory Council and shall serve as its chairman. There shall be 15 members of the Council (other than its chairman) who shall each be appointed for a term of four years. A quorum of the State Advisory Council shall consist of the chairman, or such appointed member as he may designate, plus one half of the total appointed members. The function of the Council shall be to aid the Commission in formulating policies and discussing problems related to the administration of this Chapter. Each member of the State Advisory Council attending meetings of the Council shall be paid the same amount per diem for his services as is provided for the members of other State boards, commissions, and committees who receive compensation for their services, including necessary time spent in traveling to and from his place of residence within the State to the place of meeting while engaged in the discharge of the duties of his office, and his actual mileage and subsistence at the same rate allowed to State officials.

(f) Employment Stabilization. — The Commission, with the advice and aid of its advisory councils, and through its appropriate divisions, shall take all appropriate steps to reduce and prevent unemployment; to encourage and assist in the adoption of practical methods of vocational training, retraining and vocational guidance; to investigate, recommend, advise, and assist in the establishment and operation, by municipalities, counties, school districts, and the State, of reserves for public works to be used in times of business depression and unemployment; to promote the reemployment of unemployed workers throughout the State in every other way that may be feasible; and to these ends to carry on and publish the results of investigations and research studies.

(g) Records and Reports. —

(1) Each employing unit shall keep true and accurate employment records, containing such information as the Commission may prescribe. Such records shall be open to inspection and be subject to being copied by the Commission or its authorized representatives at any reasonable time and as often as may be necessary. Any employing unit doing business in North Carolina shall make available in this State to the Commission, such information with respect to persons, firms, or other employing units performing services for it which the Commission deems necessary in connection with the administration of this

Chapter. The Commission may require from any employing unit any sworn or unsworn reports, with respect to persons employed by it, which the Commission deems necessary for the effective administration of this Chapter.

(2) If the Commission finds that any employer has failed to file any report or return required by this Chapter or any regulation made pursuant hereto, or has filed a report which the Commission finds incorrect or insufficient, the Commission may make an estimate of the information required from such employer on the basis of the best evidence reasonably available to it at the time, and make, upon the basis of such estimate, a report or return on behalf of such employer, and the report or return so made shall be deemed to be prima facie correct, and the Commission may make an assessment based upon such report and proceed to collect contributions due thereon in the manner as set forth in G.S. 96-10(b) of this Chapter: Provided, however, that no such report or return shall be made until the employer has first been given at least 10 days' notice by registered mail to the last known address of such employer: Provided further, that no such report or return shall be used as a basis in determining whether such employing unit is an employer within the meaning of this Chapter.

(h) Oaths and Witnesses. — In the discharge of the duties imposed by this Chapter, the chairman and any duly authorized representative or member of the Commission shall have power to administer oaths and affirmations, take depositions, certify to official acts, and issue subpoenas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda, and other records deemed necessary as evidence in connection with a disputed claim or the administration of this Chapter. Upon a motion, the chairman and any duly authorized representative or member of the Commission may quash a subpoena if, after a hearing, the Commission finds any of the following:

(1) The subpoena requires the production of evidence that does not relate to a matter in issue.

(2) The subpoena fails to describe with sufficient particularity the evidence required to be produced.

(3) The subpoena is subject to being quashed for any other reason sufficient in law.

(h1) Hearing on Motion to Quash Subpoena; Appeal. — A hearing on a motion to quash a subpoena pursuant to subsection (h) of this section shall be heard at least 10 days prior to the hearing for which the subpoena was issued. The denial of a motion to quash a subpoena is subject to immediate judicial review in the Superior Court of Wake County or in the superior court of the county where the person subject to the subpoena resides.

(i) Subpoenas. — In case of contumacy by, or refusal to obey a subpoena issued to any person by the Commission or its authorized representative, any clerk of a superior court of this State within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Commission, or its duly authorized representatives, shall have jurisdiction to issue to such person an order requiring such person to appear before the Commission, or its duly authorized representatives, there to produce evidence if so ordered, or there to give testimony touching upon the matter under investigation or in question; and any failure to obey such order of the said clerk of superior court may be punished by the said clerk of superior court as a contempt of said court. Any person who shall, without just cause, fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, or other records in obedience to a subpoena of the Commission, shall be punished by a fine of not more than fifty dollars ($50.00) or by imprisonment for not longer than 30 days.

(j) Protection against Self-Incrimination. — No person shall be excused from attending and testifying or from producing books, papers, correspondence, memoranda, and other records before the Commission or in obedience to the subpoena of the Commission or any member thereof, or any duly authorized representative of the Commission, in any cause or proceeding before the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(k) State-Federal Cooperation. — In the administration of this Chapter, the Commission shall cooperate, to the fullest extent consistent with the provisions of this Chapter, with the federal agency, official, or bureau fully authorized and empowered to administer the provisions of the Social Security Act approved August 14, 1935, as amended, shall make such reports, in such form and containing such information as such federal agency, official, or bureau may from time to time require, and shall comply with such provisions as such federal agency, official, or bureau may from time to time find necessary to assure the correctness and verification of such reports; and shall comply with the regulations prescribed by such agency, official, or bureau governing the expenditures of such sums as may be allotted and paid to this State under Title III of the Social Security Act for the purpose of assisting in the administration of this Chapter. The Commission shall further make its records available to the Railroad Retirement Board, created by the Railroad Retirement Act and the Railroad Unemployment Insurance Act, and shall furnish to the Railroad Retirement Board at the expense of the Railroad Retirement Board, such copies thereof as the Board shall deem necessary for its purposes in accordance with the provisions of section 303 (c) of the Social Security Act as amended.

Upon request therefor, the Commission shall furnish to any agency of the United States charged with the administration of public works or assistance through public employment, the name, address, ordinary occupation, and employment status of each recipient of benefits, and such recipient's rights to further benefits under this Chapter.

The Commission is authorized to make such investigations, secure and transmit such information, make available such services and facilities and exercise such of the other powers provided herein with respect to the administration of this Chapter as it deems necessary or appropriate to facilitate the administration of any employment security or public employment service law, and in like manner, to accept and utilize information, services and facilities made available to this State by the agency charged with the administration of such other employment security or public employment service law.

The Commission shall fully cooperate with the agencies of other states and shall make every proper effort within its means to oppose and prevent any further action which would, in its judgment, tend to effect complete or substantial federalization of State unemployment insurance funds or State employment security programs.

(*l*) Reciprocal Arrangements. —

(1) The Commission is hereby authorized to enter into reciprocal arrangements with appropriate and duly authorized agencies of other states or of the federal government, or both, whereby:

a. Services performed by an individual for a single employing unit for which services are customarily performed in more than one state shall be deemed to be services performed entirely within any one of the states
  1. In which any part of such individual's service is performed or
  2. In which such individual has his residence or
  3. In which the employing unit maintains a place of business, provided there is in effect, as to such services, an election by the employing unit, approved by the agency charged with the administration of such state's employment security law, pursuant to which the services performed by such individual for such employing unit are deemed to be performed entirely within such state.

b. Combining wage credits. — The Commission shall participate in any arrangements for the payment of compensation on the basis of combining an individual's wages and employment covered under this Chapter with his wages and employment covered under one or more laws of the federal government and the unemployment compensation laws of other states which are approved by the United States Secretary of Labor in consultation with the state unemployment compensation agencies as reasonably calculated to assure the prompt and full payment of compensation in such situations and which include provisions for (1) applying the base period of a single state law to a claim involving the combining of an individual's wages and employment covered under two or more state unemployment compensation laws, and (2) avoiding the duplicate use of wages and employment by reason of such combining.

c. The services of the Commission as agent may be made available to other states in taking interstate claims for such states.

d. Contributions due under this Chapter with respect to wages for insured work shall for the purposes of G.S. 96-10 be deemed to have been paid to the fund as of the date payment was made as contributions therefor under another state or federal employment security law, but no such arrangement shall be entered into unless it contains provisions for such reimbursement to the fund of such contributions as the Commission finds will be fair and reasonable as to all affected interests.

e. The services of the Commission may be made available to such other agencies to assist in the enforcement and collection of judgments of such other agencies.

f. The services on vessels engaged in interstate or foreign commerce for a single employer, wherever performed, shall be deemed performed within this State or within such other state.

g. Benefits paid by agencies of other states may be reimbursed to such agencies in cases where services of the claimant were "employment" under this Chapter and contributions have been paid by the employer to this agency on remuneration paid for such services; provided the amount of such reimbursement shall not exceed the amount of benefits such claimant would have been entitled to receive under the provisions of this Chapter.

(2) Reimbursements paid from the fund pursuant to subparagraphs b and c of subdivision (1) of this subsection shall be deemed to be benefits for the purpose of G.S. 96-6, 96-9, 96-12 and 96-12.01. The Commission is authorized to make to other states or federal agencies and to receive from such other state or federal agencies, reimbursements from or to

the fund, in accordance with arrangements entered into pursuant to subdivision (1) of this subsection.

(3) To the extent permissible under the laws and Constitution of the United States, the Commission is authorized to enter into or cooperate in arrangements whereby facilities and services provided under this Chapter and facilities and services provided under the employment security law of any foreign government, may be utilized for the taking of claims and the payment of benefits under the Employment Security Law of this State or under a similar law of such government.

(m) The Commission after due notice shall have the right and power to hold and conduct hearings for the purpose of determining the rights, status and liabilities of any "employing unit" or "employer" as said terms are defined by G.S. 96-8(4) and 96-8(5) and subdivisions thereunder. The Commission shall have the power and authority to determine any and all questions and issues of fact or questions of law that may arise under the Employment Security Law that may affect the rights, liabilities and status of any employing unit or employer as heretofore defined by the Employment Security Law including the right to determine the amount of contributions, if any, which may be due the Commission by any employer. Hearings may be before the Commission or a Deputy Commissioner and shall be held in the central office of the Commission or at any other designated place within the State. They shall be open to the public and shall consist of a review of the evidence taken by a hearing officer designated by the Commission and a determination of the law applicable to that evidence. The Commission shall provide for the taking of evidence by a hearing officer who shall be a member of the legal staff of the Commission. Such hearing officer shall have the same power to issue subpoenas, administer oaths, conduct hearings and take evidence as is possessed by the Commission and such hearings shall be recorded, and he shall transmit all testimony and records of such hearings to the Commission for its determination. All such hearings conducted by such hearing officer shall be scheduled and held in any county in this State in which the employing unit or employer either resides, maintains a place of business, or conducts business; however, the Commission may require additional testimony at any hearings held by it at its office. From all decisions or determinations made by the Commission or a Deputy Commissioner any party affected thereby shall be entitled to an appeal to the superior court. Before such party shall be allowed to appeal, he shall within 10 days after notice of such decision or determination, file with the Commission exceptions to the decision or the determination of the Commission, which exceptions will state the grounds of objection to such decision or determination. If any one of such exceptions shall be overruled then such party may appeal from the order overruling the exceptions, and shall, within 10 days after the decision overruling the exceptions, give notice of his appeal. When an exception is made to the facts as found by the Commission, the appeal shall be to the superior court in term time but the decision or determination of the Commission upon such review in the superior court shall be conclusive and binding as to all questions of fact supported by any competent evidence. When an exception is made to any rulings of law, as determined by the Commission, the appeal shall be to the judge of the superior court at chambers. The party appealing shall, within 10 days after the notice of appeal has been served, file with the Commission exceptions to the decision or determination overruling the exception which statement shall assign the errors complained of and the grounds of the appeal. Upon the filing of such statement the Commission shall, within 30 days, transmit all the papers and evidence considered by it, together with the assignments of errors filed by the appellant to a judge of the superior court holding court or residing in some district in which such appellant either resides, maintains a place of business or conducts business, or, unless the appellant objects after being given reasonable opportunity to object, to a judge of the Superior Court of Wake County: Provided, however, the 30-day period specified herein may be extended by agreement of parties. If there be no exceptions to any facts as found by the Commission the facts so found shall be binding upon the court and it shall be heard by the judge at chambers at some place in the district, above mentioned, of which all parties shall have 10 days' notice.

(n) The cause shall be entitled "State of North Carolina on Relationship of the Employment Security Commission of North Carolina against (here insert name of appellant)," and if there are exceptions to any facts found by the Commission it shall be placed on the civil issue docket of such court and shall have precedence over other civil actions except those described in G.S. 96-10(b), and such cause shall be tried under such rules and regulations as are prescribed for the trial of other civil causes. By consent of all parties the appeal may be held and determined at chambers before any judge of a district in which the appellant either resides, maintains a place of business or conducts business, or said appeal may be heard before any judge holding court therein, or in any district in which the appellant either resides, maintains a place of business or conducts business. Either party may appeal to the appellate division from the judgment of the superior court under the same rules and regulations as are prescribed by law for appeals, except that if an appeal shall be taken on behalf of the Employment Security Commission of North Carolina it shall not be required to give any undertaking or make any deposit to secure the cost of such appeal and such court may advance the cause on its docket so as to give the same a speedy hearing.

(o) The decision or determination of the Commission when docketed in the office of the clerk of the superior court of any county and when properly indexed and cross-indexed shall have the same force and effect as a judgment rendered by the superior court, and if it shall be adjudged in the decision or determination of the Commission that any employer is indebted to the Commission for contributions, penalties and interest or either of the same, then said judgment shall constitute a lien upon any realty owned by said employer in the county only from the date of docketing of such decision or determination in the office of the clerk of the superior court and upon personalty owned by said employer in said county only from the date of levy on such personalty, and upon the execution thereon no homestead or personal property exemptions shall be allowed; provided, that nothing herein shall affect any rights accruing to the Commission under G.S. 96-10. The provisions of this section, however, shall not have the effect of releasing any liens for contributions, penalties or interest, or either of the same, imposed by other law, nor shall they have the effect of postponing the payment of said contributions, penalties or interest, or depriving the said Employment Security Commission of North Carolina of any priority in order of payment provided in any other statute under which payment of the said contributions, penalties and interest or either of the same may be required. The superior court or any appellate court shall have full power and authority to issue any and all executions, orders, decrees, or writs that may be necessary to carry out the terms of said decision or determination of the Commission or to collect any amount of contribution, penalty or interest adjudged to be due the Commission by said decision or determination. In case of an appeal from any decision or determination of the Commission to the superior court or from any judgment of the superior court to the appellate division all proceedings to enforce said judgment, decision, or determination shall be stayed until final determination of such appeal but no proceedings for the collection of any amount of contribution, penalty or interest due on same shall be suspended or stayed unless the employer or party adjudged to pay the same shall file with the clerk of the superior court a bond in such amount not exceeding double the amount of contribution, penalty, interest or amount due and with such sureties as the clerk of the superior court deems necessary conditioned upon the payment of the contribution, penalty, interest or amount due when the appeal shall be finally decided or terminated.

(p) The conduct of hearings shall be governed by suitable rules and regulations established by the Commission. The manner in which appeals and hearings shall be presented and conducted before the Commission shall be governed by suitable rules and regulations established by it. The Commission shall not be bound by common-law or statutory rules of evidence or by technical or formal rules of procedure but shall conduct hearings in such manner as to ascertain the substantial rights of the parties.

(q) Notices of hearing shall be issued by the Commission or its authorized representative and sent by registered mail, return receipt requested, to the last known address of any employing unit, employers, persons, or firms involved. The notice shall be sent at least 10 days prior to the hearing date and shall contain notification of the place, date, hour, and purpose of the hearing. Subpoenas for witnesses to appear at any hearing shall be issued by the Commission or its authorized representative and shall order him to appear at the time, date and place shown thereon. Any bond or other undertaking required to be given in order to suspend or stay any execution shall be given payable to the Employment Security Commission of North Carolina. Any such bond or other undertaking may be forfeited or sued upon as are any other undertakings payable to the State.

(r) None of the provisions or sections herein set forth in subsections (m)-(q) shall have the force and effect nor shall the same be construed or interpreted as repealing any of the provisions of G.S. 96-15 which provide for the procedure and determination of all claims for benefits and such claims for benefits shall be prosecuted and determined as provided by said G.S. 96-15.

(s) Upon a finding of good cause, the Commission shall have the power in its sole discretion to forgive, in whole or in part, any overpayment arising under G.S. 96-18(g)(2).

(t) Confidentiality of Records, Reports, and Information Obtained from Claimants, Employers, and Units of Government.

(1) Confidentiality of Information Contained in Records and Reports. — (i) Except as hereinafter otherwise provided, it shall be unlawful for any person to obtain, disclose, or use, or to authorize or permit the use of any information which is obtained from any employing unit, individual, or unit of government pursuant to the administration of this Chapter or G.S. 108A-29. (ii) Any claimant or employer or their legal representatives shall be supplied with information from the records of the Employment Security Commission to the extent necessary for the proper presentation of claims or defenses in any proceeding under this Chapter. Notwithstanding any other provision of law, any claimant may be supplied, subject to restrictions as the Commission may by regulation prescribe, with any information contained in his payment record or on his most recent monetary determination, and any individual, as well as any interested employer, may be supplied with information as to the individual's potential benefit rights from claim records. (iii) Subject to restrictions as the Commission may by regulation provide, information from the records of the Employment Security Commission may be made available to any agency or public official for any purpose for which disclosure is required by statute or regulation. (iv) The Commission may, in its sole discretion, permit the use of information in its possession by public officials in the performance of their public duties. (v) The Commission shall release the payment and the amount of unemployment compen-

sation benefits upon receipt of a subpoena in a proceeding involving child support. (vi) The Commission shall furnish to the State Controller any information the State Controller needs to prepare and publish a comprehensive annual financial report of the State or to track debtors of the State.

(2) Job Service Information. — (i) Except as hereinafter otherwise provided it is unlawful for any person to disclose any information obtained by the North Carolina State Employment Service Division from workers, employers, applicants, or other persons or groups of persons in the course of administering the State Public Employment Service Program. Provided, however, that if all interested parties waive in writing the right to hold such information confidential, the information may be disclosed and used but only for those purposes that the parties and the Commission have agreed upon in writing. (ii) The Employment Service Division shall make public, through the newspapers and any other suitable media, information as to job openings and available applicants for the purpose of supplying the demand for workers and employment. (iii) The Labor Market Information Division shall collect, collate, and publish statistical and other information relating to the work under the Commission's jurisdiction; investigate economic developments, and the extent and causes of unemployment and its remedies with the view of preparing for the information of the General Assembly such facts as in the Commission's opinion may make further legislation desirable. (iv) Except as provided by Commission regulation, any information published pursuant to this subdivision shall not be published in any manner revealing the identity of the applicant or the employing unit.

(3) Penalties for Disclosure or Improper Use. — Any person violating any provision of this section may be fined not less than twenty dollars ($20.00) nor more than two hundred dollars ($200.00), or imprisoned for not longer than 90 days, or both.

(4) Regulations. — The Commission may provide by regulation for procedures by which requests for information will be considered and the methods by which such information may be disclosed. The Commission is authorized to provide by regulation for the assessment of fees for securing and copying information released under this section.

(5) Privileged Status of Letters and Reports and Other Information Relating to Administration of this Chapter. — All letters, reports, communication, or any other matters, either oral or written, including any testimony at any hearing, from the employer or employee to each other or to the Commission or any of its agents, representatives, or employees, which letters, reports, or other communication shall have been written, sent, delivered, or made in connection with the requirements of the administration of this Chapter, shall be absolutely privileged communication in any civil or criminal proceedings except proceedings pursuant to or involving the administration of this Chapter and except proceedings involving child support and only for the purpose of establishing the payment and amount of unemployment compensation benefits. Nothing in this subdivision shall be construed to prohibit the Commission, upon written request and on a reimbursable basis only, from disclosing information from the records of a proceeding before an appeals referee, deputy commissioner, or other hearing officer by whatever name called, compiled for the purpose of resolving issues raised pursuant to the Employment Security Law.

(6) Nothing in this subsection (t) shall operate to relieve any claimant or employing unit from disclosing any information required by this Chapter or by regulations promulgated thereunder.

(7) Nothing in this subsection (t) shall be construed to prevent the Commission from allowing any individual or entity to examine and copy any report, return, or any other written communication made by that individual or entity to the Commission, its agents, or its employees.

(7a) Nothing in this subsection (t) shall be construed to prevent the Commission from disclosing, upon request and on a reimbursable basis only, to officers and employees of the Department of Housing and Urban Development and to representatives of a public housing agency as defined in Section 303(i)(4) of the Social Security Act, any information from the records of the Employment Security Commission with respect to individuals applying for or participating in any housing assistance program administered by the Department of Housing and Urban Development who have signed an appropriate consent form approved by the Secretary of Housing and Urban Development. It is the purpose of this paragraph to assure the Employment Security Commission's compliance with Section 303(i)(1) of the Social Security Act and it shall be construed accordingly.

(7b) Nothing in this subsection (t) shall be construed to prevent the Commission from disclosing, upon request and on a reimbursable basis, to the Secretary of Health and Human Services, any information from the records of the Employment Security Commission as may be required by Section 303(h)(1) of the Social Security Act. It is the purpose of this paragraph to assure compliance with Section 303(h)(1) of the Social Security Act and it shall be construed accordingly.

(8) Any finding of fact or law, judgment, determination, conclusion or final order made by an adjudicator, appeals referee, commissioner, the Commission or any other person acting under authority of the Commission pursuant to the Employment Security Law is not admissible or binding in any separate or subsequent action or proceeding, between a person and his present or previous employer brought before an arbitrator, court or judge of this State or the United States, regardless of whether the prior action was between the same or related parties or involved the same facts.

Provided, however, any finding of fact or law, judgment, determination, conclusion, or final order made by an adjudicator, appeals referee, commissioner, the Commission or any other person acting under the authority of the Commission pursuant to the Employment Security Law shall be admissible in proceedings before the North Carolina Industrial Commission.

(u) Service of process upon the Commission in any proceeding instituted before an administrative agency or court of this State shall be pursuant to G.S. 1A-1, Rule 4(j)(4); however, notice of the requirement to withhold unemployment compensation benefits pursuant to G.S. 110-136.2(f) shall be served upon the process agent for the Employment Security Commission by regular or courier mail.

(v) Advisory rulings may be made by the Commission with respect to the applicability of any statute or rule administered by the Commission, as follows:

(1) All requests for advisory rulings shall be made in writing and submitted to the Chief Counsel. Such requests shall state the facts and statutes or rules on which the ruling is requested.

(2) The Chief Counsel may request from any person securing an advisory ruling any additional information that is necessary. Failure to supply such additional information shall be cause for the Commission to decline to issue an advisory ruling.

(3) The Commission may decline to issue an advisory ruling if any administrative or judicial proceeding is pending with the person

requesting the ruling on the same factual grounds. The Commission may decline to issue an advisory ruling if such a ruling may harm the Commission's interest in any litigation in which it is or may be a party.

(4) All advisory rulings shall be issued no later than 30 days from the date all information necessary to make a ruling has been received by the Chief Counsel.

(5) No advisory ruling shall be binding upon the Commission provided that in any subsequent enforcement action initiated by the Commission, any person's reliance on such ruling shall be considered in mitigation of any penalty sought to be assessed. (Ex. Sess. 1936, c. 1, s. 11; 1939, c. 2; c. 27, s. 8; c. 52, s. 5; cc. 207, 209; 1941, c. 279, ss. 4, 5; 1943, c. 377, ss. 16-23; 1945, c. 522, ss. 1-3; 1947, c. 326, ss. 1, 3, 4, 26; c. 598, ss. 1, 6, 7; 1949, c. 424, s. 1; 1951, c. 332, ss. 1, 18; 1953, c. 401, ss. 1-4; 1955, c. 385, ss. 1, 2; c. 479; 1957, c. 1059, s. 1; 1969, c. 44, s. 63; c. 575, ss. 1, 2; 1971, c. 673, ss. 1, 2; 1977, c. 727, ss. 8-10; 1979, c. 660, s. 2; 1979, 2nd Sess., c. 1212, s. 2; 1981, c. 160, s. 1; 1983, c. 625, s. 16; 1983 (Reg. Sess., 1984), c. 995, s. 6; 1985, c. 197, ss. 1, 6, 7; c. 552, s. 23; 1987, c. 273; c. 764, ss. 4, 4.1, 5; 1989, c. 583, ss. 1, 2; c. 707, ss. 1, 2; 1991, c. 603, s. 1; c. 723, s. 3; 1993, c. 343, s. 1; c. 512, s. 3; 1995, c. 507, s. 27.8(n); 1999-340, s. 10; 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2004-203, s. 8; 2007-251, ss. 1, 2.)

Effect of Amendments. — Session Laws 2007-251, ss. 1 and 2, effective July 20, 2007, added the language beginning "Upon a motion" at the end of the introductory paragraph of subsection (h), added subdivisions (h)(1) through (h)(3); and added subsection (h1).

Legal Periodicals. — For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

CASE NOTES

Authority of Chairman of Commission. — By subsection (a) of this section the chairman of the Employment Security Commission, except as otherwise provided by the Commission, is vested with all authority of the Commission, including authority to conduct hearings and make decisions when the Commission is not in session. State ex rel. Emp. Sec. Comm'n v. Roberts, 230 N.C. 262, 52 S.E.2d 890 (1949).

The decision and order of the chairman, under subsection (a) of this section, are deemed the decision and order of the Commission. In re Troutman, 264 N.C. 289, 141 S.E.2d 613 (1965).

Because the chairman of the ESC had the authority to staff and make personnel decisions in the ESC, she had the authority, pursuant to G.S. 126-5(e), to dismiss plaintiff from his exempt policymaking position within the ESC. Carrington v. Brown, 136 N.C. App. 554, 525 S.E.2d 230, 2000 N.C. App. LEXIS 104 (2000).

Merits of Labor Disputes. — The Commission is charged with administering the benefits provided in this Chapter in accordance with the objective standards and criteria set up in the Chapter, but the merits of labor disputes do not belong to the Commission, these being matters properly pertaining to the field of labor relations. In re Steelman, 219 N.C. 306, 13 S.E.2d 544, 135 A.L.R. 929 (1941).

Due Process Rights of Employees. — To acknowledge that constitutional restraints exist upon a State government in dealing with its employees is not to say that all such employees have a right to due process notice and hearing before they can be removed from their employment. Nantz v. Employment Sec. Comm'n, 28 N.C. App. 626, 222 S.E.2d 474, aff'd, 290 N.C. 473, 226 S.E.2d 340 (1976).

This section sets forth in detail the procedure for hearings before the Commission and incident to appeal to the superior court. State ex rel. Emp. Sec. Comm'n v. Skyland Crafts, Inc., 240 N.C. 727, 83 S.E.2d 893 (1954).

The Employment Security Law authorizes the Commission to establish its own methods of procedure and conduct of hearings. Hester v. Hanes Knitwear, 61 N.C. App. 730, 301 S.E.2d 508, cert. denied, 308 N.C. 676, 304 S.E.2d 755 (1983).

As to the employer's right to appeal from an adverse decision, see Cianfarra v. North Carolina Dep't of Transp., 306 N.C. 737, 295 S.E.2d 457 (1982).

Whether someone is an "employee" is a mixed question of law and fact. The question of fact is what the terms, express or implied, of the employment contract are; the question of law is whether those terms show the requisite degree of control. State ex rel. Emp. Sec. Comm'n v. Faulk, 88 N.C. App. 369, 363 S.E.2d 225, cert. denied, 321 N.C. 480, 364 S.E.2d 917 (1988).

Conclusiveness of Findings of Fact on Review. — The findings of fact of the Employment Security Commission are conclusive upon review when there is any competent evidence or reasonable inference from such evidence to support them. Graham v. Wall, 220 N.C. 84, 16 S.E.2d 691 (1941); State ex rel. Emp. Sec. Comm'n v. Roberts, 230 N.C. 262, 52 S.E.2d 890 (1949); State ex rel. Emp. Sec. Comm'n v. Champion Distrib. Co., 230 N.C. 464, 53 S.E.2d 674 (1949). See State ex rel. Emp. Sec. Comm'n v. Kermon, 232 N.C. 342, 60 S.E.2d 580 (1950); State ex rel. Emp. Sec. Comm'n v. Monsees, 234 N.C. 69, 65 S.E.2d 887 (1951); State ex rel. Emp. Sec. Comm'n v. Coe, 239 N.C. 84, 79 S.E.2d 177 (1953); In re Stutts, 245 N.C. 405, 95 S.E.2d 919 (1957); State ex rel. Emp. Sec. Comm'n v. Hennis Freight Lines, 248 N.C. 496, 103 S.E.2d 829 (1958).

Findings of fact by the Commission which are supported by competent evidence in the record are conclusive on appeal. Yelverton v. Kemp Furn. Indus., Inc., 51 N.C. App. 215, 275 S.E.2d 553 (1981); State ex rel. Emp. Sec. Comm'n v. Faulk, 88 N.C. App. 369, 363 S.E.2d 225 (1988).

This section does not require the Commission to state the reasons for its rulings. In fact, since the appealing party must state the grounds for its exceptions, the mere overruling of the exceptions provides the parties with the reason for the ruling. State ex rel. Emp. Sec. Comm'n v. Faulk, 88 N.C. App. 369, 363 S.E.2d 225 (1988).

Jurisdiction of Superior Court. — The court erred in exercising jurisdiction over the Employment Security Commission pursuant to G.S. 1A-1, Rule 4(j)(4), where the commission was never properly served with process, did not consent to personal jurisdiction, and did not voluntarily appear in the case. Croom v. State Dep't of Commerce, 143 N.C. App. 493, 547 S.E.2d 87, 2001 N.C. App. LEXIS 297 (2001).

Scope of Review in Superior Court. — In appeals from the Employment Security Commission, the reviewing court may determine upon proper exceptions whether the facts found by the Commission were supported by competent evidence and whether the findings so supported sustain the legal conclusions and the award made, but in no event may the reviewing court consider the evidence for the purpose of finding the facts for itself. State ex rel. Emp. Sec. Comm'n v. Paul's Young Men's Shop, Inc., 32 N.C. App. 23, 231 S.E.2d 157, cert. denied, 292 N.C. 264, 233 S.E.2d 396 (1977).

The mandatory provisions in subsection (m) of this section are controlling, and the trial in the superior court on appeal must be subject to the limitation that the decision or determination of the Commission upon such review in the superior court "shall be conclusive and binding as to all questions of fact supported by any competent evidence." State ex rel. Unemployment Comp. Comm'n v. J.M. Willis Barber & Beauty Shop, 219 N.C. 709, 15 S.E.2d 4 (1941).

When, in a proceeding under this Chapter to determine the liability of a defendant for taxation as an employer, exceptions are taken to the findings of fact made by the Commission in accordance with the procedure prescribed, defendant is not entitled to a trial de novo of the issues raised by his exceptions. State ex rel. Unemployment Comp. Comm'n v. J.M. Willis Barber & Beauty Shop, 219 N.C. 709, 15 S.E.2d 4 (1941).

When no exceptions are made to findings of fact, they are presumed to be supported by competent evidence and are binding on appeal. Davis v. Corning Glass Works, 65 N.C. App. 379, 309 S.E.2d 258 (1983).

If the findings of fact of the Employment Security Commission are insufficient to enable the court to determine the rights of the parties upon the matters in controversy, the proceeding must be remanded to the end that the Commission make proper findings. State ex rel. Emp. Sec. Comm'n v. Paul's Young Men's Shop, Inc., 32 N.C. App. 23, 231 S.E.2d 157, cert. denied, 292 N.C. 264, 233 S.E.2d 396 (1977).

Right of Jury Trial Not Infringed. — The provision of this section that the Commission's findings of fact in a proceeding before it should be conclusive on appeal when supported by competent evidence is constitutional, and objection thereto on the ground that it deprives a defendant of his right to trial by jury is untenable, since the provision relates to the administrations of a tax law and the machinery for the collection of taxes, and further, since in addition to the remedy of appeal from the decision of the Commission, the statute provides that a defendant may pay the tax under protest and sue for its recovery. State ex rel. Unemployment Comp. Comm'n v. J.M. Willis Barber & Beauty Shop, 219 N.C. 709, 15 S.E.2d 4 (1941).

Appeal by Commission from Judgment of Superior Court. — The Commission is not entitled to appeal from a judgment of the superior court that the employer does not come within this Chapter, entered in a proceeding by an employee for compensation; and where the Commission desired to have the liability of an employer for unemployment compensation contribution judicially determined on its contentions that the employer and another concern controlled by the same interests constituted but a single employing unit, it was held that it must follow the procedure prescribed by G.S. 96-10.

In re Mitchell, 220 N.C. 65, 16 S.E.2d 476, 142 A.L.R. 931 (1941).

Employment Security Commission Testimony Held Privileged. — Plaintiff could not use Employment Security Commission testimony to offer limited support to her Title VII claim, and statutory privilege barred using the same testimony for the state claim. Hartsell v. Duplex Prods., Inc., 895 F. Supp. 100 (W.D.N.C. 1995).

Applied in State ex rel. Emp. Sec. Comm'n v. Smith, 235 N.C. 104, 69 S.E.2d 32 (1952); State ex rel. Emp. Sec. Comm'n v. Simpson, 238 N.C. 296, 77 S.E.2d 718 (1953); Sellers v. National Spinning Co., 64 N.C. App. 567, 307 S.E.2d 774 (1983); Patrick v. Cone Mills Corp., 64 N.C. App. 722, 308 S.E.2d 476 (1983); Milliken & Co. v. Griffin, 65 N.C. App. 492, 309 S.E.2d 733 (1983); Gorski v. North Carolina Symphony Soc'y, Inc., 310 N.C. 686, 314 S.E.2d 539 (1984).

Cited in State ex rel. Unemployment Comp. Comm'n v. National Life Ins. Co., 219 N.C. 576, 14 S.E.2d 689, 139 A.L.R. 895 (1941); Raynor v. Commissioners for Louisburg, 220 N.C. 348, 17 S.E.2d 495 (1941); In re Emp. Sec. Comm'n, 234 N.C. 651, 68 S.E.2d 311 (1951); State ex rel. N.C. Utils. Comm'n v. Old Fort Finishing Plant, 264 N.C. 416, 142 S.E.2d 8 (1965); Nantz v. Employment Sec. Comm'n, 290 N.C. 473, 226 S.E.2d 340 (1976); In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979); Intercraft Indus. Corp. v. Morrison, 54 N.C. App. 225, 283 S.E.2d 555 (1981); Cianfarra v. North Carolina Dep't of Transp., 56 N.C. App. 380, 289 S.E.2d 100 (1982); White v. Employment Sec. Comm'n, 93 N.C. App. 762, 379 S.E.2d 91 (1989); State ex rel. Employment Sec. Comm'n v. IATSE Local 574, 114 N.C. App. 662, 442 S.E.2d 339 (1994).

OPINIONS OF ATTORNEY GENERAL

Disclosure of Settlements. — Information in a state unemployment tax act (SUTA) dumping settlement agreement that is entered into after the employer appeals a tax assessment is "information from records of a proceeding before … a hearing officer … compiled for the purpose of resolving issues raised pursuant to the Employment Security Law" and, as such, it is publicly disclosable pursuant to subdivision (t)(5) of this section. See opinion of Attorney General to Mr. Harry E. Payne, Jr., Chairman, Employment Security Commission of North Carolina, 2004 N.C.A.G. 4 (3/26/04).

§ 96-5. Employment Security Administration Fund.

(a) Special Fund. — There is hereby created in the State treasury a special fund to be known as the Employment Security Administration Fund. All moneys which are deposited or paid into this fund shall be continuously available to the Commission for expenditure in accordance with the provisions of this Chapter, and shall not lapse at any time or be transferred to any other fund. The Employment Security Administration Fund, except as otherwise provided in this Chapter, shall be subject to the provisions of the State Budget Act (Chapter 143C of the General Statutes) and the Personnel Act (G.S. 126-1 et seq.). All moneys in this fund which are received from the federal government or any agency thereof or which are appropriated by this State for the purpose described in G.S. 96-20 shall be expended solely for the purposes and in the amounts found necessary by the Secretary of Labor for the proper and efficient administration of this Chapter. The fund shall consist of all moneys appropriated by this State, all moneys received from the United States of America, or any agency thereof, including the Secretary of Labor, and all moneys received from any other source for such purpose, and shall also include any moneys received from any agency of the United States or any other state as compensation for services or facilities supplied to such agency, any amounts received pursuant to any surety bond or insurance policy or from other sources for losses sustained by the Employment Security Administration Fund or by reason of damage to equipment or supplies purchased from moneys in such fund, and any proceeds realized from the sale or disposition of any such equipment or supplies which may no longer be necessary for the proper administration of this Chapter: Provided, any interest collected on contributions and/or penalties collected pursuant to this Chapter shall be paid into the Special Employment Security Administration Fund created by subsection (c) of this section. All moneys in this fund shall be deposited, administered, and disbursed in the same manner and under the same conditions and requirements as is provided by law for other special funds in the State treasury, and shall be maintained in a separate account on the books of the State treasury. The State Treasurer shall be liable on his official bond for the faithful performance of his duties in connection with the Employment Security Administration Fund provided for under this Chapter. Such liability on the official bond shall be effective immediately upon the enactment of this provision, and such liability shall exist in addition to any liability upon any separate bond existent on the effective date of this provision, or which may be given in the future. All sums recovered on any surety bond for losses sustained by the Employment Security Administration Fund shall be deposited in said fund.

(b) Replacement of Funds Lost or Improperly Expended. — If any moneys received from the Secretary of Labor under Title III of the Social Security Act, or any unencumbered balances in the Employment Security Administration Fund or any moneys granted to this State pursuant to the provisions of the Wagner-Peyser Act, or any moneys made available by this State or its political subdivisions and matched by such moneys granted to this State pursuant to the provisions of the Wagner-Peyser Act, are found by the Secretary of Labor, because of any action or contingency, to have been lost or expended for purposes other than, or in amounts in excess of those found necessary by the Secretary of Labor for the proper administration of this Chapter, it is the policy of this State that such moneys, not available from the Special Employment Security Administration Fund established by subsection (c) of this section, shall be replaced by moneys appropriated for such purpose from the general funds of this State to the Employment Security Administration Fund for expenditure as provided in subsection (a) of this section. Upon receipt of notice of such a finding by the Secretary of Labor, the Commission shall promptly pay from the Special Employment Security Administration Fund such sum if available in such fund; if not available, it shall promptly report the amount required for such replacement to the Governor and the Governor shall, at the earliest opportunity, submit to the legislature a request for the appropriation of such amount.

(c) There is hereby created in the State treasury a special fund to be known as the Special Employment Security Administration Fund. All interest and penalties, regardless of when the same became payable, collected from employers under the provisions of this Chapter subsequent to June 30, 1947 as well as any appropriations of funds by the General Assembly, shall be paid into this fund. No part of said fund shall be expended or available for expenditure in lieu of federal funds made available to the Commission for the administration of this Chapter. Said fund shall be used by the Commission for the payment of costs and charges of administration which are found by the Secretary of Labor not to be proper and valid charges payable out of any funds in the Employment Security Administration Fund received from any source and shall also be used by the Commission for: (i) extensions, repairs, enlargements and improvements to buildings, and the enhancement of the work environment in buildings used for Commission business; (ii) the acquisition of real estate, buildings and equipment required for the expeditious handling of Commission business; and (iii) the temporary stabilization of federal funds cash flow. The Employment Security Commission may use funds either from the Special Employment Security Commission Administration Fund created by this subsection or from federal funds, or from a combination of the two, to offset the costs of compliance with Article 7A [of Chapter 163] of the General Statutes of North Carolina or compliance with P.L. 103-31. Refunds of interest allowable under G.S. 96-10, subsection (e) shall be made from this special fund:

Provided, such interest was deposited in said fund: Provided further, that in those cases where an employer takes credit for a previous overpayment of interest on contributions due by such employer pursuant to G.S. 96-10, subsection (e), that the amount of such credit taken for such overpayment of interest shall be reimbursed to the Unemployment Insurance Fund from the Special Employment Security Administration Fund. The Special Employment Security Administration Fund, except as otherwise provided in this Chapter, shall be subject to the provisions of the State Budget Act (Chapter 143C of the General Statutes) and the Personnel Act (G.S. 126-1 et seq.). All moneys in this fund shall be deposited, administered, and disbursed in the same manner and under the same conditions and requirements as is provided by law for other special funds in the State treasury, and shall be maintained in a separate account on the books of the State treasury. The State Treasurer shall be liable on his official bond for the faithful performance of his duties in connection with the Special Employment Security Administration Fund provided for under this Chapter. Such liability on the official bond shall be effective immediately upon the enactment of this provision, and such liability shall exist in addition to any liability upon any separate bond existent on the effective date of this provision, or which may be given in the future. All sums recovered on any surety bond for losses sustained by the Special Employment Security Administration Fund shall be deposited in said fund. The moneys in the Special Employment Security Administration Fund shall be continuously available to the Commission for expenditure in accordance with the provisions of this section.

(c1) Repealed by Session Laws 2004-124, s. 13.7B(b), effective July 20, 2004.

(d) The other provisions of this section and G.S. 96-6, to the contrary notwithstanding, the Commission is authorized to requisition and receive from its account in the unemployment trust fund in the treasury of the United States of America, in the manner permitted by federal law, such moneys standing to its credit in such fund, as are permitted by federal law to be used for expense of administering this Chapter and to expend such moneys for such purpose, without regard to a determination of necessity by a federal agency. The State Treasurer shall be treasurer and custodian of the amounts of money so requisitioned. Such moneys shall be deposited, administered, and disbursed in the same manner and under the same conditions and requirements as are provided by law for other special funds in the State treasury.

(e) Reed Bill Fund Authorization. — Subject to a specific appropriation by the General Assembly of North Carolina to the Employment Security Commission out of funds credited to and held in this State's account in the Unemployment Trust Fund by the Secretary of the Treasury of the United States pursuant to and in accordance with section 903 of the Social Security Act, the Commission is authorized to utilize such funds for the administration of the Employment Security Law, including personal services, operating and other expenses incurred in the administration of said law, as well as for the purchase or rental, either or both, of offices, lands, buildings or parts of buildings, fixtures, furnishings, equipment, supplies and the construction of buildings or parts of buildings, suitable for use in this State by the Employment Security Commission, and for the payment of expenses incurred for the construction, maintenance, improvements or repair of, or alterations to, such real or personal property. Provided, that any such funds appropriated by the General Assembly shall not exceed the amount in the Unemployment Trust Fund which may be obligated for expenditure for such purposes; and provided that said funds shall not be obligated for expenditure, as herein provided, after the close of the two-year period which begins on the effective date of the appropriation.

(f) Employment Security Commission Reserve Fund. — There is created in the State treasury a special trust fund, separate and apart from all other public moneys or funds of this State, to be known as the Employment Security Commission Reserve Fund, hereinafter "Reserve Fund". Part of the proceeds from the tax on contributions imposed in G.S. 96-9(b)(3)j shall be credited to the Reserve Fund, as specified in that statute. The moneys in the Reserve Fund may be used by the Commission for loans to the Unemployment Insurance Fund, as security for loans from the federal Unemployment Insurance Trust Fund, and to pay any interest required on advances under Title XII of the Social Security Act, and shall be continuously available to the Commission for expenditure in accordance with the provisions of this section. The State Treasurer shall be ex officio the treasurer and custodian and shall invest said moneys in accordance with existing law as well as rules and regulations promulgated pursuant thereto. Furthermore, the State Treasurer shall disburse the moneys in accordance with the directions of the Commission and in accordance with such regulations as the Commission may prescribe.

Administrative costs for the collection of the tax and interest payable to the Reserve Fund shall be borne by the Special Employment Security Administration Fund.

The interest earned from investment of the Reserve Fund moneys shall be deposited in a fund hereby established in the State Treasurer's Office, to be known as the "Worker Training Trust Fund". These moneys shall be used to:

(1) Fund programs, specifically for the benefit of unemployed workers or workers who have received notice of long-term layoff or permanent unemployment, which will enhance the employability of workers, including, but not limited to, adult basic education, adult high school or equivalency programs, occupational skills training programs, assessment, job counseling and placement programs;

(2) Continue operation of local Employment Security Commission offices throughout the State; or

(3) Provide refunds to employers.

The use of funds from the Worker Training Trust Fund, for the purposes set out in the above paragraph, shall be pursuant to appropriations in the Current Operations Appropriations Act. Funds appropriated from the Worker Training Trust Fund that are unexpended and unencumbered at the end of the fiscal year for which they are appropriated shall revert to the State treasury to the credit of the Worker Training Trust Fund in accordance with G.S. 143C-1-2.

(g) Notwithstanding subsection (f) of this section, the State Treasurer may invest not more than a total of twenty-five million dollars ($25,000,000) of funds in the Employment Security Commission Reserve Fund established under subsection (f) of this section in securities issued by the North Carolina Technological Development Authority, Inc., the proceeds for which are directed to support investment in venture capital funds. The State Treasurer shall report to the Joint Legislative Commission on Governmental Operations and the Fiscal Research Division on October 1 and March 1 of each fiscal year on investments made pursuant to this subsection. (Ex. Sess. 1936, c. 1, s. 13; 1941, c. 108, ss. 12, 13; 1947, c. 326, s. 5; c. 598, s. 1; 1949, c. 424, s. 2; 1951, c. 332, s. 18; 1953, c. 401, ss. 1, 5; 1977, c. 727, ss. 11-13; 1981, c. 160, s. 2; 1987, c. 17, ss. 1, 2; 1991, c. 689, s. 142; 1991, Ex. Sess., c. 6, s. 1; 1995 (Reg. Sess., 1996), c. 608, s. 2; 1996, 2nd Ex. Sess., c. 18, s. 26.6; 2004-124, s. 13.7B(b); 2005-276, s. 6.37(h); 2006-203, s. 22.)

Editor's Note. — Session Laws 1995 (Reg. Sess., 1996), c. 608, s. 3 was codified as subsection (c1) at the direction of the revisor of statutes.

Session Laws 1995, c. 507, s. 8.5(g) and s. 25.9(d) and 1995, 2nd Ex. Sess., c. 18, s. 26.9 made appropriations from the Worker Training Trust Fund to the General Assembly. Session Laws 1995, c. 507, s. 25.9(b) made appropriations from the Special Employment Security Administration Fund to the Employment Security Commission of North Carolina. Session Laws 1997-443, s. 16(a), as amended by Session Laws 1998-212, s. 15.6A, made appropriations from the Worker Training Trust Fund to the Employment Security Commission of North Carolina. Session Laws 1997-443, s. 16(b), as amended by Session Laws 1998-212, s. 15.6A, made appropriations from the Worker Training Trust Fund to various agencies. Session Laws 1997-443, s. 16.3, made appropriations from the Special Employment Security Administration Fund to the Employment Security commission of North Carolina. Session Laws 1999-237, s. 16.12(a) made appropriations from the Special Employment Security Fund to the Employment Security Commission of North Carolina. Session Laws 1999-237, s. 16.14(a), as amended by Session Laws 2000-67, s. 14.4 made appropriations from the Worker Training Trust Fund to the Employment Security Commission. Session Laws 1999-237, s. 16.14(b), as amended by Session Laws 2000-67, s. 14.4 made appropriations from the Worker Training Trust Fund to various agencies. Session Laws 2001-424, s. 20.6(b) made appropriations for the 2001-2002 fiscal year to various agencies. Session Laws 2002-126, s. 13.3(b) made appropriations from the Worker Training Trust Fund to various agencies. Session Laws 2003-284, s. 12.6(b) made appropriations for the 2003-2004 fiscal year to various agencies. Session Laws 2004-124, s. 137B(f) made appropriations for the 2004-2005 fiscal year to the Community College System Office.

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5 is a severability clause.

Session Laws 2005-276, s. 6.37(w), provides: "The Office of State Budget and Management shall develop a methodology for computing the actual costs of collection of civil penalties by State departments and agencies. This methodology shall apply to all State departments and agencies, effective July 1, 2006."

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before July 1, 2007 are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — Session Laws 2006-203, s. 22, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, substituted "State Budget Act (Chapter 143C of the General Statutes)" for "Executive Budget Act (G.S. 143-1 et seq.)" in subsections (a) and (c); and substituted "G.S. 143C-1-2" for "G.S. 143-18" at the end of the last paragraph in subsection (f).

Legal Periodicals. — For a survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2252 (1997).

§ 96-6. Unemployment Insurance Fund.

(a) Establishment and Control. — There is hereby established as a special fund, separate and apart from all public moneys or funds of this State, an Unemployment Insurance Fund, which shall be administered by the Commission exclusively for the purposes of this Chapter. This fund shall consist of:

(1) All contributions collected under this Chapter, together with any interest earned upon any moneys in the fund;

(2) Any property or securities acquired through the use of moneys belonging to the fund;

(3) All earnings of such property or securities;

(4) Any moneys received from the federal unemployment account in the unemployment trust fund in accordance with Title XII of the Social Security Act as amended;

(5) All moneys credited to this State's account in the Unemployment Trust Fund pursuant to section 903 of Title IX of the Social Security Act, as amended, (U.S.C.A. Title 42, sec. 1103 (a));

(6) All moneys paid to this State pursuant to section 204 of the Federal-State Extended Unemployment Compensation Act of 1970;
(7) Reimbursement payments in lieu of contributions.

All moneys in the fund shall be commingled and undivided.

(b) Accounts and Deposit. — The State Treasurer shall be ex officio the treasurer and custodian of the fund who shall disburse such fund in accordance with the directions of the Commission and in accordance with such regulations as the Commission shall prescribe. He shall maintain within the fund three separate accounts:

(1) A clearing account,
(2) An unemployment trust fund account, and
(3) A benefit account.

All moneys payable to the fund, upon receipt thereof by the Commission, shall be forwarded immediately to the treasurer who shall immediately deposit them in the clearing account. Refunds payable pursuant to G.S. 96-10 may be paid from the clearing account upon warrants issued upon the treasurer as provided in G.S. 143B-426.40G under the requisition of the Commission. After clearance thereof, all other moneys in the clearing account shall be immediately deposited with the secretary of the treasury of the United States of America to the credit of the account of this State in the unemployment trust fund, established and maintained pursuant to section 904 of the Social Security Act, as amended, any provision of law in this State relating to the deposit, administration, release, or disbursement of moneys in the possession or custody of this State to the contrary notwithstanding. The benefit account shall consist of all moneys requisitioned from this State's account in the unemployment trust fund. Moneys in the clearing and benefit accounts may be deposited by the treasurer, under the direction of the Commission, in any bank or public depository in which general funds of the State may be deposited, but no public deposit insurance charge or premium shall be paid out of the fund. The State Treasurer shall be liable on his official bond for the faithful performance of his duties in connection with the unemployment insurance fund provided for under this Chapter. Such liability on the official bond shall be effective immediately upon the enactment of this provision, and such liability shall exist in addition to any liability upon any separate bond existent on the effective date of this provision, or which may be given in the future. All sums recovered on any surety bond for losses sustained by the unemployment insurance fund shall be deposited in said fund.

(c) Moneys shall be requisitioned from this State's account in the unemployment trust fund solely for the payment of benefits (including extended benefits) and in accordance with regulations prescribed by the Commission. The Commission shall, from time to time, requisition from the unemployment trust fund such amounts, not exceeding the accounts standing to its account therein, as it deems necessary for the payment of benefits for a reasonable future period. Upon receipt thereof the treasurer shall deposit such moneys in the benefit account and shall pay all warrants drawn thereon as provided in G.S. 143B-426.40G and requisitioned by the Commission for the payment of benefits solely from such benefit account. Expenditures of such moneys in the benefit account and refunds from the clearing account shall not be subject to approval of the Budget Bureau or any provisions of law requiring specific appropriations or other formal release by State officers of money in their custody. All warrants issued upon the treasurer for the payment of benefits and refunds shall be issued as provided in G.S. 143B-426.40G as requisitioned by the chairman of the Commission or a duly authorized agent of the Commission for that purpose. Any balance of moneys requisitioned from the unemployment trust fund which remains unclaimed or unpaid in the benefit account after the expiration of the period for which such sums were requisitioned shall either be deducted from estimates for, and may be utilized for the payment of, benefits during succeeding periods, or, in the discretion of the Commission, shall be redeposited with the Secretary of the Treasury of the United States of America, to the credit of this State's account in the unemployment trust fund, as provided in subsection (b) of this section.

(d) Management of Funds upon Discontinuance of Unemployment Trust Fund. — The provisions of subsections (a), (b), and (c), to the extent that they relate to the unemployment trust fund, shall be operative only so long as such unemployment trust fund continues to exist, and so long as the Secretary of the Treasury of the United States of America continues to maintain for this State a separate book account of all funds deposited therein by this State for benefit purposes, together with this State's proportionate share of the earnings of such unemployment trust fund, from which no other state is permitted to make withdrawals. If and when such unemployment trust fund ceases to exist, or such separate book account is no longer maintained, all moneys, properties, or securities therein belonging to the Unemployment Insurance Fund of this State shall be transferred to the treasurer of the Unemployment Insurance Fund, who shall hold, invest, transfer, sell, deposit, and release such moneys, properties, or securities in a manner approved by the Commission, in accordance with the provisions of this Chapter: Provided, that such moneys shall be invested in the following readily marketable classes of securities: Bonds or other interest-bearing obligations of the United States of America or such investments as are now permitted by law for sinking funds of the State of North Carolina; and provided further, that such investment shall at all times be so made that all the assets of the fund shall always be readily convertible into cash when needed for the payment of benefits. The treasurer shall dispose of securities or other properties belonging to the Unemployment Insurance Fund only under the direction of the Commission.

(e) Benefits shall be deemed to be due and payable under this Chapter only to the extent provided in this Chapter and to the extent that moneys are available therefor to the credit of the Unemployment Insurance Fund, and neither the State nor the Commission shall be liable for any amount in excess of such sums.

(f) Any interest required to be paid on advances under Title XII of the Social Security Act shall be paid in a timely manner and shall not be paid, directly or indirectly, from amounts in the Unemployment Insurance Fund. (Ex. Sess. 1936, c. 1, ss. 9, 18; 1939, c. 27, s. 7; c. 52, s. 4; c. 208; 1941, c. 108; 1945, c. 522, s. 4; 1947, c. 326, s. 6; 1953, c. 401, ss. 1, 6; 1959, c. 362, s. 1; 1961, c. 454, ss. 1-3; 1969, c. 575, s. 3; 1971, c. 673, ss. 3, 4; 1985, c. 197, s. 2; 2006-66, s. 6.19(a); 2006-203, s. 23; 2006-221, s. 3A; 2006-259, s. 40(a).)

Editor's Note. — Session Laws 2006-66, s. 6.19(a), as added by Session Laws 2006-221, s. 3A, substituted G.S. 143B-426.39E for G.S. 143B-426.39B, which had been substituted for "G.S. 143-3.2" by Session Laws 2006-203, s. 23. The reference to G.S. 143B-426.39E has been changed to G.S. 143B-426.40G at the direction of the Revisor of Statutes.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006 2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006 2007 fiscal year."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before July 1, 2007 are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 2006-259, s. 40(a), which made identical changes to those made by Session Laws 2006-66, s. 6.19(a) as added by Session Laws 2006-221, s. 3A, was repealed, pursuant to the terms of Session Laws 2006-259, s. 40(i) upon Session Laws 2006-221 becoming law.

Effect of Amendments. — Session Laws

2006-66, s. 6.19(a), as added by Session Laws 2006-221, s. 3A, effective July 1, 2007, in subsections (b) and (c), substituted "G.S. 143B-426.39E" for "G.S. 143B-426.39B," which had been substituted for "G.S. 143-3.2" by Session Laws 2006-203, s. 23. See Editor's note.

Session Laws 2006-203, s. 23, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, substituted "G.S. 143B-426.39B" for "G.S. 143-3.2" in the last paragraph of subsection (b) and twice in subsection (c).

CASE NOTES

Applied in State ex rel. Emp. Sec. Comm'n v. Skyland Crafts, Inc., 240 N.C. 727, 83 S.E.2d 893 (1954).

§ 96-6.1. (Repealed effective with respect to calendar quarters beginning on or after January 1, 2011) Training and reemployment contribution.

(a) Contribution. — A mandatory training and reemployment contribution is levied upon employers at a percentage rate of the amount of the employer's unemployment insurance contributions due under G.S. 96-9. The rate is the lesser of (i) twenty percent (20%) or (ii) a percentage of the unemployment insurance contributions that yields an amount that, when added to the amount of the employer's unemployment insurance contributions due for the taxable period, is no greater than five and seven-tenths percent (5.7%) of wages for employment for the taxable period. The purpose of the training and reemployment contribution is to provide funds for Department of Community College training programs, Employment Security Commission reemployment services, administration and collection of the new contribution, and other needs of the State. The training and reemployment contribution is due and payable at the time and in the same manner as the unemployment insurance contributions under G.S. 96-9. The training and reemployment contribution does not apply in a calendar year if, as of August 1 of the preceding year, the amount in the Unemployment Insurance Fund equals or is less than nine hundred million dollars ($900,000,000) or if at any time during the 12 months preceding August 1, the State unemployment rate rises above four and three-tenths percent (4.3%). The collection of the training and reemployment contribution, the assessment of interest and penalties on unpaid contributions under this section, the filing of judgment liens, and the enforcement of the liens for unpaid contributions under this section are governed by the provisions of G.S. 96-10 where applicable.

Training and reemployment contributions collected under this section shall be credited to the Employment Security Commission Training and Employment Account created in this section, and refunds of these contributions shall be paid from the same account. The clear proceeds of any civil penalties levied pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. Any interest collected on unpaid contributions under this section shall be credited to the Special Employment Security Administration Fund, and any interest refunded on contributions imposed by this section shall be paid from the same Fund.

(b) Training and Employment Account. — There is created in the State treasury a special account separate and apart from all other public moneys or funds of this State, to be known as the Employment Security Commission Training and Employment Account. The State Treasurer is ex officio the treasurer and custodian of the Account and shall invest its funds in accordance with law. Any interest or other income derived from the Account shall be credited to the Account. Funds in the Account may be spent only pursuant to appropriation by the General Assembly and in accordance with the line item budget enacted by the General Assembly. The Account is subject to the provisions of the State Budget Act, except that no unexpended surplus of the Account shall revert to the General Fund. Funds appropriated from the Account that are unexpended and unencumbered at the end of the fiscal year for which they were appropriated shall revert to the credit of the Account in the State treasury in accordance with G.S. 143C-1-2.

It is the intent of the General Assembly that eighty percent (80%) of the funds in the Account shall be appropriated annually to the Department of Community Colleges to be used for nonrecurring expenditures to provide worker training through improved continuing education, acquisition of modern training equipment, operation of specialized training centers, enhancement of small business center training, expansion of training for new and expanding industries, incentive grants for incumbent worker training, programs funded by the Worker Training Trust Fund, and other programs of the Department of Community Colleges. It is the intent of the General Assembly that twenty percent (20%) of the funds in the Account shall be appropriated annually to the Employment Security Commission for administration and collection of the training and reemployment contribution and for nonrecurring expenditures for reemployment services.

(c) Sunset. — This section is repealed effective with respect to calendar quarters beginning on or after January 1, 2011. (1999-321, s. 2; 2001-424, ss. 30.5(e), 30.5(f); 2005-276, ss. 8.8(a), 8.8(b), 6.37(i); 2006-203, s. 24.)

Editor's Note. — Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 6.37(w), provides: "The Office of State Budget and Management shall develop a methodology for computing the actual costs of collection of civil penalties by State departments and agencies. This methodology shall apply to all State departments and agencies, effective July 1, 2006."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — Session Laws 2006-203, s. 24, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, in the first paragraph of subsection (b), substituted "State Budget Act," for "Executive Budget Act,"in the next-to-last sentence, and substituted "G.S. 143C-1-2" for "G.S. 143-18" at the end of the last sentence.

§ 96-7. Representation in court.

(a) In any civil action to enforce the provisions of this Chapter, the Commission and the State may be represented by any qualified attorney who is designated by it for this purpose.

(b) All criminal actions for violation of any provision of this Chapter, or of any rules or regulations issued pursuant thereto, shall be prosecuted as now provided by law by the district attorney or by the prosecuting attorney of any county or city in which the violation occurs. (Ex. Sess. 1936, c. 1, s. 17; 1937, c. 150; 1973, c. 47, s. 2.)

ARTICLE 2.

Unemployment Insurance Division.

§ 96-8. Definitions.

As used in this Chapter, unless the context clearly requires otherwise:

(1) "Benefits" means the money payments payable to an individual, as provided in this Chapter, with respect to his unemployment.

(2) "Commission" means the Employment Security Commission established by this Chapter.

(3) "Contributions" means the money payments to the State Unemployment Insurance Fund required by this Chapter.

(4) "Employing unit" means any individual or type of organization, including any partnership, association, trust, estate, joint-stock company, insurance company, or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person which has or had in its employ one or more individuals performing services for it within this State. All individuals performing services within this State for any employing unit which maintains two or more separate establishments within this State shall be deemed to be employed by a single employing unit for all the purposes of this Chapter. Each individual employed to perform or to assist in performing the work of any agent or employee of an employing unit shall be deemed to be employed by such employing unit for all the purposes of this Chapter unless such agent or employee is an employer subject to the tax imposed by the Federal Unemployment Tax Act, whether such individual was hired or paid directly by such employing unit or by such agent or employee, provided the employing unit had actual or constructive knowledge of such work: Provided, however, that nothing herein, on or after July 1, 1939, shall be construed to apply to that part of the business of such "employers" as may come within the meaning of that term as it is defined in section one (a) of the Railroad Unemployment Insurance Act.

(5) "Employer" means:

a. Any employing unit which (a) within the current or preceding calendar year, and which for some portion of a day in each of 20 different calendar weeks within such calendar year (whether or not such weeks are or were consecutive), has or had in employment one or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week); or (b) in any calendar quarter in either the current or preceding calendar year paid for service in employment wages of one thousand five hundred dollars ($1,500) or more. Provided further, for the purpose of this paragraph, "employment" shall include services which would constitute "employment" but for the fact that such services are deemed to be performed entirely within another state pursuant to an election under an arrangement entered into by the Commission pursuant to subsection (*l*) of G.S. 96-4, and an agency charged with the administration of any other state or federal employment security law. Provided further, for the purpose of this paragraph, "week" means a period of seven consecutive calendar days, and when a calendar week falls partly within each of two calendar years, the days of that week up to January 1 shall be deemed one calendar week, and the days beginning January 1, another such week.

b. Any employing unit which acquired the organization, trade or business, or substantially all the assets thereof, of another which at the time of such acquisition was an employer subject to this Chapter, or which acquired a part of the organization, trade, or business of another, which at the time of such acquisition was an employer subject to this Chapter; provided, such other would have been an employer under paragraph a of this subdivision if such part had constituted its entire organization, trade, or business; provided further, that G.S. 96-10, subsection (d), shall not be applicable to an individual or employing unit acquiring such part of the organization, trade or business. The provisions of G.S. 96-11(a) to the contrary notwithstanding, any employing unit which becomes an employer solely by virtue of the provisions of this paragraph shall not be liable for contributions based on wages paid or payable to individuals with respect to employment performed by such individuals for such employing unit prior to the date of acquisition of the organization, trade, business, or a part thereof as specified herein, or substantially all the assets of another, which at the time of such acquisition was an employer subject to this Chapter. This provision shall not be applicable with respect to any employing unit which is an employer by reason of any other provision of this Chapter. A successor by total acquisition under the provisions of this paragraph may be relieved from coverage hereunder by making written application with the Commission within 60 days from the date the Commission mails him a notification of his liability and provided the Commission finds the predecessor was an employer at the time of such acquisition only because such predecessor had failed to make application for termination of coverage as provided in G.S. 96-11 of this Chapter. A successor under the provisions of this paragraph who becomes an employer by virtue of having acquired a part of the organization, trade or business of the predecessor hereunder may be relieved from coverage upon making written application with the Commission within 60 days from the date the Commission mails him a notification of his liability and the Commission finds that the predecessor could have terminated by making the application under G.S. 96-11 if the part acquired had constituted all of the predecessor's business.

c. Repealed by Session Laws 1985, c. 552, s. 1.

d. Any employing unit which, having become an employer under paragraphs a or b, has not, under G.S. 96-11, ceased to be an employer subject to this Chapter; or

e. For the effective period of its election pursuant to G.S. 96-11(c) any other employing unit which has elected to become fully subject to this Chapter.

f. Any employing unit not an employer by reason of any other paragraph of this subdivision, for which within any calendar year, services in employment are or were performed with respect to which such employing unit is or was liable for any federal tax against which credit may or could have been taken for contributions required to be paid into a State Unemployment Insurance Fund; or which as a condition for approval of this Chapter for full tax credit against the tax imposed by the Federal Unemployment Tax Act is required, pursuant to such act, to be an "employer" under this Chapter; or any employing unit required to be covered by the Federal Unemployment Tax Act; provided, that such employer, notwithstanding the provisions of G.S. 96-11, shall cease to be subject to the provisions of this Chapter during any calendar year if the Commission finds that during such period the employer was not subject to the provisions of the Federal Unemployment Tax Act and any other provision of this Chapter.

g. Repealed by Session Laws 1985, c. 552, s. 2.

h. Any employing unit which maintains an operating office within this State from which the operations of an American vessel operating on navigable waters within or within and without the United States or ordinarily and regularly supervised, managed, directed, and controlled: Provided, the employing unit would be an employer by reason of any other paragraph of this subdivision.

i. Repealed by Session Laws 1985, c. 552, s. 3.

j. Prior to January 1, 1978, any institution of higher education or State hospital located in this State which is an agency or instrumentality of this State, or which is owned or operated by the State or an instrumentality of this State (or by this State and one or more states or their instrumentalities), provided such employing unit, in each of 20 different calendar weeks within the current or preceding calendar year (whether or not such weeks are or were consecutive), has or had in employment one or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week), or in any calendar quarter in either the current or preceding calendar year paid for services in employment wages of one thousand five hundred dollars ($1,500) or more.

For purposes of this Chapter, "institution of higher education" means an educational institution in this State which: (i) admits as regular students only individuals having a certificate of graduation from a high school or the recognized equivalent of such certificate; (ii) is legally authorized in this State to provide a program of education beyond high school; (iii) provides an educational program for which it awards a bachelor's or higher degree, or provides a program which is acceptable for credit toward such a degree or a program of training to prepare students for gainful employment in a recognized occupation; (iv) is a public or other nonprofit institution; and (v) notwithstanding any of the foregoing provisions of this subdivision, is a university, college, or community college in the State.

For purposes of this Chapter, "State hospital" means any institution licensed by the Department of Health and Human Services under Chapter 122C or Chapter 131E of the General Statutes.

k. Notwithstanding any other provision of this Chapter, any nonprofit organization or a group of organizations (hereafter, where the words "nonprofit organization" are used in this Chapter, it shall include a group of nonprofit organizations), any corporation, or any community chest, fund, or foundation that is organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, and that is exempt or may be exempted from federal income tax under section 501(c)(3) of the Internal Revenue Code, as long as the employing unit for some portion of a day in each of 20 different calendar weeks within the current or preceding calendar year (whether or not the weeks are or were consecutive) has or had in employment four or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each week).

l. Repealed by Session Laws 1981, c. 160, s. 5.

m. Repealed by Session Laws 1981, c. 160, s. 6.

n. With respect to employment on and after January 1, 1978, any person or employing unit who (a) during any calendar quarter in the current calendar year or the preceding calendar year paid wages of twenty thousand dollars ($20,000) or more for agricultural labor, or (b) on each of some 20 days during the current or preceding calendar year, each day being in a different calendar week, employed at least 10 individuals in employment in agricultural labor for some portion of the day. Provided, that with respect to agricultural labor performed by a crew on and after January 1, 1978, the crew leader shall be deemed an employer if (1) either of the requirements set forth in the first sentence of this paragraph are met; and (2) the crew members are not employed by another person within the meaning of the first sentence of this paragraph; (3) and if the crew leader holds a valid certificate of registration under the Migrant and Seasonal Agricultural Worker Protection Act; or substantially all the members of the crew operate or maintain tractors, mechanized harvesting or crop dusting equipment, or any other mechanized equipment, which is provided by the crew leader. For purposes of this paragraph, the term "crew leader" means an individual who (1) furnishes individuals to perform agricultural labor for any other person, (2) pays (either on his behalf or on behalf of such other person) the individuals so furnished by him for the agricultural labor performed by them, and (3) has not entered into a written agreement with such other person under which such individual is designated as an employee of such other person. The farm operator shall be deemed to be the employer of any worker hired by the farm operator; any assignment to work with a crew or under a crew leader notwithstanding. All the workers shall be deemed the employees of the farm operator when the crew leader does not qualify as the employer under the provisions set out in this paragraph.

o. With respect to employment on and after January 1, 1978, any person who during any calendar quarter in the current calendar year or the preceding calendar year paid wages in cash of one thousand dollars ($1,000) or more for domestic service in a private home, local college club, or local chapter of a college fraternity or sorority.

p. With respect to employment on and after January 1, 1978, any state and local governmental employing unit, including the State of North Carolina, a county board of education, a city board of education, the State Board of Education, the Board of Trustees of The University of North Carolina, the board of trustees of other institutions and agencies supported and under the control of the State, any other agency of and within the State by which a teacher or other employee is paid, and any county, incorporated city or town, the light and water board or commission of any incorporated city or town, the board of alcoholic control of any county or incorporated city or town, county and/or city airport authorities, housing authorities created and operated under and by virtue of Chapter 157 of the General Statutes, redevelopment commissions created and operated under and by virtue of Article 22, Chapter 160A of the General Statutes, county and/or city or regional libraries, county and/or city boards of health, district boards of health, any other separate, local governmental entity, jointly owned or operated governmental entities, and the Retirement System. For purposes of this Chapter, any employing unit described in this paragraph is not an employer by reason of hiring an intern.

q. With respect to employment on and after January 1, 1978, any nonprofit elementary and secondary school. For purposes of this Chapter, "secondary school" means any school not an institution of higher education as defined in G.S. 96-8(5)j.

r. An employee service company which is an employing unit is the employer of an individual who is engaged in employment performing services for a client or customer of the employee service company if the employee service company is taxed under the Federal Unemployment Tax Act (26 U.S.C. § 3301 to § 3311) on the basis of that employment. For purpose of this Chapter, "employee service company" means a leasing company or temporary help service which contracts with clients or customers to supply individuals to perform services for the client or customer and which, both under contract and in fact:

1. Negotiates with clients or customers for such matters as time, place, type of work, working conditions, quality, and price of the services;
2. Determines assignments or reassignments of individuals to its clients or customers, even if the individuals retain the right to refuse specific assignments;
3. Sets the rate of pay of the individuals, whether or not through negotiation;
4. Pays the individuals from its account or accounts; and
5. Hires and terminates individuals who perform services for the clients or customers.

s. Any Indian tribe as defined in the Federal Unemployment Tax Act, 26 U.S.C. § 3301 et seq.

(6)a. "Employment" means service performed including service in interstate commerce, except employment as defined in the Railroad Retirement Act and the Railroad Unemployment Insurance Act, performed for wage or under any contract of hire, written or oral, express or implied, in which the relationship of the individual performing such service and the employing unit for which such service is rendered is, as to such service, the legal relationship of employer and employee. Provided, however, the term "employee" includes an officer of a corporation, but such term does not include (i) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (ii) any individual (except an officer of a corporation) who is not an employee under such common-law rules. An employee who is on paid vacation or is on paid leave of absence due to illness or other reason shall be deemed to be in employment irrespective of the failure of such individual to perform services for the employing unit during such period.

b. The term "employment" shall include an individual's entire service, performed within or both within and without this State if:
  1. The service is localized in this State; or
  2. The service is not localized in any state but some of the service is performed in this State, and (i) the base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled, is in this State; or (ii) the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this State.
  3. The service, wherever performed, is within the United States, or Canada; such service is not covered under the unemployment compensation law of any other state or Canada; and the place from which the service is directed or controlled is in this State.

c. Services performed within this State but not covered under paragraph b of this subdivision shall be deemed to be employment subject to this Chapter, if contributions are not required and paid with respect to such services under an employment security law of any other state or of the federal government.

d. Services not covered under paragraph b of this subdivision, and performed entirely without this State, with respect to no part of which contributions are required and paid under an employment security law of any other state or of the federal government, shall be deemed to be employment subject to this Chapter if the individual performing such service is a resident of this State and the Commission approves the election of the employing unit for whom such services are performed that the entire service of such individual shall be deemed to be employment subject to this Chapter, and services covered by an election duly approved by the Commission in accordance with an arrangement pursuant to subsection (*l*) of G.S. 96-4 shall be deemed to be employment during the effective period of such election.

e. Service shall be deemed to be localized within a state if:
  1. The service is performed entirely within such state; or
  2. The service is performed both within and without such state, but the service performed without such state is incidental to the individual's service within the State, for example, is temporary or transitory in nature or consists of isolated transactions.

f. The term "employment" shall include:
  1. Services covered by an election pursuant to G.S. 96-11, subsection (c), of this Chapter; and
  2. Services covered by an election duly approved by the Commission in accordance with an arrangement pursuant to G.S. 96-4, subsection (*l*), of this Chapter during the effective period of such election.
  3. Any service of whatever nature performed by an individual for an employing unit on or in connection with an American vessel under a contract of service which is entered into within the United States or during the performance of which the vessel touches at a port in the United States, if such individual is employed on and in connection with such vessel when outside the United States: Provided, such service is performed on or in connection with the operations of an Ameri-

can vessel operating on navigable waters within or within and without the United States and such operations are ordinarily and regularly supervised, managed, directed, and controlled from an operating office maintained by the employing unit in this State: Provided further, that this subparagraph shall not be applicable to those services excluded in subdivision (6), paragraph k, subparagraph 6 of this section.

4. Any service of whatever nature performed by an individual for an employing unit on or in connection with an American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the aircraft it touches at a port in the United States, if such individual is employed on and in connection with such aircraft when outside the United States; provided such service is performed on or in connection with the operations of an American aircraft and such operations are ordinarily and regularly supervised, managed, directed, and controlled from an operating office maintained by the employing unit in this State.

5. Notwithstanding any other provision of this Chapter, "employment" shall include any individual who performs services irrespective of whether the master-servant relationship exists, for remuneration for any employing unit:

   I. As an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (other than milk) or laundry or dry-cleaning services, for his principal;

   II. As a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for side-line sales activities on behalf of some person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations if the contract of services contemplates that substantially all of such services are to be performed personally by such individual; except that an individual shall not be included in the term "employment" under the provisions of this subsection if such individual has a substantial investment in facilities used in connection with the performance of such services (other than in facilities for transportation), or if the services are in the nature of a single transaction not part of a continuing relationship with the employing unit for whom the services are performed.

6. Service of an individual who is a citizen of the United States, performed outside of the United States (except in Canada), in the employ of an American employer (other than service which is deemed "employment" under the provisions of paragraph b or e of this subsection or the parallel provisions of another state's law), if:

   I. The employer's principal place of business in the United States is located in this State; or

   II. The employer has no place of business in the United States, but

A. The employer is an individual who is a resident of this State; or

B. The employer is a corporation which is organized under the laws of this State; or

C. The employer is a partnership or a trust and the number of the partners or trustees who are residents of this State is greater than the number who are residents of any other state; or

III. None of the criteria of divisions I. and II. of this subparagraph is met but the employer has elected coverage in this State, or, the employer having failed to elect coverage in any state, the individual has filed a claim for benefits, based on such service, under the law of this State.

IV. An "American employer," for the purposes of this paragraph, means a person who is:

A. An individual who is a resident of the United States; or

B. A partnership if two thirds or more of the partners are residents of the United States; or

C. A trust, if all of the trustees are residents of the United States; or

D. A corporation organized under the laws of the United States or of any state;

E. For the purposes of this subparagraph, United States includes all the states, the District of Columbia, and the Commonwealth of Puerto Rico.

7. Services with respect to which a tax is required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a State unemployment insurance fund, or which as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act is required to be covered under this Chapter.

g. On and after January 1, 1978, the term "employment" includes services performed in agricultural labor when a person or employing unit (a) during any calendar quarter in the current calendar year or the preceding calendar year pays wages of twenty thousand dollars ($20,000) or more for agricultural labor, or (b) on each of some 20 days during the preceding calendar year, each day being in a different calendar week, employs at least 10 individuals in employment in agricultural labor for some portion of the day. For purposes of this Chapter, the term "agricultural labor" includes all services performed: (1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife; (2) in the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm; (3) in connection with the production or harvesting of crude gum (oleoresin) from a living tree, and the following products if processed by the original producer of crude gum from which derived; gum spirits of turpentine and gum resin, or in connection with the ginning of cotton or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes; or (4)(A) in the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity, but only if such operator produced more than one half of the commodity with respect to which such service is performed; (B) in the employ of a group of operators of farms (or a cooperative organization of which such operators are members) in performance of service described in subparagraph (A), but only if such operators produced more than one half of the commodity with respect to which such service is performed. (C) The provisions of subparagraphs (A) and (B) shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; (D) on a farm operated for profit if such service is not in the course of the employer's trade or business. As used in this subsection, the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards. Provided, such labor is not agricultural labor performed by an individual who is an alien admitted to the United States to perform agricultural labor pursuant to sections 214(c) and 101(a)(15)(H) of the Immigration and Nationality Act.

h. On and after January 1, 1978, the term "employment" includes domestic service in a private home, local college club or local chapter of a college fraternity or sorority performed for a person who pays cash remuneration of one thousand dollars ($1,000) or more on or after January 1, 1978, in any calendar quarter in the current calendar year or the preceding calendar year to individuals employed in such domestic service.

i. The term "employment" includes service performed for any State and local governmental employing unit or for any Indian tribe, except that employment does not include service performed (a) as an elected official; (b) as a member of a legislative body or a member of the judiciary, of a State or political subdivision thereof or of an Indian tribe; (c) as a member of the State National Guard or Air National Guard; (d) as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or similar emergency; or (e) in a policymaking or advisory position the performance of the duties of which ordinarily does not require more than eight hours per week. The services to which clause (d) of the preceding sentence applies include but are not limited to temporary emergency services compensated solely by a fixed payment for each emergency call answered whether or not provided for by prior agreement and training in preparation for such temporary emergency service whether or not compensated.

j. On and after January 1, 1978, the term "employment" includes services performed in any calendar year by employees of nonprofit elementary and secondary schools.

k. The term "employment" does not include:
  1, 2. Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 680, s. 7.
  3. Service with respect to which unemployment insurance is payable under an employment security system established by an act of Congress: Provided, that the Commission is hereby authorized and directed to enter into agreements with the proper agencies under such act of Congress, which agreements shall become effective 10 days after publication thereof in the manner provided in G.S. 96-4(b) for general rules, to provide potential rights to benefits under this Chapter, acquired rights to unemployment insurance under act of Congress, or who have, after acquiring potential rights to unemployment insurance, under such act of Congress, acquired rights to benefits under this Chapter.
  4, 5. Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 680, s. 7.
  6. Service performed on or in connection with a vessel or aircraft not an American vessel or American aircraft by an individual if the individual is performing services on and in connection with such vessel or aircraft when outside the United States; or, service performed by an individual in (or as an officer or member of the crew of a vessel while it is engaged in) the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life (including service performed by such individual as an ordinary incident to any such activity), except (i) service performed in connection with the catching or taking of salmon or halibut, for commercial purposes, and (ii) service performed on or in connection with a vessel of more than 10 net tons (determined in the manner provided for determining the registered tonnage of merchant vessels under the laws of the United States).
  7. Services performed by an individual in the employ of a son, daughter, or spouse; services performed by a child under the age of 21 in the employ of his father or mother or of a partnership consisting only of parents of the child.
  8. Service performed by an individual during any calendar quarter for any employing unit or an employer as an insurance agent or as an insurance solicitor, or as a securities salesman if all such service performed during such calendar quarter by such individual for such employing unit or employer is performed for remuneration solely by way of commission; service performed by an individual for an employing unit as a real estate agent or a real estate salesman as defined in G.S. 93A-2, provided, that such real estate agent or salesman is compensated solely by way of commission and is authorized to exercise independent judgment and control over the performance of his work.
  9. Services performed in employment as a newsboy or newsgirl selling or distributing newspapers or magazines on the street or from house to house.
  10. Except as provided in G.S. 96-8(6)f.5.I., service covered by an election duly approved by the agency charged with the administration of any other state or federal employment security law in accordance with an arrangement pursuant to

subdivision (*l*) of G.S. 96-4 during the effective period of such election.

11. Casual labor not in the course of the employing unit's trade or business.
12. Service in any calendar quarter in the employ of any organization exempt from income tax under the provisions of section 501(a) of the Internal Revenue Code (other than an organization described in section 401(a) of the Internal Revenue Code) or under section 521 of the Internal Revenue Code, if the remuneration for the service is less than fifty dollars ($50.00).
13. Service in the employ of a school, college, or university, if such service is performed (i) by a student who is enrolled and is regularly attending classes at such school, college, or university, or (ii) by the spouse of such a student, if such spouse is advised, at the time such spouse commences to perform such service, that (I) the employment of such spouse to perform such service is provided under a program to provide financial assistance to such student by such school, college, or university, and (II) such employment will not be covered by any program of unemployment insurance.
14. Service performed by an individual who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on as a student in a full-time program, taken for credit at such institution, which combines academic instruction with work experience, if such service is an integral part of such program, and such institution has so certified to the employer, except that this subparagraph shall not apply to service performed in a program established for or on behalf of an employer or group of employers.
15. Services performed (i) in the employ of a church or convention or association of churches, or an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches; or (ii) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or (iii) in a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury or providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market by an individual receiving such rehabilitation or remunerative work; or (iv) as a part of an unemployment work-relief or work-training program assisted or financed in whole or in part by any federal agency, an agency of a state or political subdivision thereof, or an Indian tribe, by an individual receiving the work relief or work training, unless a federal law, rule or regulation mandates unemployment insurance coverage to individuals in a particular work-relief or work-training program; (v) after December 31, 1971,

by an inmate for a hospital in a State prison or other State correctional institution or by a patient in any other State-operated hospital, and services performed by patients in a hospital operated by a nonprofit organization shall be exempt; (vi) after December 31, 1971, in the employ of a hospital, if such service is performed by a patient of such hospital; (vii) after December 31, 1971, by an inmate of a custodial or penal institution.

16. Notwithstanding the provisions of G.S. 96-8(6)f.3. and 96-8(6)k.6., service performed by an individual on a boat engaged in catching fish or other forms of aquatic animal life under the arrangement with the owner or operator of such boat pursuant to which: (A) The individual does not receive any cash remuneration (other than as provided in subparagraph (B)), (B) The individual receives a share of the boat's (or the boats' in the case of a fishing operation involving more than one boat) catch of fish or other forms of aquatic animal life or a share of the proceeds from the sale of such catch, and (C) The amount of the individual's share depends on the amount of the boat's (or the boats' in the case of a fishing operation involving more than one boat) catch of fish or other forms of aquatic animal life, but only if the operating crew of the boat (or each boat from which the individual receives a share in the case of a fishing operation involving more than one boat) is normally made up of fewer than 10 individuals. In order to preserve the State's right to collect State unemployment taxes for which a credit against federal unemployment taxes may be taken for contributions paid into a State unemployment insurance fund, this paragraph 16 does not apply, with respect to any individual, to service during any period for which an assessment for federal unemployment taxes is made by the Internal Revenue Service pursuant to the Federal Unemployment Tax Act which assessment becomes a final determination (as defined by section 1313 of the Internal Revenue Code).
17. Services performed by an inmate of the North Carolina prison system on work release.
18. Service performed by a full-time student in the employ of an organized camp
    I. If such camp:
        A. Did not operate for more than seven months in the calendar year and did not operate for more than seven months in the preceding calendar year; or
        B. Had average gross receipts for any six months in the preceding calendar year which were not more than thirty-three and one-third percent (33⅓%) of its average gross receipts for the other six months in the preceding calendar year; and
    II. If the full-time student performed services in the employ of such camp for less than 13 calendar weeks in the calendar year.

    As used in this sub-subdivision, an individual shall be treated as a full-time student for any period:
    I. During which the individual is enrolled as a full-time student at an educational institution; or
    II. Which is between academic years or terms if:

A. The individual was enrolled as a full-time student at an educational institution for the immediately preceding academic year or term; and

B. There is a reasonable assurance that the individual will be so enrolled for the immediately succeeding academic year or term after the period described in sub-subparagraph A. of this subparagraph.

19. Service performed as a resident by an individual who has completed a four-year course in medical school chartered or approved pursuant to State law, provided that the service is performed for and while in the employment of a nonprofit organization created to provide medical services to a targeted socio-economically disadvantaged group within this State.

20. Services performed by an individual who is an alien having residence in a foreign country which the individual has no intention of abandoning who possesses a valid J-1 Visa and is present in the State for a period of six months or less pursuant to the provisions of 8 U.S.C. § 1101(a)(15)(F)(J)(M)(Q).

(7) "Employment office" means a free public employment office, or branch thereof, operated by this State or maintained as a part of a state-controlled system of public employment offices.

(7a), (7b). Reserved for future codification purposes.

(7c) "Fund" means the Unemployment Insurance Fund established by this Chapter, to which all contributions required and from which all benefits provided under this Chapter shall be paid.

(7d), (7e). Reserved for future codification purposes.

(7f) Internal Revenue Code. — The Code as defined in G.S. 105-228.90.

(8) Recodified as subdivision (7c) by Session Laws 2001-414, s. 34.

(8a) "Reemployment services" means job search assistance and job placement services, such as counselling, testing, assessment, and providing occupational and labor market information, job search workshops, job clubs, referrals to employers, and other similar services.

(9) "State" includes, in addition to the states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands.

(10) Total and partial unemployment.

a. For the purpose of establishing a benefit year, an individual shall be deemed to be unemployed:

1. If he has payroll attachment but, because of lack of work during the payroll week for which he is requesting the establishment of a benefit year, he worked less than the equivalent of three customary scheduled full-time days in the establishment, plant, or industry in which he has payroll attachment as a regular employee. If a benefit year is established, it shall begin on the Sunday preceding the payroll week ending date.

2. If he has no payroll attachment on the date he reports to apply for unemployment insurance. If a benefit year is established, it shall begin on the Sunday of the calendar week with respect to which the claimant met the reporting requirements provided by Commission regulation.

b. For benefit weeks within an established benefit year, a claimant shall be deemed to be:

1. Totally unemployed, irrespective of job attachment, if his earnings for such week, including payments defined in sub-

paragraph c below, would not reduce his weekly benefit amount as prescribed by G.S. 96-12(c).

2. Partially unemployed, if he has payroll attachment but because of lack of work during the payroll week for which he is requesting benefits he worked less than three customary scheduled full-time days in the establishment, plant, or industry in which he is employed and whose earnings from such employment (including payments defined in subparagraph c below) would qualify him for a reduced payment as prescribed by G.S. 96-12(c).
3. Part-totally unemployed, if the claimant had no job attachment during all or part of such week and whose earnings for odd jobs or subsidiary work (including payments defined in subparagraph c below) would qualify him for a reduced payment as prescribed by G.S. 96-12(c).

c. No individual shall be considered unemployed if, with respect to the entire calendar week, he is receiving, has received, or will receive as a result of his separation from employment, remuneration in the form of (i) wages in lieu of notice, (ii) accrued vacation pay, (iii) terminal leave pay, (iv) severance pay, (v) separation pay, or (vi) dismissal payments or wages by whatever name. Provided, however, if such payment is applicable to less than the entire week, the claimant may be considered to be unemployed as defined in subsections a and b of this paragraph. Sums received by any individual for services performed as an elected official who holds an elective office, as defined in G.S. 128-1.1(d), or as a member of the N. C. National Guard, as defined in G.S. 127A-3, or as a member of any reserve component of the United States Armed Forces shall not be considered in determining that individual's employment status under this subsection. Provided further, however, that an individual shall be considered to be unemployed as to receipt of severance pay for any week the individual is registered at or attending any institution of higher education as defined in G.S. 96-8(5)j., or secondary school as defined in G.S. 96-8(5)q., or Commission approved vocational, educational, or training programs as defined in G.S. 96-13.

d. An individual's week of unemployment shall be deemed to commence only after his registration at an employment office, except as the Commission may by regulation otherwise prescribe.

e. No substitute teacher or other substitute school personnel shall be considered unemployed for days or weeks when not called to work unless the individual is or was a permanent school employee regularly employed as a full-time substitute during the period of time for which the individual is requesting benefits.

(10a) "Undue family hardship" arises when an individual is unable to accept a particular shift because the individual is unable to obtain (i) child care during that shift for a minor child who is in the legally recognized custody of the individual, (ii) elder care during that shift for an aged or disabled parent of the individual, or (iii) care for any disabled member of that individual's immediate family.

(11) "Employment Security Administration Fund" means the Employment Security Administration Fund established by this Chapter, from which administrative expenses under this Chapter shall be paid.

(12) "Wages" means all remuneration for services from whatever source.

(13)a. "Wages" shall include commissions, bonuses, any sums paid to an employee by an employer pursuant to an order of any court, the

National Labor Relations Board, or any other lawfully constituted adjudicative agency or by private agreement, consent, or arbitration for loss of pay by reason of discharge, and the cash value of all remuneration in any medium other than cash. The reasonable cash value of remuneration in any medium other than cash shall be estimated and determined in accordance with rules prescribed by the Commission; provided, if the remuneration of an individual is not based upon a fixed period or duration of time or if the individual's wages are paid at irregular intervals or in such manner as not to extend regularly over the period of employment, the wages for any week or for any calendar quarter for the purpose of computing an individual's right to unemployment benefits only shall be determined in such manner as may by authorized regulations be prescribed. The regulations shall, so far as possible, secure results reasonably similar to those that would prevail if the individual were paid his wages at regular intervals. The term "wages" shall not include the amount of any payment with respect to services to, or on behalf of, an individual in its employ under a plan or system established by an employing unit which makes provision for individuals in its employ generally or for a class or classes of such individuals (including any amount paid by an employing unit for insurance or annuities, or into a fund, to provide for any such payment), on account of (i) retirement, or (ii) sickness or accident disability, or (iii) medical and hospitalization expenses in connection with sickness or accident disability or (iv) death. However, in the case of payments made to an employee or any of his dependents on account of sickness or accident disability, only payments which are received under a worker's compensation law shall be excluded from the term "wages". Furthermore, the term "wages" shall not include payment by an employer without deduction from the remuneration of the employee of the tax imposed upon an employee under the Federal Insurance Contributions Act.

b. "Wages" shall not include:

1. Any payment made to, or on behalf of, an employee or the employee's beneficiary from or to a trust that qualifies under the conditions set forth in sections 401(a)(1) and (2) of the Internal Revenue Code;
2. Any payment made to, or under, an annuity plan which at the time of the payment meets the requirements of sections 401(a)(3), (4), (5) and (6) of the Internal Revenue Code and exempt from tax under section 501(a) of the Internal Revenue Code at the time of the payment, unless the payment is made to an employee of the trust as remuneration for services rendered as an employee and not as beneficiary of the trust; or
3. Any payment made to, or on behalf of, an employee or his beneficiary under a Cafeteria Plan within the meaning of section 125 of the Internal Revenue Code.

c. For the purposes of this Chapter, the term "wages" includes the reasonable amount of gratuities, including tips, that an employee receives directly from a customer and reports to the employer and that the employer considers as salary for the purpose of meeting minimum wage requirements. Effective January 1, 1987, and as long as the Federal Unemployment Tax Act, 26 U.S.C. 3301 et seq., contains materially identical requirements, the term "wages" includes tips which are:

(1) Received while performing services that constitute employment; and

(2) Included in a written statement furnished to the employer pursuant to the requirements of the Internal Revenue Code.

d. Wages shall not include the amount of any payment, including any amount paid into a fund to provide for such payment, made to, or on behalf of, an employee under a plan or system established by an employer or others which makes provision for employees generally, or for a class or group of employees, for the purpose of supplementing unemployment benefits, provided that the plan has been approved by the Commission under such reasonable regulations as it shall promulgate.

(14) "Week" means such period of seven consecutive calendar days as the Commission may by regulations prescribe.

(15) "Calendar quarter" means the period of three consecutive calendar months ending on March 31, June 30, September 30, or December 31.

(16) "Weekly benefit amount." An individual's "weekly benefit amount" means the amount of benefits he would be entitled to receive for one week of total unemployment.

(17)a. Repealed by Session Laws 1977, c. 727, s. 33.

b. Repealed by Session Laws 1977, c. 727, s. 33.

c. As to claims filed on or after October 1, 1974, for claimants who do not have a benefit year in progress, "benefit year" shall mean the one-year period beginning with the first day of a week with respect to which an individual first registers for work and files a valid claim for benefits. A valid claim shall be deemed to have been filed only if such individual, at the time the claim is filed, is unemployed, and has been paid wages in his base period totaling at least five hundred sixty-five dollars and fifty cents ($565.50), and equal to at least one and one-half times his high-quarter wages, which high-quarter wages must equal at least one hundred and fifty dollars ($150.00). As to claims filed on or after August 1, 1981, for claimants who do not have a benefit year in progress, "benefit year" shall mean the 52 week period beginning with the first day of a week with respect to which an individual first registers for work and files a valid claim for benefits. Provided, however, if the first day of a week with respect to which an individual first registers for work and files a valid claim for benefits is either (i) the first day of a calendar quarter, or (ii) the second day of a calendar quarter followed by a February 29 within one year thereof, "benefit year" shall mean the one-year period beginning with that first day of the week with respect to which the individual first registers for work and files a valid claim for benefits. A valid claim shall be deemed to have been filed only if such individual, at the time the claim is filed, is unemployed, and has been paid wages in his base period totaling at least six times the average weekly insured wage, obtained in accordance with G.S. 96-8(22), and has been paid wages in at least two quarters of the individual's base period.

d. Repealed by Session Laws, 1981, c. 160, s. 11.

(18) "Base period" means the first four of the last five completed calendar quarters immediately preceding the first day of an individual's benefit year as defined in subdivision (17) of this section. If an individual lacks sufficient base period wages in order to establish a benefit year in the manner set forth above, the claimant shall have an alternative base period substituted for the current base period so as not to prevent

establishment of a valid claim. For the purposes of this subdivision, "alternative base period" means the last four completed calendar quarters.

(19) Repealed by Session Laws 1977, c. 727, s. 35.

(20) The term "American vessel," as used in this Chapter, means any vessel documented or numbered under the laws of the United States; and includes any vessel which is neither documented or numbered under the laws of the United States nor documented under the laws of any foreign country, if its crew is performing service solely for one or more citizens or residents of the United States or corporations organized under the laws of the United States or of any state and the term "American aircraft" means an aircraft registered under the laws of the United States.

(21) The words "Employment Security Law" as used in this Chapter mean any law enacted by this State or any other state or territory or by the federal government providing for the payment of unemployment insurance benefits.

(22) Average Weekly Insured Wage. — "Average weekly insured wage" is the quotient obtained by dividing the total of the wages, as defined in G.S. 96-8(12) and (13), reported by all insured employers by the monthly average in insured employment under this Chapter during the immediately preceding calendar year and further dividing the quotient obtained by 52 to obtain a weekly rate. (For this computation the data as released annually in the Employment Security Commission's publication "North Carolina Insured Employment and Wage Payment" shall be used). The quotient thus obtained shall be deemed to be the average weekly wage for such year.

(23) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 680, s. 9.

(24) Work, for purposes of this Chapter, means any bona fide permanent employment the acceptance of which would not result in an undue family hardship as defined in G.S. 96-8(10a). For purposes of this definition, "bona fide permanent employment" is presumed to include only those employments of greater than 30 consecutive calendar days duration (regardless of whether work is performed on all those days) provided: (a) the presumption that an employment lasting 30 days or less is not bona fide permanent employment may be rebutted by a finding by the Commission, either on its own motion or upon a clear and convincing showing by an interested party that the application of the presumption would work a substantial injustice in view of the intent of this Chapter; (b) Any decision of the Commission on the question of bona fide employment may be disturbed on judicial review only upon a finding of plain error.

(25) Repealed by Session Laws 1981, c. 160, s. 12.

(26) If two or more related corporations concurrently employ the same individual and compensate the individual through a common paymaster that is one of the related corporations, each related corporation shall be considered to have paid as remuneration to the individual only the amounts actually disbursed by it to the individual and shall not be considered to have paid as remuneration to the individual amounts actually disbursed to the individual by another of the related corporations.

(27) "Immediate family" means an individual's wife, husband, mother, father, brother, sister, son, daughter, grandmother, grandfather, grandson, granddaughter, whether the relationship is a biological, step-, half-, or in-law relationship.

(28) Willfully. — For the purposes of this Chapter, the terms "willfully" and "knowingly" shall have the same meaning. (Ex. Sess. 1936, c. 1, s.

19; 1937, c. 448, s. 5; 1939, c. 27, ss. 11-13; c. 52, ss. 6, 7; c. 141; 1941, cc. 108, 198; 1943, c. 377, ss. 31-34; c. 552, ss. 1, 2; 1945, c. 522, ss. 5-10; c. 531, ss. 1, 2; 1947, c. 326, ss. 7-12; c. 598, ss. 1, 5, 8; 1949, c. 424, ss. 3-81/2; cc. 523, 863; 1951, c. 322, s. 1; c. 332, ss. 2, 3, 18; 1953, c. 401, ss. 1, 7-11; 1955, c. 385, ss. 3, 4; 1957, c. 1059, ss. 2-4; 1959, c. 362, ss. 2-6; 1961, c. 454, ss. 4-15; 1965, c. 795, ss. 2-5; 1969, c. 575, ss. 4-6, 15; 1971, c. 367; c. 673, ss. 5-13; c. 863; c. 1231, s. 1; 1973, c. 172, s. 1; c. 476, ss. 133, 152; c. 740, s. 2; c. 1138, ss. 1, 2; 1975, c. 226, s. 3; 1977, c. 727, ss. 14-36; 1979, c. 660, ss. 3-12; 1981, c. 160, ss. 3-12; c. 774, s. 1; 1983, c. 585, s. 20; c. 625, s. 9; c. 675; 1985, c. 57; c. 197, s. 3; c. 322, s. 1; c. 552, ss. 1-4; 1987, c. 103, ss. 2, 3; c. 212; c. 564, s. 21; 1987 (Reg. Sess., 1988), c. 999, s. 1; 1989, c. 410; c. 583, ss. 3, 5; c. 770, ss. 18, 19; 1991, c. 458, s. 1; 1993, c. 122, s. 1; c. 553, s. 30; 1993 (Reg. Sess., 1994), c. 680, ss. 4, 7-9; 1997-109, s. 5; 1997-120, s. 1; 1997-404, ss. 1, 2; 1997-443, s. 11A.118(a); 1997-456, s. 27; 1998-212, s. 11.8(g); 1999-196, ss. 1, 2; 2001-184, ss. 1, 2, 3; 2001-251, ss. 1, 2, 3, 4; 2001-285, s. 1; 2001-414, ss. 34, 35, 36, 37, 38, 39; 2001-424, s. 28.47; 2004-124, s. 13.7B(d); 2005-410, s. 4.)

Editor's Note. — Session Laws 1977, c. 727, s. 58, provides: "If U.S. Public Law 94-566 or the federal acts it amends should be adjudged unconstitutional or invalid in its or their application or stayed pendente lite as to State or local employees by a court of competent jurisdiction, then the coverage of those employees under this act is automatically stayed or repealed to the extent of the adjudged inapplicability. The repeal shall be effective from the date of final disposition upon appeal or from the date of expiration of the right of appeal and shall apply to relevant matters pending at that time. If Public Law 94-566 or those provisions thereof relating to coverage of State and local employees should at any time be repealed by the U.S. Congress, then the provisions of this act relating to coverage of State and local employees shall be automatically repealed."

Session Laws 2001-414, s. 34, recodified subdivision (8) as (7c), effective September 14, 2001.

Legal Periodicals. — For survey of 1977 law on employment regulation, see 56 N.C.L. Rev. 854 (1978).

For survey of 1982 law on taxation, see 61 N.C.L. Rev. 1217 (1983).

For 1997 legislative survey, see 20 Campbell L. Rev. 375.

CASE NOTES

I. General Consideration.
II. "Employer".
III. "Employees".

I. GENERAL CONSIDERATION.

Editor's Note. — *The relevance of many of the decisions reported below may be affected by subsequent amendatory statutes.*

This section provides the qualifications for benefits under the Employment Security Law. In re Shuler, 255 N.C. 559, 122 S.E.2d 393 (1961).

Definitions and Tests Applied According to Legislative Intent. — The General Assembly has power to determine scope of the Unemployment Compensation Act, and the definitions and tests therein prescribed will be applied by the courts in accordance with the legislative intent. Unemployment Comp. Comm'n v. City Ice & Coal Co., 216 N.C. 6, 3 S.E.2d 290 (1939).

Common-Law Relationship of Master and Servant Extended. — Employments taxable under this Chapter are not confined to the common-law relationship of master and servant, but the legislature, under its power to determine employments which shall be subject to the tax, has, by the definitions contained in the Chapter and the administrative procedure set up therein for determining whether an employment is subject to the Chapter, enlarged its coverage beyond the common-law definition of master and servant, and the scope of the Chapter must be determined upon the facts of each particular case. State ex rel. Unemployment Comp. Comm'n v. National Life Ins. Co., 219 N.C. 576, 14 S.E.2d 689, 139 A.L.R. 895 (1941). See State ex rel. Unemployment Comp. Comm'n v. L. Harvey & Son Co., 227 N.C. 291, 42 S.E.2d 86 (1947).

This section is not violative of constitu-

tional provisions when properly interpreted and applied. State ex rel. Unemployment Comp. Comm'n v. J.M. Willis Barber & Beauty Shop, 219 N.C. 709, 15 S.E.2d 4 (1941).

Purpose. — The General Assembly has stated the policy of this State is that the compulsory reserves required under the Employment Security Law be used for the benefit of persons unemployed through no fault of their own. In order to carry out the intent of the act its provisions should be liberally construed in favor of applicants. By contrast, our courts have said that sections of the act imposing disqualifications for its benefits should be strictly construed in favor of the claimant and should not be enlarged by implication. Couch v. North Carolina Emp. Sec. Comm'n, 89 N.C. App. 405, 366 S.E.2d 574, aff'd, 323 N.C. 472, 373 S.E.2d 440 (1988).

Liberal Construction. — The terms "employment," "employer," "employing unit," "wages," and "remuneration" as used in this Chapter must be liberally construed to effectuate its purpose to relieve the evils of unemployment, and the definition of the terms as contained in the Chapter are controlling and are broader than the common-law meaning of the terms, and the Chapter includes in its scope relationships which might be excluded by a strict common-law application of the definition of an independent contractor. Unemployment Comp. Comm'n v. Jefferson Std. Life Ins. Co., 215 N.C. 479, 2 S.E.2d 584 (1939).

As to rules for determining whether an individual is an "employee" or an "independent contractor," see State ex rel. Emp. Sec. Comm'n v. Faulk, 88 N.C. App. 369, 363 S.E.2d 225, cert. denied, 321 N.C. 480, 364 S.E.2d 917 (1988).

Effect of Reinstatement of Liability After Prior Exemption. — Where an employer, otherwise subject to the provisions of this Chapter, is exempted from those provisions by legislative action, and by legislative action that exemption is subsequently terminated, and, additionally, where there have been no changes in the circumstances or activities of the employer, upon reinstatement of liability under this Chapter that employer is entitled to credit for its prior account balance, and that employer's contribution rate should be determined primarily by reference to its former experience rating at the time of its exemption. The burden will be upon the commission to show what, if any, changes in circumstances have come about which would justify an upward revision of that employer's rate of contribution. State ex rel. Emp. Sec. Comm'n v. Blue Ridge Broadcasting Corp., 42 N.C. App. 702, 257 S.E.2d 640, cert. denied, 298 N.C. 805, 262 S.E.2d 4 (1979).

Former Subdivision (4) Construed. — Former subdivision (4) merely determined who should be liable for the contributions to the Commission on wages paid to employees as between an employing unit and a contractor or subcontractor under certain specified circumstances. State ex rel. Unemployment Comp. Comm'n v. Nissen, 227 N.C. 216, 41 S.E.2d 734 (1947).

Subdivision (5)b Construed. — Subdivision (5)b of this section is a definitive statute by which it can be determined whether or not an employing unit which is the transferee of all, substantially all, or a part of an organization, trade, or business of another, is subject to the provisions of the Employment Security Law and required to make the contributions as provided therein. State ex rel. Emp. Sec. Comm'n v. News Publishing Co., 228 N.C. 332, 45 S.E.2d 391 (1947). But see the 1949 amendment to § 96-9(c)(4).

In subdivision (5)b of this section, the employing unit that acquires only a part of the organization, trade, or business of another is expressly exempted from the lien imposed by G.S. 96-10(d) on the assets transferred, although the former owner may not have paid all the contributions due at the time of the transfer. If it had been the intent and purpose of the legislature, in enacting G.S. 96-9(c)(4), to authorize the transfer of such percentage of the reserve account as the transferred assets bear to the entire assets of the transferor, when only a part of the organization, trade, or business is transferred, then there would be no sound reason for exempting such assets from the provisions of G.S. 96-10(d). State ex rel. Emp. Sec. Comm'n v. News Publishing Co., 228 N.C. 332, 45 S.E.2d 391 (1947). But see the 1949 amendment to § 96-9(c)(4).

Read in context, subdivision (5)b of this section contemplates a transaction in which the purchaser, instead of buying physical assets as such, succeeds in some real sense to the organization, trade or business, or some part thereof, of a covered employer, ordinarily as a going concern. The underlying idea is that of continuity, the new employing unit succeeding to and continuing the business or some part thereof of the former employing unit. State ex rel. Emp. Sec. Comm'n v. Skyland Crafts, Inc., 240 N.C. 727, 83 S.E.2d 893 (1954).

Where defendant company was composed of new persons, engaged in a new business, under a new name, and did not purchase the predecessor's accounts receivable, customer lists, goodwill, right to use trade name, or any assets except the equipment and raw materials in the plant, there was no continuity of organization, trade or business such as is contemplated by subdivision (5)b of this section. State ex rel. Emp. Sec. Comm'n v. Skyland Crafts, Inc., 240 N.C. 727, 83 S.E.2d 893 (1954).

Subdivision (5)d Construed. — The provision that enterprises "controlled" by the same "interests" shall be considered a single employing unit, as contained in former subdivision (5)d of this section, was given the distinct, definite and commonly understood meaning of its wording. Unemployment Comp. Comm'n v. City Ice & Coal Co., 216 N.C. 6, 3 S.E.2d 290 (1939).

Where the three defendant corporations had common officers and directors and substantially identical stockholders, and maintained a central business office where each kept its records and handled all clerical matters, the three corporations were owned and controlled directly or indirectly by the same interests within the meaning of former subdivision (5)d of this section and constituted but a single employing unit within the meaning of the section. Unemployment Comp. Comm'n v. City Ice & Coal Co., 216 N.C. 6, 3 S.E.2d 290 (1939).

Former subdivision (5)d of this section, relating to employing units owned or controlled by the same interests, etc., when properly interpreted and applied, was not open to successful attack on the ground that it would result in the deprivation of property without due process of law or constitute a denial of the equal protection of the law. State ex rel. Unemployment Comp. Comm'n v. J.M. Willis Barber & Beauty Shop, 219 N.C. 709, 15 S.E.2d 4 (1941).

An individual who operated three places of business, employing in the aggregate more than eight employees, was an "employer" as defined in former subdivision (5)d of this section, relating to employing units owned or controlled by the same interests, etc. State ex rel. Unemployment Comp. Comm'n v. J.M. Willis Barber & Beauty Shop, 219 N.C. 709, 15 S.E.2d 4 (1941).

Subdivision (6)a Construed. — The employment contemplated by subdivision (6)a was to be one for personal services rendered for remuneration. State ex rel. Emp. Sec. Comm'n v. Tinnin, 234 N.C. 75, 65 S.E.2d 884 (1951).

Subdivision (6)f Construed. — Where services were rendered for remuneration, subdivision (6)f of this section formerly provided that the burden was on the party for whose benefit the services were rendered to prove that they were rendered free from his control or direction over the performance of such services, that they were outside the usual course of the business for which the services were performed, and that the person performing the service was customarily engaged in an independently established trade, occupation, profession, or business; and, since the matters of exemption were stated conjunctively, all three elements were required to be shown in order that exemption from the Chapter could be secured. Unemployment Comp. Comm'n v. Jefferson Std. Life Ins. Co., 215 N.C. 479, 2 S.E.2d 584 (1939); State ex rel. Emp. Sec. Comm'n v. Coe, 239 N.C. 84, 79 S.E.2d 177 (1953).

Subparagraph (6)k 15 Construed. — The enactment in 1977 of subdivisions (5)q and (6)j of this section, which deleted a previous exemption from unemployment tax liability for nonprofit elementary and secondary schools, did not change the effect of the exemption in subparagraph (6)k 15 of this section for persons performing services in the employ of a church organization operated primarily for religious purposes. Begley v. Employment Sec. Comm'n, 50 N.C. App. 432, 274 S.E.2d 370 (1981).

Before the 1949 amendment to subdivisions (6)(a) and (f), it was held that the provisions of the Employment Security Law classifying and designating those persons who are subject to the provisions of this Chapter, rather than the common-law definition of the relationship of master and servant, were controlling, when not capricious or unreasonable. And the burden was upon the employer to show to the satisfaction of the Employment Security Commission that persons performing services came within the exceptions enumerated in former paragraphs 1, 2 and 3 of subdivision (6)f. State ex rel. Emp. Sec. Comm'n v. Champion Distrib. Co., 230 N.C. 464, 53 S.E.2d 674 (1949).

While subdivision (10)a of this section requires a claimant to be "unemployed" as statutorily defined before receiving benefits, neither this statute nor any other in the Employment Security Law requires one to be unemployed before filing a claim or makes filing a claim determinative of the fact of unemployment. Wright v. Bus Term. Restaurant, 71 N.C. App. 395, 322 S.E.2d 201 (1984).

Under the law, facts such as unemployment and its cause are determined by evidence, rather than statutory implication. Wright v. Bus Term. Restaurant, 71 N.C. App. 395, 322 S.E.2d 201 (1984).

One is not entitled to unemployment benefits merely because he meets the legislative definition of "totally unemployed." In re Tyson, 253 N.C. 662, 117 S.E.2d 854 (1961).

A unilateral, substantial reduction in one's working hours by his employer may permit a finding of good cause attributable to the employer. Couch v. North Carolina Emp. Sec. Comm'n, 89 N.C. App. 405, 366 S.E.2d 574, aff'd, 323 N.C. 472, 373 S.E.2d 440 (1988).

Deferment of Benefits Until Exhaustion of Severance and Vacation Pay. — Discharged employees who are entitled under a contract to severance and vacation pay are not entitled to unemployment benefits until the moneys paid as severance and vacation pay have been exhausted by time elapsed at the employees' weekly wage rate. In re Tyson, 253 N.C. 662, 117 S.E.2d 854 (1961).

The fact that the legislature not only amended the definition of "wages" in 1953, but added, in 1955, a disqualifying provision, was clear evidence of its intent to prevent the collection of unemployment benefits so long as the employee had vacation or severance pay payable to him. It was a clear declaration that the legislature did not intend that an employer should be required to provide greater compensation to an unemployed individual than to the same individual when at work. In re Tyson, 253 N.C. 662, 117 S.E.2d 854 (1961).

Employee Is Entitled to Benefits If He Does Not Work and Is Not Paid for Services. — A laid-off employee is entitled to insurance benefits under the State law if he is totally unemployed; that is, if he does not work, and is not paid and not due pay for services. In re Shuler, 255 N.C. 559, 122 S.E.2d 393 (1961).

Payments Under Supplemental Unemployment Benefit Plan. — Under the wage and service test fixed by this section, payments to laid-off employees under a supplemental unemployment benefit plan do not constitute wages. In re Shuler, 255 N.C. 559, 122 S.E.2d 393 (1961).

Benefits received by a laid-off employee from a trust fund set up pursuant to a collective bargaining agreement should not be deducted from unemployment insurance benefits due such employee under the Employment Security Act. In re Shuler, 255 N.C. 559, 122 S.E.2d 393 (1961).

Recovery of Both Workers' Compensation and Unemployment Benefits. — Several states allow the recovery of both workers' compensation and unemployment benefits for the same time period, in the absence of an express statutory prohibition. In North Carolina, there is no express prohibition of duplicate benefits, although a persuasive argument can be made that the General Assembly intended that there be no recovery of both workers' compensation and unemployment benefits. Dolbow v. Holland Indus., Inc., 64 N.C. App. 695, 308 S.E.2d 335 (1983), cert. denied, 310 N.C. 308, 312 S.E.2d 651 (1984).

The United States Secretary of Labor was not a necessary party to an action to determine whether the unemployment tax statutes applied to employees of schools operated by the Roman Catholic Church in North Carolina on the grounds that State unemployment laws must follow federal statutes in order for the State to gain a credit against the federal unemployment tax and thus obtain funds to operate State employment offices and that the United States Secretary of Labor has interpreted the federal statutes to include parochial and parish schools within the scope of the federal unemployment tax provisions, since that action in no way involved an interpretation of the Federal Unemployment Tax Act. Begley v. Employment Sec. Comm'n, 50 N.C. App. 432, 274 S.E.2d 370 (1981).

Applied in Baptist Children's Homes of N.C., Inc. v. Employment Sec. Comm'n, 56 N.C. App. 781, 290 S.E.2d 402 (1982).

Cited in State ex rel. Emp. Sec. Comm'n v. Kermon, 232 N.C. 342, 60 S.E.2d 580 (1950); State ex rel. Emp. Sec. Comm'n v. Paul's Young Men's Shop, Inc., 32 N.C. App. 23, 231 S.E.2d 157 (1977); Grantham v. R.G. Barry Corp., 115 N.C. App. 293, 444 S.E.2d 659 (1994); State v. Frazier, 142 N.C. App. 207, 541 S.E.2d 800 (2001); Clark v. Sanger Clinic, P.A., 142 N.C. App. 350, 542 S.E.2d 668, 2001 N.C. App. LEXIS 97, cert. denied, 353 N.C. 450, 548 S.E.2d 524 (2001).

II. "EMPLOYER".

Corporation Acting as Contractee and Not Mere Lessor. — The corporate defendant operated a department store. Upon the discontinuance of its shoe department, it entered into a contract with the individual defendant under which he occupied space in the store at a rental of a fixed percentage of the gross and carried on the shoe business under the name of the corporation, with full authority to hire and fire employees and order stock, but under which the corporation required money from sales to be turned over to it immediately as received, controlled the extension of credit and owned all accounts, paid sales taxes and advertised in its own name with the individual defendant paying for the proportion of advertising devoted to shoes. It was held that the corporation was a contractee and not a mere landlord, and that the corporation was liable under former subdivision (4) for unemployment compensation tax on wages paid by the individual to his employees for the period of operation prior to the amendment of 1945. State ex rel. Unemployment Comp. Comm'n v. L. Harvey & Son Co., 227 N.C. 291, 42 S.E.2d 86 (1947).

Employer Required to Pay Contributions. — Where, prior to the purchase of the business by defendant, there had been employed therein more than eight individuals for 12 weeks during the calendar year, and defendant, after purchasing the business, employs more than eight employees for 16 weeks during the remainder of the year, defendant is an employer required to pay contributions upon the wages of his employees under the provisions of the Employment Security Act. State ex rel. Emp. Sec. Comm'n v. Whitehurst, 231 N.C. 497, 57 S.E.2d 770 (1950).

This section requires employment security contributions from church-related schools, and they are obligated to pay the appropriate taxes. Ascension Lutheran Church v. Employment Sec. Comm'n, 501 F. Supp. 843 (W.D.N.C. 1980). But see Begley v. Employment Sec. Comm'n, 50 N.C. App. 432, 274 S.E.2d 370 (1981).

Unemployment Taxes. — An employer

must pay state unemployment taxes on his alien farm workers with seasonal agricultural worker, "SAW" status. State ex rel. Emp. Sec. Comm'n v. Hopkins, 111 N.C. App. 437, 432 S.E.2d 703 (1993).

ESC to Be Treated as Employer. — The reasoning of the Court of Appeals erroneously treated Employment Security Commission (ESC) as an agency appealing its own agency decision rather than as an "aggrieved party" where ESC appealed to Superior Court not as an agency decision-maker, but as an employer aggrieved by the agency action. ESC-employer was liable to pay for unemployment insurance benefits the same as any other employer and had the same rights of appeal as any other employer; thus, ESC-employer had the status of "aggrieved party" under ESC Regulation 21.18(D) and had appeal rights as such. Employment Sec. Comm'n v. Peace, 341 N.C. 716, 462 S.E.2d 222 (1995).

III. "EMPLOYEES".

Unemployment insurance benefits are not available to those who are not employees within the meaning of the unemployment insurance statute. State ex rel. Emp. Sec. Comm'n v. Paris, 101 N.C. App. 469, 400 S.E.2d 76, aff'd, 330 N.C. 114, 408 S.E.2d 852 (1991).

Employee Status Versus Independent Contractor Status. — In determining whether someone is an independent contractor or an employee, the decisive test is the retention by the employer of the right to control and direct the manner in which the details of the work are to be executed and what the laborers shall do as the work progresses. State ex rel. Emp. Sec. Comm'n v. Huckabee, 120 N.C. App. 217, 461 S.E.2d 787 (1995), aff'd, 343 N.C. 297, 469 S.E.2d 552 (1996).

Employees of schools operated by the Roman Catholic Church are exempt from the unemployment tax provisions of this Chapter pursuant to subparagraph (6)k 15 of this section. Begley v. Employment Sec. Comm'n, 50 N.C. App. 432, 274 S.E.2d 370 (1981). But see Ascension Lutheran Church v. Employment Sec. Comm'n, 501 F. Supp. 843 (W.D.N.C. 1980).

Agreement of Purchaser to Perform Service in Connection with Purchase. — Evidence that a municipal corporation sold certain standing timber to defendant at a stipulated price per thousand board feet, and that in connection with the purchase, defendant agreed to remove all sawdust, to keep the bushes down and to pile no brush on the premises of the corporation, supported the finding of the Employment Security Commission that the defendant was not in the employ of the municipal corporation, within the meaning of this section. State ex rel. Emp. Sec. Comm'n v. Simpson, 238 N.C. 296, 77 S.E.2d 718 (1953).

A magistrate is a "member of the judiciary" within the meaning of subdivision (6) so as to be excluded from benefits under the Employment Security Law. Bradshaw v. Administrative Office of Courts, 320 N.C. 132, 357 S.E.2d 370 (1987).

Insurance Soliciting Agents. — Soliciting agents and managers, in their capacity as soliciting agents, are subject to a high degree of control by the insurance company employing them under their written contract, and usually their services are rendered to the company in the offices of the company, and are directly related and contribute to the primary purpose for which the company is organized, and therefore their services constitute an "employment" within this Chapter. Unemployment Comp. Comm'n v. Jefferson Std. Life Ins. Co., 215 N.C. 479, 2 S.E.2d 584 (1939). But see subdivision (6) of this section.

Research Assistant. — The claimant's services as a research assistant under a fellowship granted to students by The University of North Carolina were not "employment" within the meaning of the act. In re Scaringelli, 39 N.C. App. 648, 251 S.E.2d 728 (1979).

Private nurse's assistant was an independent contractor and not an employee and thus not entitled to unemployment compensation benefits when she was relieved of her duties, as the evidence shows that the parties did not intend for claimant to receive the agreed upon salary free from deductions and also be eligible for unemployment compensation benefits. State ex rel. Emp. Sec. Comm'n v. Paris, 101 N.C. App. 469, 400 S.E.2d 76, aff'd, 330 N.C. 114, 408 S.E.2d 852 (1991).

Salesmen. — The evidence tended to show that the services performed by defendant's salesmen were in the usual course of defendant's business, that goods were loaded on the salesmen's cars on defendant's premises, and the unsold goods returned there, that the salesmen were bonded, were allotted territory by defendant, were not permitted to sell any competitor's merchandise, paid no license or sales tax, were reported as employees in federal returns and their taxes deducted from the payroll, were required to turn in all money for goods sold and were paid weekly on a commission basis. Held: The evidence supports the finding of the Employment Security Commission that the salesmen were "employees" within the meaning of this section. State ex rel. Employment Sec. Comm'n v. Champion Distrib. Co., 230 N.C. 464, 53 S.E.2d 674 (1949). But see the 1949 amendment to subdivision (6), paragraphs a and f.

Shoeshine Boy. — Findings were held sufficient to support the conclusions of the Employment Security Commission that a shoeshine boy "engaged" by a barbershop was an employee and not an independent contractor, so as to bring the employer within the coverage of the Employment Security Law during the period in question. State ex rel. Emp. Sec. Comm'n v. Coe, 239 N.C. 84, 79 S.E.2d 177 (1953).

Special School Employee. — Project Headstart is a school within the ordinary meaning of the term, and the situation of an employee of Project Headstart is one of those addressed by the "secondary school provision" of this section, excluding from unemployment benefits those who are subject to school-related seasonal unemployment. In re Huntley, 42 N.C. App. 1, 255 S.E.2d 574, cert. denied, 298 N.C. 297, 259 S.E.2d 913 (1979).

Truck Driver. — Where an interstate carrier leased a motor vehicle for a trip under its franchise by agreement stipulating that lessor should furnish the equipment and pay the driver's salary and fully maintain and service the equipment, in consideration of a lump sum payment, the driver of such leased vehicle, whether he be the lessor owner or an employee of the lessor owner, was not an employee of the lessee within the meaning of this section. State ex rel. Emp. Sec. Comm'n v. Hennis Freight Lines, 248 N.C. 496, 103 S.E.2d 829 (1958).

Findings of fact made by the Commission were not sufficient to support the conclusion of law that drivers hauling freight in a truck owned by company, other than owner-operators, were employees of the company for purposes of this Chapter. Reco Transp., Inc. v. Employment Sec. Comm'n, 81 N.C. App. 415, 344 S.E.2d 294, cert. denied, 318 N.C. 509, 349 S.E.2d 865 (1986).

Truck Loaders. — Company maintained control over the manner and method of the truck loaders' work and the loaders did not retain that degree of independence necessary to require their classification as independent contractors where the loaders had no investment in the business, had to load the trucks at a particular plant within four set shifts under the direction and supervision of the plant, and the only discretion the loaders had was in choosing a load. State ex rel. Emp. Sec. Comm'n v. Huckabee, 120 N.C. App. 217, 461 S.E.2d 787 (1995), aff'd, 343 N.C. 297, 469 S.E.2d 552 (1996).

Cab Drivers. — For case upholding the Commission's conclusion that taxicab drivers for cab company were "employees" within the meaning of subdivision (6)a of this section, see State ex rel. Emp. Sec. Comm'n v. Faulk, 88 N.C. App. 369, 363 S.E.2d 225, cert. denied, 321 N.C. 480, 364 S.E.2d 917 (1988).

Evidence Showing Workers to Be Employees and Not Independent Contractors. — See State ex rel. Emp. Sec. Comm'n v. Monsees, 234 N.C. 69, 65 S.E.2d 887 (1951).

§ 96-9. Contributions.

(a) Payment. —

(1) Except as provided in subsection (d) hereof, contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this Chapter, with respect to wages for employment (as defined in G.S. 96-8(6)). Such contributions shall become due and be paid by each employer to the Commission for the fund in accordance with such regulations as the Commission may prescribe, and shall not be deducted in whole or in part from the remuneration of individuals in his employ. Contributions shall become due on and shall be paid on or before the last day of the month following the close of the calendar quarter in which such wages are paid and such contributions shall be paid by each employer to the Commission for the fund in accordance with such regulations as the Commission may prescribe, and shall not be deducted in whole or in part from the remuneration of individuals in his employ, provided, further, that if the Commission shall be advised by its duly authorized officers or agents that the collection of any contribution under any provision of this Chapter will be jeopardized by delay, the Commission may, whether or not the time otherwise prescribed by law for making returns and paying such tax has expired, immediately assess such contributions (together with all interest and penalties, the assessment of which is provided for by law). Such contributions, penalties and interest shall thereupon become immediately due and payable, and immediate notice and demand shall be made by the Commission for the payment thereof. Upon failure or refusal to pay such contributions, penalties, and interest, it shall be lawful to make collection thereof as provided by

G.S. 96-10 and subsections thereunder and such collection shall be lawful without regard to the due date of contributions herein prescribed, provided, further, that nothing in this paragraph shall be construed as permitting any refund of contributions heretofore paid under the law and regulations in effect at the time such contributions were paid.

(2) In the payment of any contributions a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to one cent.

(3) Benefits paid employees of this State shall be financed and administered in accordance with the provisions and conditions of G.S. 96-9(d) required for nonprofit organizations; except as provided by suitable regulations which may be adopted by the Commission. The Department of Administration shall make an election with respect to financing all such benefits.

(4) Political subdivisions of this State may finance benefits paid to employees either by coming under the experience rating program provided in G.S. 96-9(b) or by coming into the program on a reimbursement basis in accordance with the provisions and conditions of G.S. 96-9(f). Any election made shall be binding upon the political subdivision so electing for a period of four years.

(4a) Indian tribes may finance benefits paid to employees either by coming under the experience rating program provided in G.S. 96-9(b) or by coming into the program on a reimbursement basis in accordance with the provisions and conditions of G.S. 96-9(i). Any election made is binding on the tribe so electing for a period of three years.

(5) An employer is not required to pay contributions on wages the employer pays to an individual in a calendar year in excess of the taxable wage base for that calendar year. The taxable wage base is the greater of (i) the federally required taxable wage base or (ii) the product resulting from multiplying the average yearly insured wage by fifty percent (50%), rounded to the nearest multiple of one hundred dollars ($100.00). The average yearly insured wage is the average weekly insured wage on the applicable computation date multiplied by 52. The following wages are included in determining whether the amount of wages paid to an individual in a single calendar year exceeds the taxable wage base:

a. Wages paid to an individual in this State by an employer that made contributions in another state upon the wages paid to the individual because the work was performed in the other state.

b. Wages paid by a successor employer to an individual that meets both of the following conditions: (i) the individual was an employee of the predecessor and was taken over as an employee by the successor as a part of the organization acquired and (ii) the predecessor employer has paid contributions on the wages paid to the individual while in the predecessor's employ during the year of acquisition and the account of the predecessor is transferred to the successor in accordance with G.S. 96-9(c)(4)a.

(6) If the amount of the contributions shown to be due after all credits is less than five dollars ($5.00), no payment need be made. If an employer has paid contributions, penalties, and/or interest in excess of the amount due, this shall be considered an overpayment and refunded provided no other debts are owed to the Commission by the employer. Overpayments of less than five dollars ($5.00) shall be refunded only upon receipt by the Chairman of a written demand for such refund from the employer. Nothing herein shall be construed to change or extend the limitation set forth in G.S. 96-10(e), (f), and (i).

(7) Effective with the quarter ending September 30, 1999, every employer with 100 or more employees, and every person or organization that, as agent, reports wages on a total of 100 or more employees on behalf of one or more subject employers, shall file that portion of the "Employer's Quarterly Tax and Wage Report" that contains the name, social security number, and gross wages of each individual in employment on magnetic tapes or diskettes in a format prescribed by the Commission.

For failure of an employer to comply with this subdivision, there shall be added to the amount required to be shown as tax in the reports a penalty of twenty-five dollars ($25.00). For failure of an agent to comply with this subdivision, the Commission may deny the agent the right to report wages and file reports for the employer for whom the agent filed an improper report for a period of one year following the calendar quarter in which that agent filed the improper report. The Commission may reduce or waive a penalty for good cause shown.

(8) An employer of domestic service employees as defined by the Internal Revenue Code may be given permission by the Chair of the Commission to file reports once a year on or before the last day of the month following the close of the calendar year in which the wages are paid. Permission to file a report annually may be revoked if the employer is found liable to the Commission for quarterly contributions under subdivision (6) of this subsection.

(9) Employers who are granted permission under subdivision (8) of this subsection to file annual reports may be given permission to file reports by telephone. Employers who report by telephone must contact either the Field Tax Auditor who is assigned to the employer's account or the Unemployment Insurance Division in Raleigh and report the required information to that Auditor or to the Division by the date the report is due under subdivision (8) of this subsection.

(10) Employers electing to do so may pay their quarterly tax contributions by electronic funds transfer. When an electronic funds transfer cannot be completed due to insufficient funds or the nonexistence of an account of the transferor, the Commission shall assess a penalty equal to ten percent (10%) of the amount of the transfer, subject to a minimum of one dollar ($1.00) and a maximum of one thousand dollars ($1,000). The Commission may waive this penalty for good cause shown. As used in this section, the term "electronic funds transfer" means a transfer of funds initiated by using an electronic terminal, a telephone, a computer, or magnetic tape to instruct or authorize a financial institution or its agent to credit or debit an account.

(11) The Commission may establish policies to allow taxes to be payable under certain conditions by credit card. A condition of payment by credit card is receipt by the Commission of the full amount of taxes, penalties, and interest due. The Commission shall require an employer who pays by credit card to include an amount equal to any fee charged the Commission for the use of the card. A payment of taxes that is made by credit card and is not honored by the card issuer does not relieve the employer of the obligation to pay the taxes.

(b) Rate of Contributions. —

(1) Beginning Rate. — The standard beginning rate of contributions for an employer is a percentage of wages paid by the employer during a calendar year for employment occurring during that year. For any calendar year that the training and reemployment contribution in

G.S. 96-6.1 applies, the rate is determined in accordance with the following table:

Percentage	Date After Which Employment Occurs
2.25%	December 31, 1986
1.8	December 31, 1993
1.2	December 31, 1995
1.0	December 31, 1999

For any calendar year that the training and reemployment contribution in G.S. 96-6.1 does not apply, the rate is determined in accordance with the following table:

Percentage	Date After Which Employment Occurs
2.25%	December 31, 1986
1.8	December 31, 1993
1.2	December 31, 1995

(2) Experience Rating. —

a. Waiting Period for Rate Reduction. — No employer's contribution rate shall be reduced below the standard rate for any calendar year until its account has been chargeable with benefits for at least 12 calendar months ending July 31 immediately preceding the computation date. An employer's account has been chargeable with benefits for at least 12 calendar months if the employer has reported wages paid in four completed calendar quarters pursuant to G.S. 96-9(a).

b. Credit Ratio. — The Commission shall, for each year, compute a credit reserve ratio for each employer whose account has a credit balance. An employer's credit reserve ratio shall be the quotient obtained by dividing the credit balance of the employer's account as of July 31 of each year by the total taxable payroll of the employer for the 36 calendar-month period ending June 30 preceding the computation date. Credit balance as used in this section means the total of all contributions paid and credited for all past periods in accordance with the provisions of G.S. 96-9(c)(1) together with all other lawful credits to the account of the employer less the total benefits charged to the account of the employer for all past periods.

c. Debit Ratio. — The Commission shall for each year compute a debit ratio for each employer whose account shows that the total of all its contributions paid and credited for all past periods in accordance with G.S. 96-9(c)(1) together with all other lawful credits is less than the total benefits charged to its account for all past periods. An employer's debit ratio shall be the quotient obtained by dividing the debit balance of the employer's account as of July 31 of each year by the total taxable payroll of the employer for the 36 calendar-month period ending June 30 preceding the computation date. The amount arrived at by subtracting the total amount of all contributions paid and credited for all past periods in accordance with the provisions of G.S. 96-9(c)(1) together with all other lawful credits of the employer from the total amount of all benefits charged to the account of the employer for such periods is the employer's debit balance.

d. Other Provisions. — No employer's contribution rate shall be reduced below the standard rate for any calendar year unless its liability extends over a period of all or part of two consecutive calendar years and, as of August 1 of the second year, its credit reserve ratio meets the requirements of that schedule used in computing rates for the following calendar year, unless the employer's liability was established under G.S. 96-8(5)b and its predecessor's account was transferred as provided by G.S. 96-9(c)(4)a.

Whenever contributions are erroneously paid into one account which should have been paid into another account or which should have been paid into a new account, that erroneous payment can be adjusted only by refunding the erroneously paid amounts to the paying entity. No pro rata adjustment to an existing account may be made, nor can a new account be created by transferring any portion of the erroneously paid amount, notwithstanding that the entities involved may be owned, operated, or controlled by the same person or organization. No adjustment of a contribution rate can be made reducing the rate below the standard rate for any period in which the account was not in actual existence and in which it was not actually chargeable for benefits. Whenever payments are found to have been made to the wrong account, refunds can be made to the entity making the wrongful payment for a period not exceeding five years from the last day of the calendar year in which it is determined that wrongful payments were made. Notwithstanding payment into the wrong account, if an entity is determined to have met the requirements to be a covered employer, whether or not the entity has had paid on the account of its employees any sum into another account, the Commission shall collect contributions at the standard rate or the assigned rate, whichever is higher, for the five years preceding the determination of erroneous payments, which five years shall run from the last day of the calendar year in which the determination of liability for contributions or additional contributions is made. This requirement applies regardless of whether the employer acted in good faith.

(3)a through c. Repealed by Session Laws 1977, c. 727, s. 39.

d. Rate schedule A, B, C, D, E, F, G, H, or I appearing on the line opposite the fund ratio in the following Fund Ratio Schedules table shall be applicable in determining and assigning each eligible employer's contribution rate for the calendar year immediately following the computation date. The fund ratio is the total amount available for benefits in the Unemployment Insurance Fund on the computation date divided by the total amount of the taxable payroll of all subject employers for the 12-month period ending June 30 preceding the computation date.

FUND RATIO SCHEDULES

When the Fund Ratio Is:		Applicable
As Much As	But Less Than	Schedule
——	2.0%	A
2.0%	3.0%	B
3.0%	4.0%	C
4.0%	5.0%	D
5.0%	6.0%	E
6.0%	7.0%	F
7.0%	8.0%	G

When the Fund Ratio Is: As Much As	But Less Than	Applicable Schedule
8.0%	9.0%	H
9.0% and in excess thereof		I

d1. Repealed by Session Laws 1994, Extra Session, c. 10, s. 3.

d2. Repealed by Session Laws 1995, c. 4, s. 3, effective January 1, 1998.

d3. The standard contribution rate set by subdivision (b)(1) of this section applies to an employer unless the employer's account has a credit balance. Beginning January 1, 1999, for any calendar year that the training and reemployment contribution in G.S. 96-6.1 does not apply, the contribution rate of an employer whose account has a credit balance is determined in accordance with the rate set in the following Experience Rating Formula table for the applicable rate schedule. The contribution rate of an employer whose contribution rate is determined by this Experience Rating Formula table shall be reduced by fifty percent (50%) for any year in which the balance in the Unemployment Insurance Fund on computation date equals or exceeds one and ninety-five hundredths percent (1.95%) of the gross taxable wages reported to the Commission in the previous calendar year, and the fund ratio determined on that date is less than five percent (5%) and shall be reduced by sixty percent (60%) for any year in which the balance in the Unemployment Insurance Fund on computation date equals or exceeds one and ninety-five hundredths percent (1.95%) of the gross taxable wages as reported to the Commission in the previous calendar year, and the fund ratio determined on that date is five percent (5%) or more.

EXPERIENCE RATING FORMULA

When The Credit Ratio Is:

As Much As	But Less Than	Rate Schedules (%)								
		A	B	C	D	E	F	G	H	I
0.0%	0.2%	2.70%	2.70%	2.70%	2.70%	2.50%	2.30%	2.10%	1.90%	1.70%
0.2%	0.4%	2.70%	2.70%	2.70%	2.50%	2.30%	2.10%	1.90%	1.70%	1.50%
0.4%	0.6%	2.70%	2.70%	2.50%	2.30%	2.10%	1.90%	1.70%	1.50%	1.30%
0.6%	0.8%	2.70%	2.50%	2.30%	2.10%	1.90%	1.70%	1.50%	1.30%	1.10%
0.8%	1.0%	2.50%	2.30%	2.10%	1.90%	1.70%	1.50%	1.30%	1.10%	0.90%
1.0%	1.2%	2.30%	2.10%	1.90%	1.70%	1.50%	1.30%	1.10%	0.90%	0.80%
1.2%	1.4%	2.10%	1.90%	1.70%	1.50%	1.30%	1.10%	0.90%	0.80%	0.70%
1.4%	1.6%	1.90%	1.70%	1.50%	1.30%	1.10%	0.90%	0.80%	0.70%	0.60%
1.6%	1.8%	1.70%	1.50%	1.30%	1.10%	0.90%	0.80%	0.70%	0.60%	0.50%
1.8%	2.0%	1.50%	1.30%	1.10%	0.90%	0.80%	0.70%	0.60%	0.50%	0.40%
2.0%	2.2%	1.30%	1.10%	0.90%	0.80%	0.70%	0.60%	0.50%	0.40%	0.30%
2.2%	2.4%	1.10%	0.90%	0.80%	0.70%	0.60%	0.50%	0.40%	0.30%	0.20%
2.4%	2.6%	0.90%	0.80%	0.70%	0.60%	0.50%	0.40%	0.30%	0.20%	0.15%

When The Credit Ratio Is:

As Much As	But Less Than	Rate Schedules (%)								
		A	B	C	D	E	F	G	H	I
2.6%	2.8%	0.80%	0.70%	0.60%	0.50%	0.40%	0.30%	0.20%	0.15%	0.10%
2.8%	3.0%	0.70%	0.60%	0.50%	0.40%	0.30%	0.20%	0.15%	0.10%	0.09%
3.0%	3.2%	0.60%	0.50%	0.40%	0.30%	0.20%	0.15%	0.10%	0.09%	0.08%
3.2%	3.4%	0.50%	0.40%	0.30%	0.20%	0.15%	0.10%	0.09%	0.08%	0.07%
3.4%	3.6%	0.40%	0.30%	0.20%	0.15%	0.10%	0.09%	0.08%	0.07%	0.06%
3.6%	3.8%	0.30%	0.20%	0.15%	0.10%	0.09%	0.08%	0.07%	0.06%	0.05%
3.8%	4.0%	0.20%	0.15%	0.10%	0.09%	0.08%	0.07%	0.06%	0.05%	0.04%
4.0% & OVER		0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%

d4. Expired.

d5. The standard contribution rate set by subdivision (b)(1) of this section applies to an employer unless the employer's account has a credit balance. Beginning January 1, 1999, for any calendar year that the training and reemployment contribution in G.S. 96-6.1 applies, the contribution rate of an employer whose account has a credit balance is determined in accordance with the rate set in the following Experience Rating Formula table for the applicable rate schedule. The contribution rate of an employer whose contribution rate is determined by this Experience Rating Formula table shall be reduced by fifty percent (50%) for any year in which the balance in the Unemployment Insurance Fund on computation date equals or exceeds one and ninety-five hundredths percent (1.95%) of the gross taxable wages reported to the Commission in the previous calendar year, and the fund ratio determined on that date is less than five percent (5%) and shall be reduced by sixty percent (60%) for any year in which the balance in the Unemployment Insurance Fund on computation date equals or exceeds one and ninety-five hundredths percent (1.95%) of the gross taxable wages reported to the Commission in the previous calendar year, and the fund ratio determined on that date is five percent (5%) or more.

EXPERIENCE RATING FORMULA

When The Credit Ratio Is:

As Much As	But Less Than	Rate Schedules (%)								
		A	B	C	D	E	F	G	H	I
0.0%	0.2%	2.16%	2.16%	2.16%	2.16%	2.00%	1.84%	1.68%	1.52%	1.36%
0.2%	0.4%	2.16%	2.16%	2.16%	2.00%	1.84%	1.68%	1.52%	1.36%	1.20%
0.4%	0.6%	2.16%	2.16%	2.00%	1.84%	1.68%	1.52%	1.36%	1.20%	1.04%
0.6%	0.8%	2.16%	2.00%	1.84%	1.68%	1.52%	1.36%	1.20%	1.04%	0.88%

When The Credit Ratio Is:

As Much As	But Less Than	Rate Schedules (%)								
		A	B	C	D	E	F	G	H	I
0.8%	1.0%	2.00%	1.84%	1.68%	1.52%	1.36%	1.20%	1.04%	0.88%	0.72%
1.0%	1.2%	1.84%	1.68%	1.52%	1.36%	1.20%	1.04%	0.88%	0.72%	0.64%
1.2%	1.4%	1.68%	1.52%	1.36%	1.20%	1.04%	0.88%	0.72%	0.64%	0.56%
1.4%	1.6%	1.52%	1.36%	1.20%	1.04%	0.88%	0.72%	0.64%	0.56%	0.48%
1.6%	1.8%	1.36%	1.20%	1.04%	0.88%	0.72%	0.64%	0.56%	0.48%	0.40%
1.8%	2.0%	1.20%	1.04%	0.88%	0.72%	0.64%	0.56%	0.48%	0.40%	0.32%
2.0%	2.2%	1.04%	0.88%	0.72%	0.64%	0.56%	0.48%	0.40%	0.32%	0.24%
2.2%	2.4%	0.88%	0.72%	0.64%	0.56%	0.48%	0.40%	0.32%	0.24%	0.16%
2.4%	2.6%	0.72%	0.64%	0.56%	0.48%	0.40%	0.32%	0.24%	0.16%	0.12%
2.6%	2.8%	0.64%	0.56%	0.48%	0.40%	0.32%	0.24%	0.16%	0.12%	0.08%
2.8%	3.0%	0.56%	0.48%	0.40%	0.32%	0.24%	0.16%	0.12%	0.08%	0.07%
3.0%	3.2%	0.48%	0.40%	0.32%	0.24%	0.16%	0.12%	0.08%	0.07%	0.06%
3.2%	3.4%	0.40%	0.32%	0.24%	0.16%	0.12%	0.08%	0.07%	0.06%	0.06%
3.4%	3.6%	0.32%	0.24%	0.16%	0.12%	0.08%	0.07%	0.06%	0.06%	0.05%
3.6%	3.8%	0.24%	0.15%	0.12%	0.08%	0.07%	0.06%	0.06%	0.05%	0.04%
3.8%	4.0%	0.16%	0.12%	0.08%	0.07%	0.06%	0.06%	0.05%	0.04%	0.03%
4.0% OVER	&	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%

e. For any calendar year that the training and reemployment contribution in G.S. 96-6.1 applies, each employer whose account as of any computation date occurring after August 1, 1964, shows a debit balance shall be assigned the rate of contributions appearing on the line opposite its debit ratio as set forth in the following Rate Schedule for Overdrawn Accounts:

RATE SCHEDULE FOR OVERDRAWN ACCOUNTS BEGINNING WITH THE CALENDAR YEAR 1978

When the Debit Ratio Is: As Much As	But Less Than	Assigned Rate
0.0%	0.3%	2.3%
0.3	0.6	2.5
0.6	0.9	2.6
0.9	1.2	2.8
1.2	1.5	3.0
1.5	1.8	3.1
1.8	2.1	3.3
2.1	2.4	3.4
2.4	2.7	3.6
2.7	3.0	3.8
3.0	3.3	3.9
3.3	3.6	4.1

When the Debit Ratio Is: As Much As	But Less Than	Assigned Rate
3.6	3.9	4.2
3.9	4.2	4.4
4.2	4.5	4.6
4.5	4.8	4.8
4.8	5.1	5.0
5.1	5.4	5.2
5.4 and over		5.4

For any calendar year that the training and reemployment contribution in G.S. 96-6.1 does not apply, each employer whose account as of any computation date occurring after August 1, 1964, shows a debit balance shall be assigned the rate of contributions appearing on the line opposite its debit ratio as set forth in the following Rate Schedule for Overdrawn Accounts:

RATE SCHEDULE FOR OVERDRAWN ACCOUNTS BEGINNING WITH THE CALENDAR YEAR 1978

When the Debit Ratio Is: As Much As	But Less Than	Assigned Rate
0.0%	0.3%	2.9%
0.3	0.6	3.1
0.6	0.9	3.3
0.9	1.2	3.5
1.2	1.5	3.7
1.5	1.8	3.9
1.8	2.1	4.1
2.1	2.4	4.3
2.4	2.7	4.5
2.7	3.0	4.7
3.0	3.3	4.9
3.3	3.6	5.1
3.6	3.9	5.3
3.9	4.2	5.5
4.2 and over		5.7

The Rate Schedule for Overdrawn Accounts Beginning with the Calendar Year 1966 in force in any particular calendar year shall apply to all accounts for that calendar year subsequent replacement enactments notwithstanding.

f. The computation date for all contribution rates shall be August 1 of the calendar year preceding the calendar year with respect to which such rates are effective.

g. Any employer may at any time make a voluntary contribution, additional to the contributions required under this Chapter, to the fund to be credited to its account, and such voluntary contributions when made shall for all intents and purposes be deemed "contributions required" as this term is used in G.S. 96-8(8). Any voluntary contributions so made by an employer within 30 days after the date of mailing by the Commission pursuant to G.S. 96-9(c)(3) of notification of contribution rate contained in cumulative account statement and computation of rate, shall be credited to its account as of the previous July 31. If, however, the voluntary contribution is made after July 31 of any year it shall not be considered a part of the balance of the unemployment insurance fund for the purposes of G.S. 96-9(b)(3) until the following July 31. The Commission in accepting a voluntary contribution shall not be bound by any condition stipulated in or made a part of the voluntary contribution by the employer.

h. If, within the calendar month in which the computation date occurs, the Commission finds that any employing unit has failed to file any report required in connection therewith or has filed a report which the Commission finds incorrect or insufficient, the Commission shall make an estimate of the information required from such employing unit on the basis of the best evidence reasonably available to it at the time and shall notify the employing unit thereof by registered mail addressed to its last known address. Unless such employing unit shall file the report or a corrected or sufficient report, as the case may be, within 15 days after the mailing of such notice, the Commission shall compute such employing unit's rate of contributions on the basis of such estimates, and the rate as so determined shall be subject to increases but not to reduction, on the basis of subsequently ascertained information.

i. Repealed by Session Laws 1987, c. 17, s. 5.

j. A tax is imposed upon contributions at the rate of twenty percent (20%) of the amount of contributions due. The tax is due and payable at the time and in the same manner as the contributions. The tax does not apply in a calendar year if, as of August 1 of the preceding year, either of the following conditions was met; (i) the amount in the Reserve Fund equals or exceeds one hundred sixty-three million three hundred forty-nine thousand dollars ($163,349,000), which is one percent (1%) of taxable wages for calendar year 1984; or (ii) the balance in the Unemployment Insurance Fund established by G.S. 96-6(a) is five hundred million ($500,000,000) or less. The collection of this tax, the assessment of interest and penalties on unpaid taxes, the filing of judgment liens, and the enforcement of the liens for unpaid taxes is governed by the provisions of G.S. 96-10 where applicable. Taxes collected under this subpart shall be credited to the Employment Security Commission Reserve Fund, and refunds of the taxes shall be paid from the same Fund. The clear proceeds of any civil penalties collected under this subpart shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. Any interest collected on unpaid taxes shall be credited to the Special Employment Security Administration Fund, and any interest refunded on taxes imposed by this subpart shall be paid from the same Fund.

(c)(1) Except as provided in subsection (d) of this section, the Commission shall maintain a separate account for each employer and shall credit his account with all voluntary contributions made by him and all other contributions which he has paid or is paid on his behalf, provided the Commission shall credit the account of each employer in an amount equal to eighty percent (80%) of all voluntary contributions paid with respect to periods prior to January 1, 1984, and of all other contributions paid with respect to periods between July 1, 1965, and December 31, 1983. On the computation date, beginning first with August 1, 1948, the ratio of the credit balance in each individual account to the total of all the credit balances in all employer accounts shall be computed as of such computation date, and an amount equal to the interest credited to this State's account in the unemployment trust fund in the treasury of the United States for the four most recently completed calendar quarters shall be credited prior to the next computation date on a pro rata basis to all employers' accounts having a credit balance on the computation date. Such amount shall be prorated to the individual accounts in the same ratio that the credit balance in each individual account bears to the total of the credit balances in all such accounts. In computing the amount to be credited to the account of an employer as a result of interest earned by funds on deposit in the unemployment trust fund in the treasury of the United States to the account of this State, any voluntary contributions made by an employer after July 31 of any year shall not be considered a part of the account balance of the employer until the next computation date occurring after such voluntary contribution was made. No provision in this section shall in any way be subject to or affected by any provisions of the Executive Budget Act, as amended. Nothing in this Act shall be construed to grant any employer or individual in his service prior claims or rights to the amount paid by him into the fund either on his own behalf or on behalf of such individuals.

(2) Charging of benefit payments. —

a. Benefits paid shall be allocated to the account of each base period employer in the proportion that the base period wages paid to an eligible individual in any calendar quarter by each such employer bears to the total wages paid by all base period employers during the base period, except as hereinafter provided in paragraphs b, c, and d of this subdivision, G.S. 96-9(d)(2)c, and 96-12.01G. The amount so allocated shall be multiplied by one hundred twenty percent (120%) and charged to that employer's account. Benefits paid shall be charged to employers' accounts upon the basis of benefits paid to claimants whose benefit years have expired.

b. Any benefits paid to any claimant under a claim filed for a period occurring after the date of such separations as are set forth in this paragraph and based on wages paid prior to the date of (i) the leaving of work by the claimant without good cause attributable to the employer; (ii) the discharge of claimant for misconduct in connection with his work; (iii) the discharge of the claimant for substantial fault as that term may be defined in G.S. 96-14; (iv) the discharge of the claimant solely for a bona fide inability to do the work for which he was hired but only where the claimant's period of employment was 100 days or less; (v) separations made disqualifying under G.S. 96-14(2b) and (6a); (vi) separation due to leaving for disability or health condition; or (vii) separation of claimant solely as the result of an undue family hardship shall not be charged to the account of an employer by whom the claimant was employed at the time of such separation; provided, however, said employer promptly furnishes the Commission with such notices regarding any separation of the individual from work as are or may be required by the regulations of the Commission.

No benefit charges shall be made to the account of any employer who has furnished work to an individual who, because of the loss of employment with one or more other employers, becomes eligible for partial benefits while still being furnished work by such employer on substantially the same basis and substantially the same amount as had been made available to such individual during his base period whether the employments were simultaneous or successive; provided, that such employer makes a written request for noncharging of benefits in accordance with Commission regulations and procedures.

No benefit charges shall be made to the account of any employer for benefit years ending on or before June 30, 1992, where benefits were paid as a result of a discharge due directly to the reemployment of a veteran mandated by the Veteran's Reemployment Rights Law, 38 USCA § 2021, et seq.

No benefit charges shall be made to the account of any employer where benefits are paid as a result of a decision by an Adjudicator, Appeals Referee or the Commission if such decision to pay benefits is ultimately reversed; nor shall any such benefits paid be deemed to constitute an overpayment under G.S. 96-18(g)(2), the provisions thereof notwithstanding. Provided, an overpayment of benefits paid shall be established in order to provide for the waiting period required by G.S. 96-13(c).

c. Any benefits paid to any claimant who is attending a vocational school or training program as provided in G.S. 96-13(a)(3) shall not be charged to the account of the base period employer(s).

d. Any benefits paid to any claimant under the following conditions shall not be charged to the account of the base period employer(s):
  1. The benefits are paid for unemployment due directly to a major natural disaster, and
  2. The President has declared the disaster pursuant to the Disaster Relief Act of 1970, 42 USCA 4401, et seq., and
  3. The benefits are paid to claimants who would have been eligible for disaster unemployment assistance under this Act, if they had not received unemployment insurance benefits with respect to that unemployment.

e.1. Any benefits paid to any claimant which are based on previously uncovered employment which are reimbursable by the federal government shall not be charged to the experience rating account of any employer.
  2. For purposes of this paragraph previously uncovered employment for which benefits are reimbursable by the federal government means services performed before July 1, 1978, in the case of a week of unemployment beginning before July 1, 1978, or before January 1, 1978, in the case of a week of unemployment beginning after July 1, 1978, and to the extent that assistance under Title II of the Emergency Jobs and Unemployment Assistance Act of 1974 (SUA) was not paid to such individuals on the basis of such service.

(3) As of July 31 of each year, and prior to January 1 of the succeeding year, the Commission shall determine the balance of each employer's account and shall furnish him with a statement of all charges and credits thereto. At the same time the Commission shall notify each employer of his rate of contributions as determined for the succeeding calendar year pursuant to this section. Such determination shall become final unless the employer files an application for review or redetermination prior to May 1 following the effective date of such rates. The Commission may redetermine on its own motion within the same period of time.

(4) Transfer of account. —

a. 1. Mandatory. — When an employer, as defined in G.S. 96-8(5)b., in any manner acquires all of the organization, trade, or business of another employing unit, the account of the predecessor shall be transferred as of the date of the acquisition to the successor employer for use in the determination of the successor's rate of contributions. This mandatory transfer does not apply when there is no common ownership between the predecessor and the successor and the successor acquired the assets of the predecessor in a sale in bankruptcy. In this circumstance, the successor's rate of contributions is determined without regard to the predecessor's rate of contributions.

2. Consent. — When an employer, as defined in G.S. 96-8(5)b., in any manner acquires a distinct and severable portion of the organization, trade, or business of another employing unit, the part of the account of the predecessor that relates to the acquired portion of the business shall, upon the mutual consent of the parties concerned and approval of the Commission in conformity with the regulations as prescribed therefor, be transferred as of the date of acquisition to the successor employer for use in the determination of the successor's rate of contributions, provided application for transfer is made within 60 days after the Commission notifies the successor of the right to request such transfer, otherwise the effective date of the transfer shall be the first day of the calendar quarter in which such application is filed, and that after the transfer the successor employing unit continues to operate the transferred portion of such organization, trade or business. On or after January 1, 2006, whenever part of an organization, trade, or business is transferred between entities subject to substantially common ownership, management, or control, the tax account shall be transferred in accordance with regulations. However, employing units transferring entities with any common ownership, management, or control are not entitled to separate and distinct employer status under this Chapter. Provided, however, that the transfer of an account for the purpose of computation of rates shall be deemed to have been made prior to the computation date falling within the calendar year within which the effective date of such transfer occurs and the account shall thereafter be used in the computation of the rate of the successor employer for succeeding years, subject, however, to the provisions of paragraph b of this subdivision. No request for a transfer of the account will be accepted and no transfer of the account will be made if the request for the transfer of the account is not received within two years of the date of acquisition or notification by the Commission of the right to request such transfer, whichever occurs later. However, in no event will a request for a transfer be allowed if an account has been terminated because an employer ceases to be an employer pursuant to G.S. 96-9(c)(5) and G.S. 96-11(d) regardless of the date of notification.

a1. A new employing unit shall not be assigned a discrete employer number when there is an acquisition or change in the form or organization of an existing business enterprise, or severable portion thereof, and there is a continuity of control of the business enterprise. That new employing unit shall continue to be the same employer for the purposes of this Chapter as before the acquisition or change in form. As used in this sub-subdivision:

1. "Control of the business enterprise" may occur by means of ownership of the organization conducting the business enterprise, ownership of assets necessary to conduct the business enterprise, security arrangements or lease arrangements covering assets necessary to conduct the business enterprise, or a contract when the ownership, stated arrangements, or contract provide for or allow direction of the internal affairs or conduct of the business enterprise.
2. A "continuity of control" will exist if one or more persons, entities, or other organizations controlling the business enterprise remain in control of the business enterprise after an acquisition or change in form. Evidence of continuity of control shall include, but not be limited to, changes of an individual proprietorship to a corporation, partnership, limited liability company, association, or estate; a partnership to an individual proprietorship, corporation, limited liability company, association, estate, or the addition, deletion, or change of partners; a limited liability company to an individual proprietorship, partnership, corporation, association, estate, or to another limited liability company; a corporation to an individual proprietorship partnership, limited liability company, association, estate, or to another corporation or from any form to another form.

This sub-subdivision shall not modify the provisions of G.S. 96-10(d) — Collections of Contributions Upon Transfer or Cessation of Business.

b. Notwithstanding any other provisions of this section, if the successor employer was an employer subject to this Chapter prior to the date of acquisition of the business, the successor's rate of contribution for the period from that date to the end of the then current contribution year shall be the same as the successor's rate in effect on the date of the acquisition. If the successor was not an employer prior to the date of the acquisition of the business, the successor shall be assigned a standard beginning rate of contribution set forth in G.S. 96-9(b)(1) for the remainder of the year in which the successor acquired the business of the predecessor; however, if the successor makes application for the transfer of the account within 60 days after notification by the Commission of the right to do so and the account is transferred, or meets the requirements for mandatory transfer, the successor shall be assigned for the remainder of the year the rate applicable to the predecessor employer or employers on the date of acquisition of the business, as long as there was only one predecessor or, if more than one, the predecessors had identical rates. In the event the rates of the predecessor were not identical, the rate of the successor shall be the highest rate applicable to any of the predecessor employers on the date of acquisition of the business.

Irrespective of any other provisions of this Chapter, when an account is transferred in its entirety by an employer to a successor, the transferring employer shall thereafter pay the standard beginning rate of contributions set forth in G.S. 96-9(b)(1) and shall continue to pay at that rate until the transferring employer qualifies for a reduction, reacquires the account transferred or acquires the experience rating account of another employer, or is subject to an increase in rate under the conditions prescribed in G.S. 96-9(b)(2) and (3).

c. In those cases where the organization, trade, or business of a deceased person, or insolvent debtor is taken over and operated by an administrator, administratrix, executor, executrix, receiver, or trustee in bankruptcy, such employing units shall automatically succeed to the account and rate of contribution of such deceased person, or insolvent debtor without the necessity of the filing of a formal application for the transfer of such account.

(5) In the event any employer subject to this Chapter ceases to be such an employer, his account shall be closed and the same shall not be used in any future computation of such employer's rate nor shall any period prior to the effective date of the termination of such employer during which benefits were chargeable be considered in the application of G.S. 96-9(b)(2) of this Chapter.

(6) If the Commission finds that an employer's business is closed solely because of the entrance of one or more of the owners, officers, partners, or the majority stockholder into the Armed Forces of the United States, or of any of its allies, or of the United Nations, such employer's experience rating account shall not be terminated; and, if the business is resumed within two years after the discharge or release from active duty in the Armed Forces of such person or persons, the employer's account shall be deemed to have been chargeable with benefits throughout more than 13 consecutive calendar months ending July 31 immediately preceding the computation date. This subdivision shall apply only to employers who are liable for contributions under the experience rating system of financing unemployment benefits. This subdivision shall not be construed to apply to employers who are liable for payments in lieu of contributions or to employers using the reimbursable method of financing benefit payments.

(d) Benefits paid to employees of nonprofit organizations shall be financed in accordance with the provisions of this paragraph. For the purposes of this paragraph, a nonprofit organization is an organization (or group of organizations) described in section 501(c)(3) of the Internal Revenue Code that is exempt from income tax under section 501(a) of the Internal Revenue Code.

(1)a. Any nonprofit organization which becomes subject to this Chapter on or after January 1, 1972, shall pay contributions under the provisions of this Chapter, unless it elects in accordance with this paragraph to pay the Commission for the Unemployment Insurance Fund an amount equal to the amount of regular benefits and of one half of the extended benefits paid, that is attributable to service in the employ of such nonprofit organization, to individuals for weeks of unemployment which begin within a benefit year established during the effective period of such election.

b. Any nonprofit organization which is or becomes subject to this Chapter on or after January 1, 1972, may elect to become liable for payments in lieu of contributions for a period of not less than four calendar years beginning with the date on which subjectivity begins by filing a written notice of its election with the Commission not later than 30 days immediately following the date of written notification of the determination of such subjectivity. Provided if notification is not by registered mail, the election may be made on or after January 1, 1972, within six months following the date of the written notification of the determination of such subjectivity. If such election is not made as set forth herein, no election can be made until after four calendar years have elapsed under the contributions method of payment.

c. Any nonprofit organization which makes an election in accordance with subparagraph b of this paragraph will continue after such four calendar years to be liable for payments in lieu of contributions until it files with the Commission a written notice terminating its election not later than 30 days prior to the next January 1, effective on such January 1. Provided, however, no employer granted or in reimbursement status will be allowed refund of any previous balances used in a transfer to reimbursement status.

d. Any nonprofit organization which has been paying contributions under this Chapter for a period of at least four consecutive calendar years subsequent to January 1, 1972, may elect to change to a reimbursement basis by filing with the Commission not later than 30 days prior to the next January 1 a written notice of election to become liable for payments in lieu of contributions, effective on such January 1. Such election shall not be terminable for a period of four calendar years. In the event of such an election, the account of such employer shall be closed and shall not be used in any future computation of such employer's contribution rate in any manner whatsoever. Provided, however, any nonprofit employer formerly paying contributions who elects and qualifies to change to a reimbursement basis may be relieved of the requirement to pay one percent (1%) of taxable wages as required by G.S. 96-9(d)(2)a to the following extent and upon the following conditions:

1. Any nonprofit employer which has, for the year the election will be effective, an experience rating of 1.7 or less, will have transferred from its experience rating account an amount equal to one percent (1%) of its payroll as reported for each of the four calendar quarters which constitute the election year;
2. Any nonprofit employer which has, for the year the election will be effective, an experience rating of less than 2.7 but more than 1.7, will have transferred from its experience rating account an amount equal to one-half of one percent (.5%) of its payroll as reported for each of the four calendar quarters which constitute the election year. Such employers shall make advance payments to the Commission quarterly, computed at one-half of one percent (.5%) of the taxable wages reported as provided in G.S. 96-9(d)(2)a;
3. Any nonprofit employer which has, for the year the election will become effective, an experience rating of 2.7 or more, upon electing to change to a reimbursement basis, will meet all the requirements of G.S. 96-9(d)(2)a, including making advance payments computed at one percent (1%) of taxable wages.

e. The Commission, in accordance with such regulations as it may adopt, shall notify each nonprofit organization of any determination which it may make of its status as an employer and of the effective date of any election which it makes and of any termination of such election. Such determinations shall be subject to reconsideration, appeal and review.

(2) Payments in lieu of contributions shall be made in accordance with the provisions of this subparagraph and shall be processed as provided herein.

a. Quarterly contributions and wage reports and advance payments shall be submitted to the Commission quarterly under the same conditions and requirements of G.S. 96-9 and 96-10, except that the amount of advance payments shall be computed as one percent (1%) of taxable wages and entered on such reports; provided that such advance payments shall become effective only with respect to the first four thousand two hundred dollars ($4,200) in wages paid in a calendar year until January 1, 1978. On and after that date advance payments shall be effective with respect to the federally required wage base provided that after December 31, 1983, the wage base shall be the same as that provided for in G.S. 96-9(a)(5). Collection of such advance payments shall be made as provided for the collection of contributions in G.S. 96-10.

Beginning January 1, 1978, any employer making quarterly reports of employment to the Commission and if such employer is a newly electing reimbursement employer he shall pay contributions of one percent (1%) of taxable wages entered on such reports.

Any employer paying by reimbursement having been, prior to July 1, under the reimbursement method of payment for the preceding calendar year, shall continue to file quarterly reports but shall make no payments with those reports.

b. The Commission shall establish a separate account for each such employer and such account shall be credited, and maintained as provided in G.S. 96-9(c)(1), except that advance payments shall be credited in full and voluntary contributions are not applicable.

c. Benefits paid shall be allocated to the employer's account in accordance with G.S. 96-9(c)(2)a but charged to such account without the application of any multiplier, and no benefits shall be noncharged except amounts equal to fifty percent (50%) of extended benefits paid and amounts equal to one hundred percent (100%) of benefits paid through error.

d. As of July 31 of each year, and prior to January 1 of the succeeding year, the Commission shall determine the balance of each such employer's account and shall furnish him with a statement of all charges and credits thereto.

As of the second computation date (August 1) following the effective date of liability and as of each computation date thereafter, any credit balance remaining in the employer's account (after all applicable postings) in excess of whichever is the greater (a) benefits charged to such account during the 12 months ending on such computation date, or (b) one percent (1%) of taxable wages for the 12 months ending on June 30 preceding such computation date shall be refunded. Any such refund shall be made prior to February 1 following such computation date.

Should the balance in such account not equal that requiring a refund, the employer shall upon notice and demand for payment mailed to his last known address pay into his account an amount that will bring such balance to the minimum required for a refund. Such amount shall become due on or before the tenth day following the mailing of such notice and demand for payment. Any such amount unpaid on the due date shall be collected in the same manner, including interest, as prescribed in G.S. 96-10.

Upon a change in election as to the method of payment from reimbursement to contributions, or upon termination of coverage and after all applicable benefits paid based on wages paid prior to such change in election or termination of coverage have been charged, any credit balance in such account shall be refunded to the employer.

Should there be a debit balance in such account, the employer shall, upon notice and demand for payment, mailed to his last-known address, pay into his account an amount equal to such debit balance. Such amount shall become due on or before the tenth day following the mailing of such notice and demand for payment.

Any such amount unpaid on the date due shall be collected in the same manner, including interest, as prescribed in G.S. 96-10.

Beginning January 1, 1978, each employer paying by reimbursement shall have his account computed on computation date (August 1) and if there is a deficit shall be billed for an amount necessary to bring his account to one percent (1%) of his taxable payroll. Any amount of his account in excess of that required to equal one percent (1%) of his payroll shall be refunded. Amounts due from any employer to bring his account to a one percent (1%) balance shall be billed as soon as practical and payment will be due within 25 days from the date of mailing of the statement of amount due. Amounts due from any nonprofit organization to bring its account to a one percent (1%) balance shall be billed as soon as practical, and payment will be due within 60 days from the date of mailing of the statement of the amount due.

e. The Commission may make necessary rules and regulations with respect to coverage of a group of nonprofit organizations and with respect to the reimbursement of benefits payments by such group of nonprofit organizations.

(3)a. Any benefits paid to any claimant which are based on previously uncovered employment which are reimbursable by the federal government shall not be charged to a nonprofit organization which makes payments to the State Unemployment Insurance Fund in lieu of contributions.

b. For purposes of this paragraph previously uncovered employment for which benefits are reimbursable by the federal government means services performed before July 1, 1978, in the case of a week of unemployment beginning before July 1, 1978, or before January 1, 1978, in the case of a week of unemployment beginning after July 1, 1978, and to the extent that assistance under Title II of the Emergency Jobs and Unemployment Assistance Act of 1974 (SUA) was not paid to such individuals on the basis of such service.

(e) In order that the Commission shall be kept informed at all times on the circumstances and conditions of unemployment within the State and as to whether the stability of the fund is being impaired under the operation and effect of the system provided in subsection (c) of this section, the actuarial study now in progress shall be continued and such other investigations and studies of a similar nature as the Commission may deem necessary shall be made.

(f)(1) On and after January 1, 1978, all benefits charged to a State or local governmental employing unit shall be paid to the Commission within 25 days from the date a list of benefit charges is mailed to the State or local governmental employing agency and the appropriate account(s) shall be credited with such payment(s).

(2) In lieu of paying for benefits by reimbursement as provided in subdivision (1) hereof, any State or local governmental employing unit

may elect pursuant to rules and regulations established by the Commission:

a. To pay contributions on an experience rating basis as provided in G.S. 96-9(a), (b), and (c); or,

b. To pay to the Commission, within 25 days from the date a list of benefit charges is mailed to such employing unit, a sum equal to the amount which its account would be charged if it were a tax paying employer under G.S. 96-9(c)(2).

(3) State or local governmental employing units paying for benefits as provided in subdivision (1) herein may establish pool accounts; provided, that such pool accounts are established and maintained according to the rules and regulations of the Commission.

(4) Any governmental entity paying by reimbursement as provided in subdivision (1) hereof shall not have any benefits paid against its account noncharged or forgiven except as provided in G.S. 96-9(d)(2)c.

(g) Nothing contained in subsections (d), (f), and (i) of this section prevents the Commission from providing any reimbursing employer with informational bills or lists of charges on a basis more frequent than yearly, if in its sole discretion, the Commission considers such action to be in the best interest of the Commission and the affected employer(s).

(h)(1) Any nonprofit organization which has been paying contributions on a reimbursement basis for at least three consecutive calendar years during none of which years the benefit charges exceeded four tenths of one percent (.4%) of its taxable payroll may, before November 1 of the fourth or subsequent calendar year, elect to pay contributions by special reimbursement on the basis provided for in subdivision (2) below but only upon the following conditions:

a. Benefit charges in the year of election are less than four tenths of one percent (.4%) of taxable payroll.

b. The election shall apply to no less than the four calendar years following the year of election unless terminated by the Commission under subdivision (3) below.

c. All reimbursements during the year of election and the three preceding years were paid when due.

d. The election of special reimbursement shall not entitle the electing nonprofit organization to any refund of any portion of its account balance.

e. No later than January 1 of the first year to which its election applies, the electing nonprofit organization shall furnish the Commission a letter of credit in an amount equal to one hundred fifty percent (150%) of the account balance required under subdivision (2) below.

f. The Commission shall by regulation prescribe the form of the letter of credit and the criteria for the financial institution issuing such letter of credit along with the form of election under this section.

(2) Any qualified nonprofit organization that meets the conditions of subdivision (1) above shall, upon the approval of its election by the Commission, pay contributions by special reimbursement as follows:

a. The organization's account shall have a required minimum balance that shall be computed on August 1 of each calendar year for the following calendar year and shall be equal to the greater of:

1. One-half the largest amount of claims charged to it during any of the three calendar years preceding the computation date; or,

2. One-tenth of one percent (0.1%) of the highest total taxable payroll during any of the three calendar years preceding the computation date.

b. On the first day of each quarter of any calendar year, the Commission shall bill the employer for an amount necessary to bring its account to the required minimum balance, and the amount so billed is due no later than 25 days after the bill is mailed.

(3) If any electing organization shall fail to make any quarterly payment when due:

a. The Commission may draw the full amount of the letter of credit for application to the employer's account;

b. The organization's required minimum balance shall immediately and without notice become the greater of:

1. A sum equal to its current minimum balance plus the full amount of the current letter of credit; or

2. A sum equal to five tenths of one percent (.5%) of its total taxable payroll. Any amount necessary, after the application of any funds drawn from the letter of credit, to bring the employer's account to such balance shall be payable upon demand.

c. If, after demand, the organization shall fail to pay any sums required under paragraph b. above, the Commission may revoke the organization's election for special reimbursement and any difference between the employer's account balance and one percent (1%) of its total taxable payroll shall become immediately due and payable.

d. The Commission may, in addition, exercise any of the powers granted to it in G.S. 96-10 to collect any amount due.

e. Pursuant to such regulations as the Commission may adopt, the Commission shall afford any organization affected by this paragraph a hearing to determine if any increase in the organization's minimum required balance should be reduced, in whole or in part, or if any revocation of a special reimbursement election should be rescinded. If the Commission, in its sole discretion, is satisfied that the conditions giving rise to the increase or revocation have been corrected, it may reduce such increase or rescind such revocation provided that it may require as a condition of such reduction or recision a new letter of credit up to three times the amount normally required.

f. When used in the subsection, "total taxable payroll" means the highest total taxable payroll during the three most recent, completed calendar years.

(i) Indian Tribes. — Benefits paid to employees of Indian tribe employing units shall be financed in accordance with the provisions of this subsection. For the purposes of this subsection, an "Indian tribe employing unit" is an Indian tribe, a subdivision or subsidiary of an Indian tribe, or a business enterprise wholly owned by an Indian tribe.

(1) Election. —

a. An Indian tribe employing unit shall pay contributions under the provisions of this Chapter, unless it elects in accordance with this subsection to pay the Commission for the Unemployment Insurance Fund an amount equal to the amount of benefits paid that is attributable to service in the employ of the unit, to individuals for weeks of unemployment that begin within a benefit year established during the effective period of the election.

b. An Indian tribe employing unit may elect to become liable for payments in lieu of contributions for a period of not less than three calendar years by filing a written notice of its election with the Commission at least 30 days before the January 1 effective date of the election.

c. An Indian tribe employing unit that makes an election in accordance with this subsection will continue after the end of the three calendar years to be liable for payments in lieu of contributions until it files with the Commission a written notice terminating its election at least 30 days before the January 1 effective date of the termination.

d. The account of an Indian tribe employing unit that has been paying contributions under this Chapter for a period of at least three consecutive calendar years and that elects to change to a reimbursement basis shall be closed and shall not be used in any future computation of the unit's contribution rate in any manner except that the unit may be relieved of the requirement to pay one percent (1%) of taxable wages as required by subdivision (2) of this subsection to the following extent and upon the following conditions:

1. An Indian tribe employing unit that has, for the year the election will be effective, an experience rating of 1.7 or less will have transferred from its experience rating account an amount equal to one percent (1%) of its payroll as reported for each of the four calendar quarters that constitute the election year.

2. An Indian tribe employing unit that has, for the year the election will be effective, an experience rating of less than 2.7 but more than 1.7 will have transferred from its experience rating account an amount equal to one-half of one percent (.5%) of its payroll as reported for each of the four calendar quarters that constitute the election year. These employing units shall make advance payments to the Commission quarterly, computed at one-half of one percent (.5%) of the taxable wages reported as provided in subdivision (2) of this subsection.

3. An Indian tribe employing unit that has, for the year the election will become effective, an experience rating of 2.7 or more, upon electing to change to a reimbursement basis, will meet all the requirements of subdivision (2) of this subsection, including making advance payments computed at one percent (1%) of taxable wages.

e. The Commission, in accordance with regulations it adopts, shall notify each Indian tribe employing unit of any determination of the effective date of any election it makes and of any termination of the election. These determinations shall be subject to reconsideration, appeal, and review.

(2) Procedure. — Indian tribe employing units' payments by reimbursement in lieu of contributions shall be made and processed as provided in this subdivision.

a. Quarterly contributions and wage reports and advance payments shall be submitted to the Commission quarterly under the same conditions and requirements of G.S. 96-9 and G.S. 96-10, except that the amount of advance payments shall be computed as one percent (1%) of taxable wages and entered on the reports, and except that the wage base shall be the same as that provided for in G.S. 96-9(a)(5). Collection of these advance payments shall be made as provided for the collection of contributions in G.S. 96-10.

Any Indian tribe employing unit paying by reimbursement having been, prior to July 1, under the reimbursement method of payment for the preceding calendar year, shall continue to file quarterly reports but shall make no payments with those reports.

b. The Commission shall establish a separate account for each Indian tribe employing unit paying by reimbursement. The account shall be credited and maintained as provided in G.S. 96-9(c)(1), except that advance payments shall be credited in full, and voluntary contributions are not applicable.

c. Benefits paid shall be allocated to the employer's account in accordance with G.S. 96-9(c)(2)a. but charged to the account without the application of any multiplier, and no benefits shall be noncharged except amounts of benefits paid through error.

d. As of July 31 of each year, and prior to January 1 of the succeeding year, the Commission shall determine the balance of each Indian tribe employing unit's account and shall furnish the unit with a statement of all charges and credits to the account.

As of August 1 of each year, there shall be refunded any credit balance remaining in the Indian tribe employing unit's account (after all applicable postings) in excess of one percent (1%) of taxable wages for the 12 months ending on June 30 preceding the computation date. The refund must be made before February 1 following the computation date.

If the balance in the account does not equal one percent (1%) of taxable wages, the Indian tribe employing unit must, upon notice and demand for payment mailed to its last known address, pay into the account an amount that will bring the balance to one percent (1%) of taxable wages. This amount becomes due on or before the 25th day after the notice and demand for payment is mailed. Any amount unpaid on the due date shall be collected in the same manner, including interest, as prescribed in G.S. 96-10.

Upon a change in election as to the method of payment from reimbursement to contributions, or upon termination of coverage and after all applicable benefits paid based on wages paid before the change in election or termination of coverage have been charged, any credit balance in the account shall be refunded to the Indian tribe employing unit.

If there is a debit balance in the account, the Indian tribe employing unit must, upon notice and demand for payment mailed to its last known address, pay into the account an amount necessary to bring the account to one percent (1%) of taxable wages. This amount becomes due on or before the 25th day after the notice and demand for payment is mailed. Any amount unpaid on the due date shall be collected in the same manner, including interest, as prescribed in G.S. 96-10.

e. Notices to Indian tribe employing units of payment and reporting delinquency must include information that failure to make full payment within the time prescribed will cause the unit to become liable for contributions under subsection (a) of this section, will cause the unit to lose the option of making payment by reimbursement in lieu of contributions, and could cause the unit to lose coverage under this Chapter for services performed for the unit.

(3) Forfeiture of option. — If an Indian tribe employing unit fails to make payments, including interest and penalties, required under this subsection within 90 days after receipt of the bill, the unit loses the option to make payments by reimbursement in lieu of contributions for the following calendar year unless payment in full is made before contribution rates for the following calendar year are computed. An Indian tribe that has lost the option to make payments by reimburse-

ment in lieu of contributions for a calendar year regains that option for the following calendar year if it makes all contributions timely during the year for which the option was lost, and no payments, penalties, or interest remain outstanding.

(4) Forfeiture of coverage. — If an Indian tribe employing unit fails to make payments, including interest and penalties, required under this subsection after all collection activities considered necessary by the Commission have been exhausted, services performed for that employing unit are no longer treated as "employment" for the purpose of coverage under this Chapter. An Indian tribe employing unit that has lost coverage regains coverage under this Chapter for services performed for the employing unit if the Commission determines that all contributions, payments in lieu of contributions, penalties, and interest have been paid.

The Commission shall notify the Internal Revenue Service and the United States Department of Labor of any termination or reinstatement of coverage pursuant to this subdivision.

(5) Extended benefits. — Extended benefits paid that are attributable to service in the employ of an Indian tribe employing unit and not reimbursed by the federal government shall be financed in their entirety by the Indian tribe employing unit. (Sess. 1936, c. 1, s. 7; 1939, c. 27, s. 6; 1941, c. 108, ss. 6, 8; c. 320; 1943, c. 377, ss. 11-14; 1945, c. 522, ss. 11-16; 1947, c. 326, ss. 13-15, 17; c. 881, s. 3; 1949, c. 424, ss. 9-13; c. 969; 1951, c. 322, s. 2; c. 332, ss. 4-7; 1953, c. 401, ss. 12-14; 1955, c. 385, ss. 5, 6; 1957, c. 1059, ss. 5-11; 1959, c. 362, ss. 7, 8; 1965, c. 795, ss. 6-10; 1969, c. 575, ss. 7, 8; 1971, c. 673, ss. 14-20; 1973, c. 172, ss. 2, 3; c. 740, s. 1; 1977, c. 727, ss. 37-49; 1979, c. 660, ss. 13-15; 1981, c. 160, ss. 13-15; c. 534; 1983, c. 585, ss. 1-11; 1985, c. 552, ss. 5-7, 13; 1987, c. 17, ss. 3-7; c. 197; 1987 (Reg. Sess., 1988), c. 999, ss. 2, 3; 1989, c. 583, ss. 4, 6; c. 770, s. 20; 1991, c. 276, s. 1; c. 421, s. 1; c. 458, ss. 2, 3; 1991, Ex. Sess., c. 6, s. 2; 1993, c. 85, s. 1; c. 424, s. 1; 1994, Ex. Sess., c. 10, ss. 1-3; 1995, c. 4, ss. 1-3; c. 463, ss. 1-3; 1996, 1st Ex. Sess., c. 1; 1997-398, s. 4; 1999-196, s. 3; 1999-321, ss. 1, 3-6; 1999-340, ss. 1-3; 1999-421, s. 1; 2000-140, s. 87; 2001-184, ss. 4, 5, 6; 2001-207, s. 1; 2001-251, ss. 2, 5; 2001-414, s. 40; 2001-424, ss. 30.5(f), 30.5(g), 30.5(h), 30.5(i), 30.5(j); 2001-513, s. 7; 2003-67, s. 1; 2003-220, ss. 2, 4; 2003-405, s. 1; 2004-124, s. 13.7B(a); 2004-170, s. 3(a); 2005-276, s. 6.37(j); 2005-410, ss. 2, 3, 5; 2006-251, s. 1.)

Cross References. — For provisions authorizing the State Treasurer to establish a pool account in cooperation with any one or more units of local government for the purpose of reimbursing the Employment Security Commission for unemployment benefits paid by the Commission and chargeable to each local unit of government participating in the pool account, see G.S. 147-86.1.

Editor's Note. — Session Laws 1977, c. 727, which amended this section, provides in s. 58: "If U.S. Public Law 94-566 or the federal acts it amends should be adjudged unconstitutional or invalid in its or their application or stayed pendente lite as to State or local employees by a court of competent jurisdiction, then the coverage of those employees under this act is automatically stayed or repealed to the extent of the adjudged inapplicability. The repeal shall be effective from the date of final disposition upon appeal or from the date of expiration of the right of appeal and shall apply to relevant matters pending at that time. If Public Law 94-566 or those provisions thereof relating to coverage of State and local employees should at any time be repealed by the U.S. Congress, then the provisions of this act relating to coverage of State and local employees shall be automatically repealed."

House Bill 1241 of the 2003 General Assembly, enrolled as Session Laws 2003-405, lacked the enacting clause required by Art. II, sec. 21 of the North Carolina Constitution. Pursuant to State v. Patterson, 98 N.C. 660, 4 S.E. 350 (1887) and In re Advisory Opinion, 227 N.C. 708, 43 S.E.2d 73 (1947), the amendment that would have been made by House Bill 1241 was not implemented at the direction of the Revisor of Statutes. Session Laws 2004-170, s. 3(a) reenacted Session Laws 2003-405, effective August 12, 2003, and repealed for taxes imposed in the 2005 and subsequent calendar years, during which time, subdivision (b)(3)j. of this section would have read as follows:

"A tax is imposed upon contributions at the rate of twenty percent (20%) of the amount of contributions due. The tax is due and payable at the time and in the same manner as the contributions. The tax does not apply in a calendar year if, as of August 1 of the preceding year, either of the following conditions was met: (i) the amount in the Reserve Fund equals or exceeds one hundred sixty-three million three hundred forty-nine thousand dollars ($163,349,000), which is one percent (1%) of taxable wages for calendar year 1984, or (ii) the balance in the Unemployment Insurance Fund established by G.S. 96-6(a) is five hundred million dollars ($500,000,000) or less. The collection of this tax, the assessment of interest and penalties on unpaid taxes, the filing of judgment liens, and the enforcement of the liens for unpaid taxes is governed by the provisions of G.S. 96-10 where applicable. Taxes collected under this subpart shall be credited to the Employment Security Commission Reserve Fund, and refunds of the taxes shall be paid from the same Fund. Any interest or penalties collected on unpaid taxes shall be credited to the Special Employment Security Administration Fund, and any interest or penalties refunded on taxes imposed by this subpart shall be paid from the same Fund."

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 6.37(w), provides: "The Office of State Budget and Management shall develop a methodology for computing the actual costs of collection of civil penalties by State departments and agencies. This methodology shall apply to all State departments and agencies, effective July 1, 2006."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Effect of Amendments. — Session Laws 2006-251, s. 1, effective August 16, 2006, and applicable to acquisitions made on or after August 1, 2003, rewrote subdivision (c)(4)a.

Legal Periodicals. — For survey of 1977 law on employment regulation, see 56 N.C.L. Rev. 854 (1978).

For note on unemployment compensation and labor dispute disqualification, see 16 Wake Forest L. Rev. 472 (1980).

CASE NOTES

Editor's Note. — *Many of the cases cited below were decided prior to later amendatory provisions.*

Application of this section to church-related schools does not violate the free exercise and establishment clauses of U.S. Const., Amend. I. Ascension Lutheran Church v. Employment Sec. Comm'n, 501 F. Supp. 843 (W.D.N.C. 1980).

Effect of Reinstatement of Liability After Prior Exemption. — Where an employer, otherwise subject to the provisions of this Chapter, is exempted from those provisions by legislative action and by legislative action that exemption is subsequently terminated, and additionally, where there have been no changes in the circumstances or activities of the employer, upon reinstatement of liability under this Chapter that employer is entitled to credit for its prior account balance, and that employer's contribution rate should be determined primarily by reference to its former experience rating at the time of its exemption. The burden will be upon the Commission to show what, if any, changes in circumstances have come about which would justify an upward revision of that employer's rate of contribution. State ex rel. Emp. Sec. Comm'n v. Blue Ridge Broadcasting Corp., 42 N.C. App. 702, 257 S.E.2d 640, cert. denied, 298 N.C. 805, 262 S.E.2d 4 (1979).

Contributions Constitute a Tax. — Contributions imposed on employers within the purview of this Chapter are compulsory and therefore constitute a tax, and they are not rendered any less a tax by reason of the provision that they should be segregated in a special fund for distribution in furtherance of the purpose of the Chapter. Prudential Ins. Co. of Am. v. Powell, 217 N.C. 495, 8 S.E.2d 619 (1940).

A State bank which is a member of the federal reserve system is not exempt from taxation under this Chapter because of its connection with the Federal Deposit Insurance Corporation nor may it claim such exemption because the tax would discriminate against it in favor of national member banks, since to relieve it from such taxation would discriminate in favor of it against nonmember State banks. Unemployment Comp. Comm'n v. Wachovia Bank & Trust Co., 215 N.C. 491, 2 S.E.2d 592 (1939).

Declaratory Judgment as to Inclusion of Certain Salaries Cannot Be Obtained. — An action to determine whether salaries paid certain employees should be included in computing the contributions to be paid by an employer under the Unemployment Compensation Act involves solely an issue of fact and does not involve any right, status or legal relation, and the employer may not maintain proceedings under the Declaratory Judgment Act, G.S. 1-253 et seq., to determine the question. Prudential Ins. Co. of Am. v. Powell, 217 N.C. 495, 8 S.E.2d 619 (1940).

Prior to the 1949 amendment, subdivision (c)(4) of this section, by its own limitation, restricted the transfer of reserve accounts to those cases where the account was to be transferred in toto; and even then, such reserve account could be transferred only to such employing unit defined in G.S. 96-8(5)b, as might acquire the organization, trade, or business of another for whom a reserve account had been theretofore established and maintained. State ex rel. Emp. Sec. Comm'n v. News Publishing Co., 228 N.C. 332, 45 S.E.2d 391 (1947).

Transfer of Reserve Credited to Particular Employer Through Misapprehension. — Subdivision (c)(4) authorizes the Commission to transfer a reserve fund only upon the mutual consent of the parties. However, the law does not apply where such reserve was credited to a particular person, firm or corporation under a misapprehension of the facts or the status of the person, firm or corporation making the contribution. State ex rel. Unemployment Comp. Comm'n v. Nissen, 227 N.C. 216, 41 S.E.2d 734 (1947).

Applied in Unemployment Comp. Comm'n v. Jefferson Std. Life Ins. Co., 215 N.C. 479, 2 S.E.2d 584 (1939); State ex rel. Emp. Sec. Comm'n v. Skyland Crafts, Inc., 240 N.C. 727, 83 S.E.2d 893 (1954).

Cited in State ex rel. Emp. Sec. Comm'n v. Hennis Freight Lines, 248 N.C. 496, 103 S.E.2d 829 (1958); In re Tyson, 253 N.C. 662, 117 S.E.2d 854 (1961).

§ 96-10. Collection of contributions.

(a) Interest on Past-Due Contributions. — Contributions unpaid on the date on which they are due and payable, as prescribed by the Commission, shall bear interest at the rate set under G.S. 105-241.21 per month from and after that date until payment plus accrued interest is received by the Commission. An additional penalty in the amount of ten percent (10%) of the taxes due shall be added. The clear proceeds of any civil penalties levied pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. Interest collected pursuant to this subsection shall be paid into the Special Employment Security Administration Fund. If any employer, in good faith, pays contributions to another state or to the United States under the Federal Unemployment Tax Act, prior to a determination of liability by this Commission, and the contributions were legally payable to this State, the contributions, when paid to this State, shall be deemed to have been paid by the due date under the law of this State if they were paid by the due date of the other state or the United States.

(b) Collection. —

(1) If, after due notice, any employer defaults in any payment of contributions or interest thereon, the amount due shall be collected by civil action in the name of the Commission, and the employer adjudged in default shall pay the costs of such action. Civil actions brought under this section to collect contributions or interest thereon from an employer shall be heard by the court at the earliest possible date, and shall be entitled to preference upon the calendar of the court over all other civil actions, except petitions for judicial review under this Chapter and cases arising under the Workers' Compensation Law of this State; or, if any contribution imposed by this Chapter, or any portion thereof, and/or penalties duly provided for the nonpayment thereof shall not be paid within 30 days after the same become due and payable, and after due notice and reasonable opportunity for hearing, the Commission, under the hand of its chairman, may certify the same to the clerk of the superior court of the county in which the

delinquent resides or has property, and additional copies of said certificate for each county in which the Commission has reason to believe the delinquent has property located. If the amount of a delinquency is less than fifty dollars ($50.00), the Commission may not certify the amount to the clerk of court until a field tax auditor or another representative of the Commission personally contacts, or unsuccessfully attempts to personally contact, the delinquent and collect the amount due. A certificate or a copy of a certificate forwarded to the clerk of the superior court shall immediately be docketed and indexed on the cross index of judgments, and from the date of such docketing shall constitute a preferred lien upon any property which said delinquent may own in said county, with the same force and effect as a judgment rendered by the superior court. The Commission shall forward a copy of said certificate to the sheriff or sheriffs of such county or counties, or to a duly authorized agent of the Commission, and when so forwarded and in the hands of such sheriff or agent of the Commission, shall have all the force and effect of an execution issued to such sheriff or agent of the Commission by the clerk of the superior court upon a judgment of the superior court duly docketed in said county. Provided, however, the Commission may in its discretion withhold the issuance of said certificate or execution to the sheriff or agent of the Commission for a period not exceeding 180 days from the date upon which the original certificate is certified to the clerk of superior court. The Commission is further authorized and empowered to issue alias copies of said certificate or execution to the sheriff or sheriffs of such county or counties, or to a duly authorized agent of the Commission in all cases in which the sheriff or duly authorized agent has returned an execution or certificate unsatisfied; when so issued and in the hands of the sheriff or duly authorized agent of the Commission, such alias shall have all the force and effect of an alias execution issued to such sheriff or duly authorized agent of the Commission by the clerk of the superior court upon a judgment of the superior court duly docketed in said county. Provided, however, that notwithstanding any provision of this subsection, upon filing one written notice with the Commission, the sheriff of any county shall have the sole and exclusive right to serve all executions and make all collections mentioned in this subsection and in such case no agent of the Commission shall have the authority to serve any executions or make any collections therein in such county. A return of such execution, or alias execution, shall be made to the Commission, together with all moneys collected thereunder, and when such order, execution, or alias is referred to the agent of the Commission for service the said agent of the Commission shall be vested with all the powers of the sheriff to the extent of serving such order, execution or alias and levying or collecting thereunder. The agent of the Commission to whom such order or execution is referred shall give a bond not to exceed three thousand dollars ($3,000) approved by the Commission for the faithful performance of such duties. The liability of said agent shall be in the same manner and to the same extent as is now imposed on sheriffs in the service of executions. If any sheriff of this State or any agent of the Commission who is charged with the duty of serving executions shall willfully fail, refuse, or neglect to execute any order directed to him by the said Commission and within the time provided by law, the official bond of such sheriff or of such agent of the Commission shall be liable for the contributions, penalty, interest, and costs due by the employer.

(2) Any representative of the Employment Security Commission may examine and copy the county tax listings, detailed inventories, statements of assets or similar information required under General Statutes, Chapter 105, to be filed with the tax supervisor of any county in this State by any person, firm, partnership, or corporation, domestic or foreign, engaged in operating any business enterprise in such county. Any such information obtained by an agent or employee of the Commission shall not be divulged, published, or open to public inspection other than to the Commission's employees in the performance of their public duties. Any employee or member of the Commission who violates any provision of this section shall be fined not less than twenty dollars ($20.00), nor more than two hundred dollars ($200.00), or imprisoned for not longer than 90 days, or both.

(3) When the Commission furnishes the clerk of superior court of any county in this State a written statement or certificate to the effect that any judgment docketed by the Commission against any firm or individual has been satisfied and paid in full, and said statement or certificate is signed by the chairman of the Commission and attested by its secretary, with the seal of the Commission affixed, it shall be the duty of the clerk of superior court to file said certificate and enter a notation thereof on the margin of the judgment docket to the effect that said judgment has been paid and satisfied in full, and is in consequence canceled of record. Such cancellation shall have the full force and effect of a cancellation entered by an attorney of record for the Commission. It shall also be the duty of such clerk, when any such certificate is furnished him by the Commission showing that a judgment has been paid in part, to make a notation on the margin of the judgment docket showing the amount of such payment so certified and to file said certificate. This paragraph shall apply to judgments already docketed, as well as to the future judgments docketed by the Commission. For the filing of said statement or certificate and making new notations on the record, the clerk of superior court shall be paid a fee of fifty cents (50¢) by the Commission.

(c) Priorities under Legal Dissolution or Distributions. — In the event of any distribution of an employer's assets pursuant to an order of any court under the laws of this State, including any receivership, assignment for benefit of creditors, adjudicated insolvency, composition, or similar proceeding, contributions then or thereafter due shall be paid in full prior to all other claims except taxes, and claims for remuneration of not more than two hundred and fifty dollars ($250.00) to each claimant, earned within six months of the commencement of the proceeding. In the event of an employer's adjudication in bankruptcy, judicially confirmed extension proposal, or composition, under the Federal Bankruptcy Act of 1898, as amended, contributions then or thereafter due shall be entitled to such priority as is provided in section 64(a) of that act (U.S.C., Title 11, section 104(a)), as amended.

A receiver of any covered employer placed into an operating receivership pursuant to an order of any court of this State shall pay to the Commission any contributions, penalties or interest then due out of moneys or assets on hand or coming into his possession before any such moneys or assets may be used in any manner to continue the operation of the business of the employer while it is in receivership.

(d) Collections of Contributions upon Transfer or Cessation of Business. — The contribution or tax imposed by G.S. 96-9, and subsections thereunder, of this Chapter shall be a lien upon the assets of the business of any employer subject to the provisions hereof who shall lease, transfer or sell out his business, or shall cease to do business and such employer shall be required, by the next reporting date as prescribed by the Commission, to file with the Commission all reports and pay all contributions due with respect to wages payable for employment up to the date of such lease, transfer, sale or cessation of the business and such employer's successor in business shall be required to withhold sufficient of the purchase money to cover the amount of said contributions due and unpaid until such time as the former owner or employer shall produce a receipt from the Commission showing that the contributions have been paid, or a certificate that no contributions are due. If the purchaser of a business or a successor of such employer shall fail to withhold purchase money or any money due to such employer in consideration of a lease or other transfer and the contributions shall be due and unpaid after the next reporting date, as above set forth, such successor shall be personally liable to the extent of the assets of the business so acquired for the payment of the contributions accrued and unpaid on account of the operation of the business by the former owner or employer.

(e) Refunds. — If not later than five years from the last day of the calendar year with respect to which a payment of any contributions or interest thereon was made, or one year from the date on which such payment was made, whichever shall be the later, an employer or employing unit who has paid such contributions or interest thereon shall make application for an adjustment thereof in connection with subsequent contribution payments, or for a refund, and the Commission shall determine that such contributions or any portion thereof was erroneously collected, the Commission shall allow such employer or employing unit to make an adjustment thereof, without interest, in connection with subsequent contribution payments by him, or if such an adjustment cannot be made in the next succeeding calendar quarter after such application for such refund is received, a cash refund may be made, without interest, from the fund: Provided, that any interest refunded under this subsection, which has been paid into the Special Employment Security Administration Fund established pursuant to G.S. 96-5(c), shall be paid out of such fund. For like cause and within the same period, adjustment or refund may be so made on the Commission's own initiative. Provided further, that nothing in this section or in any other section of this Chapter shall be construed as permitting the refund of moneys due and payable under the law and regulations in effect at the time such moneys were paid. In any case, where the Commission finds that any employing unit has erroneously paid to this State contributions or interest upon wages earned by individuals in employment in another state, refund or adjustment thereof shall be made, without interest, irrespective of any other provisions of this subsection, upon satisfactory proof to the Commission that such other state has determined the employing unit liable under its law for such contributions or interest.

(f) No injunction shall be granted by any court or judge to restrain the collection of any tax or contribution or any part thereof levied under the provisions of this Chapter nor to restrain the sale of any property under writ of execution, judgment, decree or order of court for the nonpayment thereof. Whenever any employer, person, firm or corporation against whom taxes or contributions provided for in this Chapter have been assessed, shall claim to have a valid defense to the enforcement of the tax or contribution so assessed or charged, such employer, person, firm or corporation shall pay the tax or contribution so assessed to the Commission; but if at the time of such payment he shall notify the Commission in writing that the same is paid under protest, such payment shall be without prejudice to any defenses or rights he may have in the premises, and he may, at any time within 30 days after such payment, demand the same in writing from the Commission; and if the same shall not be refunded within 90 days thereafter, he may sue the Commission for the amount so demanded; such suit against the Employment Security Commission of North Carolina must be brought in the Superior Court of Wake County, or in the county in which the taxpayer resides, or in the county where the taxpayer conducts his principal place of business; and if, upon the trial it shall be determined that such tax or contribution or any part thereof was for any reason invalid, excessive or contrary to the provisions of this Chapter, the amount paid shall be refunded by the Commission accordingly. The remedy provided by this subsection shall be deemed to be cumulative and in addition to such other remedies as are provided by other subsections of this Chapter. No suit, action or proceeding for refund or to recover contributions or payroll taxes paid under protest according to the provisions of this subsection shall be maintained unless such suit, action or proceeding is commenced within one year after the expiration of the 90 days mentioned in this subsection, or within one year from the date of the refusal of said Commission to make refund should such refusal be made before the expiration of said 90 days above mentioned. The one-year limitation here imposed shall not be retroactive in its effect, shall not apply to pending litigation nor shall the same be construed as repealing, abridging or extending any other limitation or condition imposed by this Chapter.

(g) Upon the motion of the Commission, any employer refusing to submit any report required under this Chapter, after 10 days' written notice sent by the Commission by registered or certified mail to the employer's last known address, may be enjoined by any court of competent jurisdiction from hiring and continuing in employment any employees until such report is properly submitted. When an execution has been returned to the Commission unsatisfied, and the employer, after 10 days' written notice sent by the Commission by registered mail to the employer's last known address, refuses to pay the contributions covered by the execution, such employer shall upon the motion of the Commission be enjoined by any court of competent jurisdiction from hiring and continuing in employment any employees until such contributions have been paid.

An employer who fails to file a report within the required time shall be assessed a late filing penalty of five percent (5%) of the amount of contributions due with the report for each month or fraction of a month the failure continues. The penalty may not exceed twenty-five percent (25%) of the amount of contributions due. An employer who fails to file a report within the required time but owes no contributions shall not be assessed a penalty unless the employer's failure to file continues for more than 30 days.

(h) When any uncertified check is tendered in payment of any contributions to the Commission and such check shall have been returned unpaid on account of insufficient funds of the drawer of said check in the bank upon which same is drawn, a penalty shall be payable to the Commission, equal to ten percent (10%) of the amount of said check, and in no case shall such penalty be less than one dollar ($1.00) nor more than two hundred dollars ($200.00).

(i) Except as otherwise provided in this subsection, no suit or proceedings for the collection of unpaid contributions may be begun under this Chapter after five years from the date on which the contributions become due, and no suit or proceeding for the purpose of establishing liability and/or status may be begun with respect to any period occurring more than five years prior to the first day of January of the year within which the suit or proceeding is instituted. This subsection shall not apply in any case of willful attempt in any manner to defeat or evade the payment of any contributions becoming due under this Chapter. A proceeding shall be deemed to have been instituted or begun upon the date of issuance of an order by the chairman of the Commission directing a hearing to be held to determine liability or nonliability, and/or status under this Chapter of an employing unit, or upon the date notice and demand for payment is mailed by certified mail to the last known address of the employing unit. The order shall be deemed to have been issued on the date the order is mailed by certified mail to the last known address of the employing unit. The running of the period of limitations provided in this subsection for the making of assessments or collection shall, in a case under Title II of the United States Code, be suspended for the period during which the Commission is prohibited by reason of the case from making the assessment or collection and for a period of one year after the prohibition is removed.

(j) Waiver of Interest and Penalties. — The Commission may, for good cause shown, reduce or waive any interest assessed on unpaid contributions under this section. The Commission may reduce or waive any penalty provided in G.S. 96-10(a) or G.S. 96-10(g). The late filing penalty under G.S. 96-10(g) shall be waived when the mailed report bears a postmark that discloses that it was mailed by midnight of the due date but was addressed or delivered to the wrong State or federal agency. The late payment penalty and the late filing penalty imposed by G.S. 96-10(a) and G.S. 96-10(g) shall be waived where the delay was caused by any of the following:

(1) The death or serious illness of the employer or a member of his immediate family, or by the death or serious illness of the person in the employer's organization responsible for the preparation and filing of the report;
(2) Destruction of the employer's place of business or business records by fire or other casualty;
(3) Failure of the Commission to furnish proper forms upon timely application by the employer, by reason of which failure the employer was unable to execute and file the report on or before the due date;
(4) The inability of the employer or the person in the employer's organization responsible for the preparation and filing of reports to obtain an interview with a representative of the Commission upon a personal visit to the central office or any local office for the purpose of securing information or aid in the proper preparation of the report, which personal interview was attempted to be had within the time during which the report could have been executed and filed as required by law had the information at the time been obtained;
(5) The entrance of one or more of the owners, officers, partners, or the majority stockholder into the Armed Forces of the United States, or any of its allies, or the United Nations, provided that the entrance was unexpected and is not the annual two weeks training for reserves; and
(6) Other circumstances where, in the opinion of the Chairman, the Assistant Administrator, or their designees, the imposition of penalties would be inequitable.

In the waiver of any penalty, the burden shall be upon the employer to establish to the satisfaction of the Chairman, the Assistant Administrator, or their designees, that the delinquency for which the penalty was imposed was due to any of the foregoing facts or circumstances.

The waiver or reduction of interest or a penalty under this subsection shall be valid and binding upon the Commission. The reason for any reduction or waiver shall be made a part of the permanent records of the employing unit to which it applies. (Ex. Sess. 1936, c. 1, s. 14; 1939, c. 27, ss. 9, 10; 1941, c. 108, ss. 14-16; 1943, c. 377, ss. 24-28; 1945, c. 221, s. 1; c. 288, s. 1; c. 522, ss. 17-20; 1947, c. 326, ss. 18-20; c. 598, s. 9; 1949, c. 424, ss. 14-16; 1951, c. 332, ss. 8, 20; 1953, c. 401, s. 15; 1959, c. 362, s. 9; 1965, c. 795, s. 11; 1971, c. 673, s. 21; 1973, c. 108, s. 43; c. 172, s. 4; 1977, c. 727, s. 50; 1979, c. 660, s. 16; 1981, c. 160, s. 16; 1989, c. 770, s. 21; 1991, c. 422, s. 1; 1995, c. 463, ss. 4-6; 1997-398, ss. 1-3; 2001-207, ss. 2, 3; 2005-276, s. 6.37(k); 2007-491, s. 44(1)a.)

Editor's Note. — Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 6.37(w), provides: "The Office of State Budget and Management shall develop a methodology for computing the actual costs of collection of civil penalties by State departments and agencies. This methodology shall apply to all State departments and agencies, effective July 1, 2006."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-491, s. 44(1)a, effective January 1, 2008, substituted "105-241.21" for "105-241.1(i)" in subsection (a).

Legal Periodicals. — For note on unemployment compensation and labor dispute disqualification, see 16 Wake Forest L. Rev. 472 (1980).

For a survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2252 (1997).

CASE NOTES

Editor's Note. — *Many of the cases cited below were decided prior to later amendatory provisions.*

This Chapter provides remedies for an employer who claims a valid defense to the enforcement of the tax or to the collection of the contributions assessed. In addition to right of appeal from the decision of the Commission, it is provided that he may pay the tax under protest and sue for its recovery. The remedy provided by this section must be pursued in the manner therein prescribed. State ex rel. Unemployment Comp. Comm'n v. J.M. Willis Barber & Beauty Shop, 219 N.C. 709, 15 S.E.2d 4 (1941).

The remedies provided by this Chapter are adequate and preclude an employer from maintaining suit in the superior court seeking judgment that salaries paid certain of its employees should not be included in computing the amount of contributions it should pay. Prudential Ins. Co. of Am. v. Powell, 217 N.C. 495, 8 S.E.2d 619 (1940).

This section provides an adequate remedy to sue the Employment Security Commission in state superior court for refund of unemployment taxes paid under protest. Ascension Lutheran Church v. Employment Sec. Comm'n, 501 F. Supp. 843 (W.D.N.C. 1980).

Right to Raise Question of Constitutionality. — In an action by the Employment Security Commission to determine liability of defendant for contributions under the act, the defendant may not raise the question of the constitutionality of the statute under which the Commission levied the assessment in question, it being required in order to raise this defense that he pay the contributions under protest and sue for recovery. State ex rel. Emp. Sec. Comm'n v. Kermon, 232 N.C. 342, 60 S.E.2d 580 (1950).

Judgment That Certain Salaries Should Not Be Included Cannot Be Obtained. — A judgment that salaries paid to certain of plaintiff's employees should not be included in computing the amount of the contributions plaintiff should pay under this Chapter would in effect enjoin the Commission from seeking further to collect the amount of contributions which it contends are justly due, and it being expressly provided that injunction shall not lie to restrain the collection of any tax or contribution levied under the Chapter, the court is without jurisdiction of an action seeking such relief, since it may not do indirectly what it is prohibited from doing directly. Prudential Ins. Co. of Am. v. Powell, 217 N.C. 495, 8 S.E.2d 619 (1940).

Single Employing Unit. — Where the Commission contended that an employer and another concern controlled by the same interests jointly constituted a single employment unit liable for the payment of unemployment compensation contributions and it wished to have this liability judicially adjudged, it was required to follow the procedure prescribed by this section. In re Mitchell, 220 N.C. 65, 16 S.E.2d 476, 142 A.L.R. 931 (1941). See note to § 96-8.

Subsection (e), relating to refunds, is procedural; the limitation it imposes is addressed to the power of the Commission to make a refund and the conditions upon which it may be made rather than to any limitation upon an action for the recovery of money. It is broad enough in its phraseology to cover refund of money paid through mistake, without raising technical distinctions between voluntary and involuntary payments. B-C Remedy Co. v. Unemployment Comp. Comm'n, 226 N.C. 52, 36 S.E.2d 733, 163 A.L.R. 773 (1946).

Retroactive Extension of Time for Applying for Refunds. — While the limitation on the authority of the Commission to make refunds is fatal to a claim, so long as the limitation lasts, a change of law, enlarging time in which refunds may be applied for or made, does not involve any constitutional inhibitions such as apply to ordinary statutes of limitation, and the legislature has the power to apply the extended time retroactively. B-C Remedy Co. v. Unemployment Comp. Comm'n, 226 N.C. 52, 36 S.E.2d 733, 163 A.L.R. 773 (1946), so holding as to the 1943 amendment of subsection (e).

The trial court can properly award prejudgment interest on protested unemployment compensation tax payments recovered in actions against the Employment Security Commission brought under this section. Begley v. Employment Sec. Comm'n, 50 N.C. App. 432, 274 S.E.2d 370 (1981).

Payments collected as penalties under the Employment Security Act are "additional taxes" and thus remedial, rather than punitive, in nature; accordingly, payments collected by the Employment Security Commission pursuant to G.S. 96-10 are not subject to N.C. Const. IX, § 7. N.C. Sch. Bds. Ass'n v. Moore, 160 N.C. App. 253, 585 S.E.2d 418 (2003).

Applied in National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

Cited in State ex rel. Emp. Sec. Comm'n v. News Publishing Co., 228 N.C. 332, 45 S.E.2d 391 (1947); State ex rel. Employment Sec. Comm'n v. IATSE Local 574, 114 N.C. App. 662, 442 S.E.2d 339 (1994).

§ 96-11. Period, election, and termination of employer's coverage.

(a) Any employing unit which is or becomes an employer subject to this Chapter within any calendar year shall be subject to this Chapter during the whole of such calendar year except as otherwise provided in G.S. 96-8(5)b; provided, however, that on and after July 1, 1939, this section shall not be construed to apply to any part of the business of an employer as may come within the terms of section one (a) of the Federal Railroad Unemployment Insurance Act.

(b) Prior to January 1, 1972, and except as otherwise provided in subsections (a), (c), and (d) of this section, an employing unit shall cease to be an employer subject to this Chapter only as of the first day of January of any calendar year, if it files with the Commission prior to the first day of March of such calendar year a written application for termination of coverage and the Commission finds that there were no 20 different weeks in the preceding calendar year (whether or not such weeks are or were consecutive) within which said employing unit employed four or more individuals in employment (not necessarily simultaneously and irrespective of whether the same individuals were employed in each such week); provided that on and after January 1, 1972, except as otherwise provided in subsections (a), (c), and (d) of this section, an employing unit shall cease to be an employer subject to this Chapter only as of the first day of January in any calendar year, if it files with the Commission prior to the first day of March of such year a written application for termination of coverage and the Commission finds that there were no 20 different weeks within the preceding calendar year (whether or not such weeks are or were consecutive) within which said employing unit employed one or more individuals in employment (not necessarily simultaneously and irrespective of whether the same individual was employed in each such week), and the Commission finds that there was no calendar quarter within the preceding calendar year in which the total wages of its employees were one thousand five hundred dollars ($1,500) or more. Any employing unit, as defined in G.S. 96-8(5)n, shall cease to be an employer only if it files with the Commission by the first day of March of any calendar year an application for termination of coverage, and the Commission finds that there were no 20 different weeks within the preceding calendar year in which such employing unit had at least 10 individuals in employment, and that there was no calendar quarter within the preceding calendar year in which such employing unit paid twenty thousand dollars ($20,000) or more in wages for services in employment. Any employing unit, as defined in G.S. 96-8(5)o, shall cease to be an employer if it files with the Commission by the first day of March of any calendar year an application for termination of coverage and the Commission finds that there was no calendar quarter within the preceding calendar year in which such employing unit paid one thousand dollars ($1,000) or more in wages for services in employment. Provided further, except as otherwise provided in subsections (a), (c), and (d) of this section on and after January 1, 1974, an "employer" as the term is used in G.S. 96-8(5)k shall cease to be an employer subject to this Chapter only as of the first day of January in any calendar year, if it files with the Commission prior to the first day of March of such year a written application for termination of coverage and the Commission finds that there were no 20 different weeks within the preceding calendar year (whether or not such weeks are or were consecutive) within which said employing unit employed four or more individuals in employment (not necessarily simultaneously and irrespective of whether the same individuals were employed in each such week). For the purpose of this subsection, the two or more employing units mentioned in paragraphs b or c of G.S. 96-8, subdivision (5) shall be treated as a single employing unit: Provided, however, that any employer, as the term is used in G.S. 96-8(5)k, whose liability covers a period of more than two years when first discovered by the Commission, upon filing a written application for termination within 90 days after notification of his liability by the Commission, may be terminated as an employer effective January 1; and for any subsequent year if the Commission finds there were no 20 different weeks within the preceding calendar year (whether or not such weeks are or were consecutive) within which said employing unit employed four or more individuals in employment (not necessarily simultaneously and irrespective of whether the same individuals were employed in each such week). Provided further, any other employer whose liability covers a period of more than two years when first discovered by the Commission, upon filing a written application for termination within 90 days after notification of his liability by the Commission may be terminated as an employer effective January 1, and for any subsequent years if the Commission finds that prior to January 1, 1972, there were no 20 different weeks within the preceding calendar year (whether or not such weeks are or were consecutive) within which said employing unit employed four or more individuals in employment (not necessarily simultaneously and irrespective of whether the same individuals were employed in each such week); and with respect to 1972 and subsequent years, if the Commission finds that there were no 20 different weeks within the preceding calendar year (whether or not such weeks are or were consecutive) within which said employing unit employed one or more individuals in employment (not necessarily simultaneously and irrespective of whether the same individual was employed in each such week), and the Commission finds that there was no calendar quarter within the preceding calendar year in which the total wages of its employees were one thousand five hundred dollars ($1,500) or more. In such cases, a protest of liability shall be considered as an application for termination within the meaning of this provision where the decision with respect to such protest has not become final; provided further, this provision shall not apply in any case of willful attempt in any manner to defeat or evade the payment of contributions becoming due under this Chapter.

(c)(1) An employing unit, not otherwise subject to this Chapter, which files with the Commission its written election to become an employer subject hereto for not less than two calendar years shall, with the written approval of such election by the Commission, become an employer subject hereto to the same extent as all other employers, as of the date stated in such approval, and shall cease to be subject hereto as of January 1 of any calendar year subsequent to such two calendar years only if, prior to the first day of March following such first day of January, it has filed with the Commission a written notice to that effect, provided such employing unit may be terminated by the Commission as provided under the provisions of subdivision (3) [(4)] of this subsection.

(2) Any employing unit for which services that do not constitute employment as defined in this Chapter are performed may file with the Commission a written election that all such services performed by individuals in its employ, in one or more distinct establishments or places of business, shall be deemed to constitute employment for all the purposes of this Chapter for not less than two calendar years. Upon the written approval of such election by the Commission such services shall be deemed to constitute employment subject to this Chapter from and after the date stated in such approval. Such services shall cease to be deemed employment, subject hereto as of January one of any calendar year subsequent to such two calendar years only if, prior to the first day of March following such first day of January, such employing unit has filed with the Commission a written notice to that effect, provided such employing unit may be terminated by the Commission as provided under the provisions of subdivision (3) [(4)] of this subsection.

(3)a. On and after January 1, 1972, through December 31, 1977, any political subdivision of this State may elect, for a period of not less than two calendar years, to cover under this Chapter service performed by employees in all of the hospitals and institutions of higher education, as defined in G.S. 96-8(5)*l*, operated by such political subdivisions. Any election is to be made by filing with the Commission a notice of such election at least 30 days prior to January 1, the effective date of such election. Any political subdivision electing coverage under this subsection shall make payments in lieu of contributions with respect to benefits attributable to such employment as provided with respect to nonprofit organizations in G.S. 96-9(d).

b. The provisions in G.S. 96-13(4) with respect to benefit rights based on service for State and nonprofit institutions of higher education shall be applicable also to service covered by an election under this section.

c. The amounts required to be paid in lieu of contributions by any political subdivision under this section shall be as provided in G.S. 96-9(d), with respect to similar payments by nonprofit organizations.

d. An election under this section may be terminated as of January 1 of any calendar year subsequent to such two calendar years only if 30 days prior to such January 1, such employer has filed with the Commission a written notice to that effect.

(4) On and after July 1, 1965, the Commission on its own motion and in its discretion, upon 30 days' written notice mailed to the last known address of such employer, may terminate coverage of any employer which has become subject to this Chapter solely by electing coverage under the provisions of this subsection.

(d) Except as provided in G.S. 96-9(c)(6), an employer who has not paid any covered wages for a period of two consecutive calendar years shall cease to be an employer subject to this Chapter. An employer who has not had individuals in employment and who has made due application for exemption from filing contributions and wage reports required under this Chapter and has been so exempted may be terminated from liability upon written application within 120 days after notification of the reactivation of his account. Such termination shall be effective January 1 of any calendar year only if the Commission finds there were no 20 different weeks within the preceding calendar year, whether or not such weeks are or were consecutive, within which said employer employed one or more individuals in employment (four or more prior to January 1, 1972), not necessarily simultaneously and irrespective of whether the same individuals were employed in each such week, and the Commission finds that there was no calendar quarter within the preceding calendar year in which the total wages of its employees were one thousand five hundred dollars ($1,500) or more, except as otherwise provided. Provided further, an employer, as the term is used in G.S. 96-8(5)k, who has not had individuals in employment and who has made due application for exemption from filing contributions and wage reports required under this Chapter and has been so exempted may be terminated from liability upon written application within 120 days after notification of the reactivation of its account. Such termination shall be effective January 1 of any calendar year only if the Commission finds that there were no 20 different weeks within the preceding calendar year, whether or not such weeks are or were consecutive, within which said employer employed four or more individuals in employment, not necessarily simultaneously and irrespective of whether the same individuals were employed in each such week. In such cases a protest of liability shall be considered as an application for termination within the meaning of this provision where the decision with respect to such protest has not become final. (Ex. Sess. 1936, c. 1, s. 8; 1939, c. 52, ss. 2, 3; 1941, c. 108, s. 9; 1945, c. 522, ss. 21-23; 1949, c. 424, ss. 17, 18; c. 522; 1951, c. 332, s. 9; c. 1147; 1953, c. 401, s. 16; 1955, c. 385, s. 10; 1959, c. 362, ss. 10, 11; 1961, c. 454, s. 16; 1965, c. 795, ss. 12-14; 1971, c. 673, ss. 22-24; 1973, c. 172, s. 5; 1977, c. 727, s. 51; 1979, c. 660, s. 17; 1985, c. 552, s. 8; 1991, c. 421, s. 2.)

Editor's Note. — Subdivision (5)*l* of G.S. 96-8, referred to in subdivision (c)(3)a. of this section, has been repealed.

The reference in subdivision (c)(3)b. of this section to G.S. 96-13(4) is erroneous, as G.S. 96-13 does not contain a subdivision (4).

CASE NOTES

Employer Remains Covered Until Coverage Is Terminated as Provided by This Section. — Where employment within the meaning of the Employment Security Law is once established and the employer becomes covered thereunder, he remains so until coverage is terminated as provided by this section. State ex rel. Emp. Sec. Comm'n v. Coe, 239 N.C. 84, 79 S.E.2d 177 (1953).

Effect of Reinstatement of Liability After Prior Exemption. — Where an employer, otherwise subject to the provisions of this Chapter, is exempted from those provisions by legislative action and by legislative action that exemption is subsequently terminated, and additionally, where there have been no changes in the circumstances or activities of the employer, upon reinstatement of liability under this Chapter that employer is entitled to credit for its prior account balance, and that employer's contribution rate should be determined primarily by reference to its former experience rating at the time of its exemption. The burden will be upon the Commission to show what, if any, changes in circumstances have come about which would justify an upward revision of that employer's rate of contribution. State ex rel. Emp. Sec. Comm'n v. Blue Ridge Broadcasting Corp., 42 N.C. App. 702, 257 S.E.2d 640, cert. denied, 298 N.C. 805, 262 S.E.2d 4 (1979).

Cited in State ex rel. Emp. Sec. Comm'n v. Skyland Crafts, Inc., 240 N.C. 727, 83 S.E.2d 893 (1954).

§ 96-12. Benefits.

(a) Payment of Benefits. — Twenty-four months after the date when contributions first accrue under this Chapter benefits shall become payable from the fund. All benefits shall be paid through employment offices, in accordance with such regulations as the Commission may prescribe.

(b)(1)a. Repealed by Session Laws 1977, c. 727, s. 52.

b. An individual who is totally unemployed shall be paid the individual's weekly benefit amount. The weekly benefit amount for an individual is the amount of the high-quarter wages paid to the individual in the individual's base period, divided by 26 and, if the quotient is not a whole dollar, rounded to the next lower whole dollar. If this amount is less than fifteen dollars ($15.00), the individual is not eligible for benefits.

c. Repealed by Session Laws 1981, c. 160, s. 17.

(2) Each August 1, the Commission shall calculate the maximum weekly benefit amount available to an individual. The maximum weekly benefit amount is sixty-six and two-thirds percent (66 2/3%) of the average weekly insured wage rounded, if the amount is not a whole dollar, to the next lower whole dollar. The maximum weekly benefit amount set on August 1 of a year applies to an individual whose benefit year begins on or after that date and before August 1 of the following year.

(3) Repealed by Session Laws 1981, c. 160, s. 18.

(4) Qualifying Wages for Second Benefit Year. — An individual whose prior benefit year has expired and who files a new benefit claim is not entitled to benefits unless the individual has been paid qualifying wages since the beginning date of the prior benefit year and before the date the new benefit claim was filed equal to at least six times the average weekly insured wage, obtained in accordance with G.S. 96-8(22), and has been paid wages in at least two quarters of the individual's base period. "Qualifying wages" are wages earned with an employer subject to the provisions of this Chapter or some other state employment security law or in federal service as defined in 5 U.S.C. Chapter 85.

(c) Partial Weekly Benefit. — An individual who is partially unemployed or part-totally employed shall be paid a portion of the individual's weekly benefit amount. The portion payable is the difference between the individual's weekly benefit amount and any part of the wages or remuneration that is payable to the individual for a week for which benefits are claimed and that exceeds ten percent (10%) of the individual's average weekly wage in the highest quarter of the individual's base period rounded, if the amount is not a whole dollar, to the next lower whole dollar. Payments received by an individual under a supplemental benefit plan referred to in G.S. 96-8(13)d. do not affect the computation of the individual's partial weekly benefit.

(d) Duration of Benefits. — The total benefits paid to an individual shall not be less than the minimum total benefit and shall not exceed the lesser of the maximum total benefit or the individual's total benefit amount. The total benefit amount for an individual is determined by dividing the individual's base-period wages by the individual's high-quarter wages, multiplying that quotient by eight and two thirds, rounding the result to the nearest whole number, and then multiplying the resulting amount by the individual's weekly benefit amount. The minimum total benefit for an individual is 13 times the individual's weekly benefit amount. The maximum total benefit for an individual is 26 times the individual's weekly benefit amount, unless the benefits are extended further in accordance with G.S. 96-12.01. The Commission shall establish and maintain individual wage record accounts for each individual who earns wages in covered employment for as long as the wages would be included in a determination of benefits.

(e) Recodified as § 96-12.01 by Session Laws 1997-456, s. 27.

(f) Any amount payable under any provision of this Chapter when applicable is subject to the retirement reduction required by G.S. 96-14(9).

(g) Income Tax Withholding. — When an individual files a new claim for unemployment compensation, the individual shall be advised in writing at the time of filing that:

(1) Unemployment compensation is subject to federal and State individual income tax.
(2) Requirements exist pertaining to estimated tax payments.
(3) The individual may elect to have federal individual income tax deducted and withheld from the individual's payment of unemployment compensation at the amount specified in section 3402 of the Internal Revenue Code.
(4) The individual may elect to have State individual income tax deducted and withheld from the individual's payment of unemployment compensation in an amount determined by the individual.
(5) The individual may change a previously elected withholding status.

The Commission shall follow the procedures specified by the United States Department of Labor, the Internal Revenue Service, and the Department of Revenue pertaining to the deducting and withholding of individual income tax. The amounts deducted and withheld from unemployment compensation shall remain in the Unemployment Insurance Fund until transferred to the appropriate taxing authority as a payment of income tax. If two or more deductions are made from an individual's unemployment compensation payment, then the deductions will be deducted and withheld in accordance with priorities established by the Commission. (Ex. Sess. 1936, c. 1, s. 3; 1937, c. 448, s. 1; 1939, c. 27, ss. 1-3, 14; c. 141; 1941, c. 108, s. 1; c. 276; 1943, c. 377, ss. 1-4; 1945, c. 522, ss. 24-26; 1947, c. 326, s. 21; 1949, c. 424, ss. 19-21; 1951, c. 332, ss. 10-12; 1953, c. 401, ss. 17, 18; 1957, c. 1059, ss. 12, 13; c. 1339; 1959, c. 362, ss. 12-15; 1961, c. 454, ss. 17, 18; 1965, c. 795, ss. 15, 16; 1969, c. 575, s. 9; 1971, c. 673, ss. 25, 26; 1973, c. 1138, ss. 3-7; 1975, c. 2, ss. 1-5; 1977, c. 727, s. 52; 1979, c. 660, ss. 18, 19; 1981, c. 160, ss. 17-23; 1981 (Reg. Sess., 1982), c. 1178, ss. 3-14; 1983, c. 585, ss. 12-16; c. 625, ss. 1, 7; 1985, c. 552, s. 9; 1985 (Reg. Sess., 1986), c. 918; 1987, c. 17, s. 8; 1993, c. 122, s. 2; 1993 (Reg. Sess., 1994), c. 680, ss. 1-3; 1995 (Reg. Sess., 1996), c. 646, s. 25(a); 1997-456, s. 27; 1999-340, s. 11; 2001-414, s. 41.)

Legal Periodicals. — For note on unemployment compensation and labor dispute disqualification, see 16 Wake Forest L. Rev. 472 (1980).

For survey of 1982 administrative law, see 61 N.C.L. Rev. 961 (1983).

CASE NOTES

Purpose. — The General Assembly has stated that the policy of this State is that the compulsory reserves required under the Employment Security Law be used for the benefit of persons unemployed through no fault of their own. In order to carry out the intent of the act, its provisions should be liberally construed in favor of applicants. By contrast, our courts have said that sections of the act imposing disqualifications for its benefits should be strictly construed in favor of the claimant and should not be enlarged by implication. Couch v. North Carolina Emp. Sec. Comm'n, 89 N.C. App. 405, 366 S.E.2d 574, aff'd, 323 N.C. 472, 373 S.E.2d 440 (1988).

Recovery of Both Workers' Compensation and Unemployment Benefits. — Several states allow the recovery of both workers' compensation and unemployment benefits for the same time period, in the absence of an express statutory prohibition. In North Carolina, there is no express prohibition of duplicate benefits, although a persuasive argument can be made that the General Assembly intended that there be no recovery of both workers' compensation and unemployment benefits. Dolbow v. Holland Indus., Inc., 64 N.C. App. 695, 308 S.E.2d 335 (1983), cert. denied, 310 N.C. 308, 312 S.E.2d 651 (1984).

A unilateral, substantial reduction in one's working hours by his employer may permit a finding of good cause attributable to the employer. Couch v. North Carolina Emp. Sec. Comm'n, 89 N.C. App. 405, 366 S.E.2d 574, aff'd, 323 N.C. 472, 373 S.E.2d 440 (1988).

Cited in In re Tyson, 253 N.C. 662, 117 S.E.2d 854 (1961).

§ 96-12.01. Extended benefits.

(a) Extended benefits shall be paid under this Chapter as provided in this section.

(a1) Definitions. — As used in this section, unless the context clearly requires otherwise —

(1) "Extended benefit period" means a period which:
  a. Begins the third week after a week for which there is an "on" indicator; and
  b. Ends with either of the following weeks, whichever occurs later:
    1. The third week after the first week for which there is an "off" indicator; or
    2. The 13th consecutive week of such period.

Provided, that no extended benefit period may begin before the 14th week following the end of a prior extended benefit period which was in effect with respect to this State.

(2) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1178, s. 4.

(3) Repealed by Session Laws 1982 (Regular Session, 1982), c. 1178, s. 5.

(4) There is an "on indicator" for this State for a week if the Commission determines, in accordance with the regulations of the United States Secretary of Labor, that for the period consisting of such week and the immediate preceding 12 weeks, the rate of insured unemployment (not seasonally adjusted) under this Chapter:
  a. Equalled or exceeded one hundred twenty percent (120%) of the average of such rates for the corresponding 13-week period ending in each of the preceding two calendar years, and equalled or exceeded five percent (5%), or
  b. Equalled or exceeded six percent (6%), or
  c. With respect to benefits for weeks of unemployment in North Carolina beginning after May 1, 2002.
    1. The average rate of total unemployment (seasonally adjusted), as determined by the United States Secretary of Labor, for the period consisting of the most recent three months for which data for all states are published before the close of such week equals or exceeds a six and one-half percent (6.5%), and
    2. The average rate of total unemployment in the State (seasonally adjusted), as determined by the United States Secretary of Labor, for the three-month period referred to in sub-subdivision c.1. of this subdivision, equals or exceeds one hundred ten percent (110%) of such average for either or both of the corresponding three-month periods ending in the two preceding calendar years.
  d. There is a State "off indicator" for a week with respect to sub-subdivision c. of this subdivision, only if, for the period consisting of such week and the immediately preceding 12 weeks, the option specified in sub-subdivision c. does not result in an "on indicator".
  e. Total extended benefit amount.
    1. The total extended benefit amount payment to any eligible individual with respect to the applicable benefit year shall be the least of the following amounts:
      I. Fifty percent (50%) of the total amount of regular benefits which were payable to the individual under this Chapter in the individual's applicable benefit year; or
      II. Thirteen times the individual's weekly benefit amount that was payable to the individual under this Chapter

for a week of total unemployment in the applicable benefit year.

2.I. Effective with respect to weeks beginning in a high unemployment period, sub-subdivision e.1. of this subdivision shall be applied by substituting:

A. "Eighty percent (80%)" for "fifty percent (50%)" in sub-subdivision e.1.I., and

B. "Twenty" for "thirteen" in sub-subdivision e.1.II.

II. For purposes of sub-subdivision 2.I., the term "high unemployment period" means any period during which an extended benefit period would be in effect if sub-subdivision c. of this subdivision were applied by substituting "eight percent (8%)" for six and one-half percent (6.5%)".

(5) There is an "off indicator" for this State for a week if the Commission determines, in accordance with the regulations of the United States Secretary of Labor, that for the period consisting of such week and the immediately preceding 12 weeks, the rate of insured unemployment (not seasonally adjusted) under this Chapter:

a. Was less than one hundred twenty percent (120%) of the average of such rates for the corresponding 13-week period ending in each of the preceding two calendar years, and was less than six percent (6%), or

b. Was less than five percent (5%).

(6) "Rate of insured unemployment," for the purposes of subparagraphs (4) and (5) of this subsection, means the percentage derived by dividing

a. The average weekly number of individuals filing claims for regular compensation in this State for weeks of unemployment with respect to the most recent 13 consecutive-week period, as determined by the Commission on the basis of its reports to the United States Secretary of Labor, by

b. The average monthly employment covered under this Chapter for the first four of the most recent six completed calendar quarters ending before the end of such 13-week period.

(7) "Regular benefits" means benefits payable to an individual under this Chapter or any other State law (including benefits payable to federal civilian employees and to ex-servicemen pursuant to 5 U.S.C. Chapter 85) other than extended benefits.

(8) "Extended benefits" means benefits (including benefits payable to federal civilian employees and to ex-servicemen pursuant to 5 U.S.C. Chapter 85) payable to an individual under the provisions of this section for weeks of unemployment in his eligibility period.

(9) "Eligibility period" of an individual means the period consisting of the weeks in his benefit year which begin in an extended benefit period and if his benefit year ends within such extended benefit period, any weeks thereafter which begin in such period.

(10) "Exhaustee" means an individual who, with respect to any week of unemployment in his eligibility period:

a. Has received, prior to such week, all of the regular benefits that were available to him under this Chapter or any other State law (including dependents' allowances and benefits payable to federal civilian employees and ex-servicemen under 5 U.S.C. Chapter 85) in his current benefit year that includes such week;

Provided, that, for the purposes of this subdivision, an individual shall be deemed to have received all of the regular benefits that were available to him although (1) as a result of a pending appeal with respect to wages that were not considered in the original monetary determination in his benefit year, he may subsequently be determined to be entitled to added regular benefits, or (2) he may be entitled to regular benefits with respect to future weeks of unemployment, but such benefits are not payable with respect to such week of unemployment by reason of the provisions in G.S. 96-16; or

b. His benefit year having expired prior to such week, has no, or insufficient, wages on the basis of which he could establish a new benefit year that would include such week; and

c. 1. Has no right to unemployment benefits or allowances, as the case may be, under the Railroad Unemployment Insurance Act, the Trade Expansion Act of 1962, the Automotive Products Trade Act of 1965 and such other federal laws as are specified in regulations issued by the United States Secretary of Labor; and

2. Has not received and is not seeking unemployment benefits under the unemployment compensation law of Canada; but if he is seeking such benefits and the appropriate agency finally determines that he is not entitled to benefits under such law, he is considered an exhaustee.

(11) "State law" means the unemployment insurance law of any state approved by the United States Secretary of Labor under section 3304 of the Internal Revenue Code.

(b) Effect of State Law Provisions Relating to Regular Benefits on Claims for, and for Payment of, Extended Benefits. — Except when the result would be inconsistent with the other provisions of this section and in matters of eligibility determination, as provided in the regulations of the Commission, the provisions of this Chapter which apply to claims for, or the payment of, regular benefits shall apply to claims for, and the payment of, extended benefits.

(c) Eligibility Requirements for Extended Benefits. — An individual shall be eligible to receive extended benefits with respect to any week of unemployment in his eligibility period only if the Commission finds that with respect to such week:

(1) He is an "exhaustee" as defined in subsection (a)(10).

(2) He has satisfied the requirements of this Chapter for the receipt of regular benefits that are applicable to individuals claiming extended benefits, including not being subject to a disqualification for the receipt of benefits. Provided, however, that for purposes of disqualification for extended benefits for weeks of unemployment beginning after March 31, 1981, the term "suitable work" means any work which is within the individual's capabilities to perform if: (i) The gross average weekly remuneration payable for the work exceeds the sum of the individual's weekly extended benefit amount plus the amount, if any, of supplemental unemployment benefits (as defined in section 501(C)(17)(D) of the Internal Revenue Code of 1954) payable to such individual for such week; and (ii) the gross wages payable for the work equal the higher of the minimum wages provided by section 6(a)(1) of the Fair Labor Standards Act of 1938 as amended (without regard to any exemption), or the State minimum wage; and (iii) the work is offered to the individual in writing and is listed with the State employment service; and (iv) the considerations contained in G.S. 96-14(3) for determining whether or not work is suitable are applied to the extent that they are not inconsistent with the specific requirements of this subdivision; and (v) the individual cannot furnish

evidence satisfactory to the Commission that his prospects for obtaining work in his customary occupation within a reasonably short period of time are good, but if the individual submits evidence which the Commission deems satisfactory for this purpose, the determination of whether or not work is suitable with respect to such individual shall be made in accordance with G.S. 96-14(3) without regard to the definition contained in this subdivision. Provided, further, that no work shall be deemed to be suitable work for an individual which does not accord with the labor standard provisions set forth in this subdivision, but the employment service shall refer any individual claiming extended benefits to any work which is deemed suitable hereunder. Provided, further, that any individual who has been disqualified for voluntarily leaving employment, being discharged for misconduct or substantial fault, or refusing suitable work under G.S. 96-14 and who has had the disqualification terminated, shall have such disqualification reinstated when claiming extended benefits unless the termination of the disqualification was based upon employment subsequent to the date of the disqualification.

(3) After March 31, 1981, he has not failed either to apply for or to accept an offer of suitable work, as defined in G.S. 96-12.01(c)(2), to which he was referred by an employment office of the Commission, and he has furnished the Commission with tangible evidence that he has actively engaged in a systematic and sustained effort to find work. If an individual is found to be ineligible hereunder, he shall be ineligible beginning with the week in which he either failed to apply for or to accept the offer of suitable work or failed to furnish the Commission with tangible evidence that he has actively engaged in a systematic and sustained effort to find work and such individual shall continue to be ineligible for extended benefits until he has been employed in each of four subsequent weeks (whether or not consecutive) and has earned remuneration equal to not less than four times his weekly benefit amount.

(4) Pursuant to section 202(a)(7) of the Federal-State Extended Unemployment Compensation Act of 1970 (P.L. 91-373), as amended by section 202(b)(1) of the Unemployment Compensation Amendments of 1992 (Public Law 102-318), for any week of unemployment beginning after March 6, 1993, and before January 1, 1995, the individual is an exhaustee as defined by federal law and has satisfied the requirements of this Chapter for the receipt of regular benefits that are applicable to individuals claiming extended benefits, including not being subject to a disqualification for the receipt of benefits. Provided, the terms and conditions of State law that apply to claims for regular compensation and to the payment thereof shall apply to claims for extended benefits and to the payment thereof.

(5) An individual shall not be eligible for extended compensation unless the individual had 20 weeks of full-time insured employment, or the equivalent in insured wages, as determined by a calculation of base period wages based upon total hours worked during each quarter of the base period and the hourly wage rate for each quarter of the base period. For the purposes of this paragraph, the equivalent in insured wages shall be earnings covered by the State law for compensation purposes which exceed 40 times the individual's most recent weekly benefit amount or one and one-half times the individual's insured wages in that calendar quarter of the base period in which the individual's insured wages were the highest.

(d) Weekly Extended Benefit Amount. — The weekly extended benefit amount payable to an individual for a week of total unemployment in his eligibility period shall be an amount equal to the weekly benefit amount payable to him during his applicable benefit year. For any individual who was paid benefits during the applicable benefit year in accordance with more than one weekly benefit amount, the weekly extended benefit amount shall be the average of such weekly benefit amounts rounded to the nearest lower full dollar amount (if not a full dollar amount). Provided, that for any week during a period in which federal payments to states under Section 204 of the Federal-State Extended Unemployment Compensation Act of 1970, P.L. 91-373, are reduced under an order issued under Section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985, P.L. 99-177, the weekly extended benefit amount payable to an individual for a week of total unemployment in his eligibility period shall be reduced by a percentage equivalent to the percentage of the reduction in the federal payment. The reduced weekly extended benefit amount, if not a full dollar amount, shall be rounded to the nearest lower full dollar amount.

(e)(1) Total Extended Benefit Amount. — Except as provided in subdivision (2) hereof, the total extended benefit amount payable to any eligible individual with respect to his applicable benefit year shall be the least of the following amounts:

a. Fifty percent (50%) of the total amount of regular benefits which were payable to him under this Chapter in his applicable benefit year; or

b. Thirteen times his weekly benefit amount which was payable to him under this Chapter for a week of total unemployment in the applicable benefit year.

Provided, that during any fiscal year in which federal payments to states under Section 204 of the Federal-State Extended Unemployment Compensation Act of 1970, P.L. 91-373, are reduced under an order issued under Section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985, P.L. 99-177, the total extended benefit amount payable to an individual with respect to his applicable benefit year shall be reduced by an amount equal to the aggregate of the reductions under G.S. 96-12.01(d) and the weekly amounts paid to the individual.

(2) Notwithstanding any other provisions of this Chapter, if the benefit year of any individual ends within an extended benefit period, the remaining balance of extended benefits that such individual would, but for this subdivision, be entitled to receive in that extended benefit period, with respect to weeks of unemployment beginning after the end of the benefit year, shall be reduced (but not below zero) by the product of the number of weeks for which the individual received any amounts as trade readjustment allowances within that benefit year, multiplied by the individual's weekly benefit amount for extended benefits.

(f) Beginning and Termination of Extended Benefit Period. —

(1) Whenever an extended benefit period is to become effective in this State as a result of an "on" indicator, or an extended benefit period is to be terminated in this State as a result of an "off" indicator, the Commission shall make an appropriate public announcement; and

(2) Computations required by the provisions of subsection (a)(6) shall be made by the Commission, in accordance with regulations prescribed by the United States Secretary of Labor.

(g) Prior to January 1, 1978, any extended benefits paid to any claimant under G.S. 96-12.01 shall not be charged to the account of the base period employer(s) who pay taxes as required by this Chapter. However, fifty percent (50%) of any such benefits paid shall be allocated as provided in G.S. 96-9(c)(2) a (except that G.S. 96-9(c)(2) b shall not apply), and the applicable amount shall be charged to the account of the appropriate employer paying on a reimbursement basis in lieu of taxes.

On and after January 1, 1978, the federal portion of any extended benefits shall not be charged to the account of any employer who pays taxes as required by this Chapter but the State portion of such extended benefits shall be:

(1) Charged to the account of such employer; or

(2) Not charged to the account of the employer under the provisions of G.S. 96-9(c)(2).

All state portions of the extended benefits paid shall be charged to the account of governmental entities or other employers not liable for FUTA taxes who are the base period employers.

(h) Notwithstanding the provisions of G.S. 96-9(d)(1)a, 96-9(d)(2)c, 96-12.01(g), or any other provision of this Chapter, any extended benefits paid which are one hundred percent (100%) federally financed shall not be charged in any percentage to any employer's account.

(i) For weeks of unemployment beginning on or after June 1, 1981, a claimant who is filing an interstate claim under the interstate benefit payment plan shall be eligible for extended benefits for no more than two weeks when there is an "off indicator" in the state where the claimant files. (Ex. Sess. 1936, c. 1, s. 3; 1937, c. 448, s. 1; 1939, c. 27, ss. 1-3, 14; c. 141; 1941, c. 108, s. 1; c. 276; 1943, c. 377, ss. 1-4; 1945, c. 522, ss. 24-26; 1947, c. 326, s. 21; 1949, c. 424, ss. 19-21; 1951, c. 332, ss. 10-12; 1953, c. 401, ss. 17, 18; 1957, c. 1059, ss. 12, 13; c. 1339; 1959, c. 362, ss. 12-15; 1961, c. 454, ss. 17, 18; 1965, c. 795, ss. 15, 16; 1969, c. 575, s. 9; 1971, c. 673, ss. 25, 26; 1973, c. 1138, ss. 3-7; 1975, c. 2, ss. 1-5; 1977, c. 727, s. 52; 1979, c. 660, ss. 18, 19; 1981, c. 160, ss. 17-23; 1981 (Reg. Sess., 1982), c. 1178, ss. 3-14; 1983, c. 585, ss. 12-16; c. 625, ss. 1, 7; 1985, c. 552, s. 9; 1985 (Reg. Sess., 1986), c. 918; 1987, c. 17, s. 8; 1993, c. 122, s. 2; 1993 (Reg. Sess., 1994), c. 680, ss. 1-3; 1995 (Reg. Sess., 1996), c. 646, s. 25(a); 1997-456, s. 27; 1999-340, ss. 4, 5; 2001-414, ss. 42, 43, 44; 2002-143, ss. 1, 1.1.)

Editor's Note. — Session Laws 2001-414, s. 42 states: "G.S. 96-12.01(a) is recodified as G.S. 91-12.01(a1)." It appears that the intent of this provision was to recodify G.S. 96-12.01(a) as G.S. 96-12.01(a1). The subsection is set out above as such at the direction of the Revisor of Statutes.

§ 96-12.1. Extended base period for certain job related injuries.

If an individual lacks sufficient base period wages because of a job related injury for which he received workers' compensation, upon written application by the claimant, an extended base period will be substituted for the current base period on a quarter-by-quarter basis as needed to establish a valid claim. "Extended base period" means the four quarters prior to the claimant's base period. These four quarters may be substituted for base period quarters on a quarter-by-quarter basis to establish a valid claim regardless of whether the wages have been used to establish a prior claim, except any wages earned that would render the Employment Security Commission of North Carolina out of compliance with applicable federal law will be excluded if used in a prior claim. Benefits paid on the basis of an extended base period, which would not otherwise be payable, shall be noncharged. (1991, c. 409, s. 1; 1993, c. 343, s. 6.)

§ 96-13. Benefit eligibility conditions.

(a) An unemployed individual shall be eligible to receive benefits with respect to any week only if the Commission finds that —

(1) The individual has registered for work at and thereafter has continued to report at an employment office as directed by the Commission in accordance with such regulations as the Commission may prescribe;

(2) The individual has made a claim for benefits in accordance with the provisions of G.S. 96-15(a);

(3) The individual is able to work, and is available for work: Provided that, unless temporarily excused by Commission regulations, no individual shall be deemed available for work unless he establishes to the satisfaction of the Commission that he is actively seeking work: Provided further, that an individual customarily employed in seasonal employment shall, during the period of nonseasonal operations, show to the satisfaction of the Commission that such individual is actively seeking employment which such individual is qualified to perform by past experience or training during such nonseasonal period: Provided further, however, that no individual shall be considered available for work for any week not to exceed two in any calendar year in which the Commission finds that his unemployment is due to a vacation. In administering this proviso, benefits shall be paid or denied on a payroll-week basis as established by the employing unit. A week of unemployment due to a vacation as provided herein means any payroll week within which the equivalent of three customary full-time working days consist of a vacation period. For the purpose of this subdivision, any unemployment which is caused by a vacation period and which occurs in the calendar year following that within which the vacation period begins shall be deemed to have occurred in the calendar year within which such vacation period begins. For purposes of this subdivision, no individual shall be deemed available for work during any week that the individual tests positive for a controlled substance if (i) the test is a controlled substance examination administered under Article 20 of Chapter 95 of the General Statutes, (ii) the test is required as a condition of hire for a job, and (iii) the job would be suitable work for the claimant. The employer shall report to the Commission, in accordance with regulations adopted by the Commission, each claimant that tests positive for a controlled substance under this subdivision. An unemployed individual shall not be disqualified for eligibility for unemployment compensation solely on the basis that the individual is in school.

(4) No individual shall be deemed able to work under this subsection during any week for which that person is receiving or is applying for benefits under any other State or federal law based on his temporary total or permanent total disability. Provided that if compensation is denied to any individual for any week under the foregoing sentence and such individual is later determined not to be totally disabled, such individual shall be entitled to a retroactive payment of the compensation for each week for which the individual filed a timely claim for compensation and for which the compensation was denied solely by reason of the foregoing sentence.

(5) The individual has participated in reemployment services, if the Division referred the individual to these services after determining, through use of a worker profiling system, that the individual would likely exhaust regular benefits and would need reemployment services to make a successful transition to new employment, unless the individual establishes justifiable cause for failing to participate in the services.

(6) An unemployed individual shall not be disqualified for eligibility for unemployment compensation benefits solely on the basis that the

individual is only available for part-time work. If an individual restricts his or her eligibility to part-time work, the individual may be considered able and available to work if it is determined that all the following conditions exist:

a. The claimant's monetary eligibility is based predominately on wages from part-time work.

b. The claimant is actively seeking and is willing to accept work under essentially the same conditions as existed while the claimant's reported wages were accrued.

c. The claimant imposes no other restriction and is in a labor market in which a reasonable demand exists for part-time service.

This subdivision shall not be construed to amend subdivision (3) of this subsection as it applies to students or G.S. 96-16 as it applies to seasonal workers.

(b)(1) The payment of benefits to any individual based on services for nonprofit organizations, hospitals, or State hospitals and State institutions of higher education, other institutions of higher education, or secondary schools and subdivisions of secondary schools subject to this Chapter shall be in the same manner and under the same conditions of the laws of this Chapter as applied to individuals whose benefit rights are based on other services subject to this Chapter. Except that with respect to services in the educational institutions listed above:

a. In an instructional, research, or principal administrative capacity, compensation shall not be payable based on such services for any week commencing during the period between two successive academic years or terms, or, when an agreement provides instead for a similar period between two regular but not successive terms, during that period, to any individual if he performs such services in the first of the academic years or terms and if there is a contract or reasonable assurance that the individual will perform services in any such capacity for any educational institution in the second of the academic years or terms; and,

b. In any other capacity for an educational institution:

1. Compensation shall be denied on the basis of such services for any week which commences during a period between two successive academic years or terms if the individual performs such services in the first of the academic years or terms and there is a reasonable assurance that the individual will perform such services in the second of the academic years or terms, except that

2. If compensation is denied to any individual for any week under subclause 1 and the individual was not offered an opportunity to perform such services for the educational institution for the second of the academic years or terms, the individual shall be entitled to a retroactive payment of the compensation for each week for which the individual filed a timely claim for compensation and for which compensation was denied solely by reason of subclause 1; and,

c. With respect to any services described in clause a or b, compensation payable on the basis of such services shall be denied to any individual for any week which commences during an established and customary vacation period or holiday recess, and there is a reasonable assurance that such individual will perform such services in the period immediately following the vacation period or holiday recess; and,

d. With respect to any services described in clause a or b, compensation on the basis of services in any such capacity shall be denied as specified in clauses a, b, and c. to any individual who performed such services in an educational institution while in the employ of an educational service agency, and for this purpose the term "educational service agency" means a governmental agency or governmental entity which is established and operated exclusively for the purpose of providing such services to one or more educational institutions; and,

e. With respect to any services to which G.S. 96-13(b)(1) applies, if such services are provided to or on behalf of an educational institution, compensation shall be denied under the same circumstances as described in clauses a through d.

(2) Repealed by Session Laws 1983, c. 625, s. 5.

(c) Beginning February 16, 1977, an unemployed individual shall be eligible to receive benefits with respect to any week only if the Commission finds that he has been totally, partially, or part-totally unemployed for a waiting period of one week with respect to each benefit year. No week shall be counted as a week of unemployment for waiting-period credit under this provision unless the claimant except for the provisions of this subdivision was otherwise eligible for benefits. As to claims filed on or after September 5, 1999, the waiting period for a benefit year shall not be required of any claimant if all of the following conditions are met:

(1) The benefits are to be paid for unemployment due directly to a major natural disaster.

(2) The President of the United States has declared the disaster pursuant to the Disaster Relief Act of 1970, 42 U.S.C.A. 4401, et seq.

(3) The benefits are to be paid to claimants who would have been eligible for disaster unemployment assistance if they had not been eligible to receive unemployment insurance benefits with respect to that unemployment.

(4) The claimant files for a waiver of the waiting period week within 30 days after the date of notification or mailing of the notice of the right to have the waiting period week waived. The Employment Security Commission, for good cause shown, may at any time in its discretion, with or without motion or notice, order the period enlarged if the request for an enlargement of time is made before the expiration of the period originally prescribed or as extended by a previous order. After expiration of the specified period, the Employment Security Commission may permit the act to be done where the failure to act was a result of excusable neglect.

The benefits paid as a result of the waiver of the waiting period week shall not be charged to the account or accounts of the base period employer or employers in accordance with G.S. 96-9(c)(2)d. The Employment Security Commission shall implement regulations prescribing the procedure for the waiver of the waiting period week in accordance with G.S. 96-4(b).

(c1) As to claims filed on or after January 29, 2003, the waiting period for a benefit year shall not be required of a claimant if all of the following conditions are met:

(1) The benefits are to be paid for unemployment due directly to a major industrial disaster that destroys substantially all of the physical facilities of a manufacturing plant.

(2) The Governor has acknowledged the disaster through the creation of such task forces as are needed to coordinate State assistance to the manufacturer and its employees.

(3) The Governor has issued an Executive Order directing and authorizing the Employment Security Commission to waive the waiting week for employees of the manufacturer.

(4) The Employment Security Commission shall implement regulations prescribing the procedure for the waiver of the waiting period week in accordance with G.S. 96-4(b).

(d) Benefit entitlement based on services for governmental entities that become subject to Employment Security Commission law effective January 1, 1978, will be administered in the same manner and under the same conditions of the laws of this Chapter as are applicable to individuals whose benefit rights are based on other service subject to this Chapter.

(e) Benefits shall not be payable to any individual on the basis of any services, substantially all of which consist of participating in sports or athletic events or training or preparing to so participate, for any week which commences during the period between two successive sport seasons (or similar periods) if such individual performs such services in the first of such seasons (or similar periods) and there is a reasonable assurance that such individual will perform such services in the latter of such seasons (or similar periods).

(f)(1) Benefits shall not be payable on the basis of services performed by an alien unless such alien is an individual who was lawfully admitted for permanent residence at the time such services were performed, or otherwise was permanently residing in the United States under color of law at the time such services were performed, or was lawfully present for purposes of performing such services (including an alien who is lawfully present in the United States as a result of the application of the provisions of section 203 (a)(7) or section 212 (d)(5) of the Immigration and Nationality Act). Any data or information required of individuals applying for benefits to determine whether benefits are not payable to them because of their alien status shall be uniformly required from all applicants for benefits. In the case of an individual whose application for benefits would otherwise be approved, no determination that compensation to such individual is not payable because of his alien status shall be made except upon a preponderance of the evidence.

(2) An individual who is not a citizen or national of the United States shall not be deemed available for work under subsection (a)(3) of this section unless the individual is in satisfactory immigration status under the laws administered by the United States Department of Justice, Immigration and Naturalization Service.

(g)(1) Except as herein provided, no individual shall be eligible for benefits for any week during any part of which the Commission finds that work was not available to the individual because he had been placed on a bona fide disciplinary suspension by his employer. To be bona fide, a disciplinary suspension must be based on acts or omissions which constitute fault on the part of the employee and are connected with the work but such acts or omissions need not alone be disqualifying under G.S. 96-14.

(2) Ineligibility pursuant to the preceding paragraph based on a single disciplinary suspension shall not be imposed for any claims week beginning after the tenth consecutive calendar day of the suspension. If at the time a claim is filed for such a week the individual is still so suspended, the individual shall be deemed to have been discharged from his work because of all the acts or omissions that caused his suspension and the issue of whether that discharge was for disqualifying reasons under G.S. 96-14 shall then be adjudicated pursuant to G.S. 96-15.

(3) Any individual who files a claim for benefits for a week with respect to which he is ineligible under this subsection is deemed to be attached to his employer's payroll and any issue concerning separation from

work that may be present under G.S. 96-14 shall be held in abeyance until such time as a claim is filed for a week to which this subsection does not apply. (Ex. Sess. 1936, c. 1, s. 4; 1939, c. 27, ss. 4, 5; c. 141; 1941, c. 108, s. 2; 1943, c. 377, s. 5; 1945, c. 522, ss. 27-28; 1947, c. 326, s. 22; 1949, c. 424, s. 22; 1951, c. 332, s. 13; 1961, c. 454, s. 19; 1965, c. 795, ss. 17, 18; 1969, c. 575, ss. 10, 11; 1971, c. 673, ss. 27, 28; 1973, c. 172, s. 6; 1975, c. 2, s. 6; c. 8, ss. 1, 2; c. 226, ss. 1, 2; 1977, c. 727, s. 53; 1979, c. 660, ss. 20, 21, 29-31; 1981, c. 160, ss. 24, 25; c. 883; 1983, c. 585, s. 17; c. 625, ss. 2-5; 1985, c. 53; c. 197, ss. 4, 5; c. 552, ss. 10, 11; c. 616, s. 2; 1989, c. 707, s. 3; c. 770, s. 22; 1991, c. 423, s. 1; 1993 (Reg. Sess., 1994), c. 680, s. 5; 1995, c. 270, s. 1; c. 284, s. 1; 1997-398, s. 5; 1997-456, s.27; 1999-463, Ex. Sess., s. 7; 2003-1, s. 1; 2003-220, s. 5; 2005-410, s. 1.)

Legal Periodicals. — For note on availability for suitable work, see 34 N.C.L. Rev. 591 (1956).

For survey of 1972 case law on the applicability of the "available for work" requirement to voluntary retirees, see 51 N.C.L. Rev. 1205 (1973).

For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For article, "Smoking in the Workplace: Who Has What Rights?," see 11 Campbell L. Rev. 311 (1989).

For article discussing the protection of nonsmokers' rights in the workplace, see 11 Campbell L. Rev. 339 (1989).

CASE NOTES

Design of Employment Security Law. — See In re Watson, 273 N.C. 629, 161 S.E.2d 1 (1968).

The Employment Security Act was not designed to provide benefits to a person who is physically unable to work or who, for any other personal reason, would at no time be in a position to accept any employment if it were tendered to him, however capable and industrious such person may be. Milliken & Co. v. Griffin, 65 N.C. App. 492, 309 S.E.2d 733 (1983), cert. denied, 311 N.C. 402, 319 S.E.2d 272 (1984).

A person who must quit a job for health reasons but who is available for other employment is clearly not a person envisioned by this language. Both reason and justice demand that such a claimant receive unemployment benefits. Milliken & Co. v. Griffin, 65 N.C. App. 492, 309 S.E.2d 733 (1983), cert. denied, 311 N.C. 402, 319 S.E.2d 272 (1984).

For discussion of whether a person who loses his employment for health reasons has left involuntarily with good cause attributable to the employer, see Milliken & Co. v. Griffin, 65 N.C. App. 492, 309 S.E.2d 733 (1983), cert. denied, 311 N.C. 402, 319 S.E.2d 272 (1984).

Construed with G.S. 96-14. — This section and G.S. 96-14 as cognate statutes provide the overall formula governing the right to unemployment compensation benefits. Being thus in pari materia, they are to be construed together. In re Miller, 243 N.C. 509, 91 S.E.2d 241 (1956); In re Troutman, 264 N.C. 289, 141 S.E.2d 613 (1965).

Recovery of Both Workers' Compensation and Unemployment Benefits. — Several states allow the recovery of both workers' compensation and unemployment benefits for the same time period, in the absence of an express statutory prohibition. In North Carolina, there is no express prohibition of duplicate benefits, although a persuasive argument can be made that the General Assembly intended that there be no recovery of both workers' compensation and unemployment benefits. Dolbow v. Holland Indus., Inc., 64 N.C. App. 695, 308 S.E.2d 335 (1983), cert. denied, 310 N.C. 308, 312 S.E.2d 651 (1984).

"Able to Work". — The terms "able to work", "available for work", and "suitable employment" are not precise terms capable of application with mathematical precision. In re Thomas, 13 N.C. App. 513, 186 S.E.2d 623, rev'd on other grounds, 281 N.C. 598, 189 S.E.2d 245 (1972); In re Beatty, 22 N.C. App. 563, 207 S.E.2d 321, aff'd, 286 N.C. 226, 210 S.E.2d 193 (1974). See also, In re Watson, 273 N.C. 629, 161 S.E.2d 1 (1968).

The words "available for work" in this section mean "available for suitable work" in the same sense as the words "suitable work" are used in G.S. 96-14. In re Miller, 243 N.C. 509, 91 S.E.2d 241 (1956); In re Troutman, 264 N.C. 289, 141 S.E.2d 613 (1965); McNeil v. Employment Sec. Comm'n, 89 N.C. App. 142, 365 S.E.2d 306 (1988).

The phrase "available for work" is not susceptible of precise definition, and whether a person is available for work differs according to the facts of each individual case. In re Beatty, 286 N.C. 226, 210 S.E.2d 193 (1974); McNeil v. Employment Sec. Comm'n, 89 N.C. App. 142, 365 S.E.2d 306 (1988).

Availability requirement is said to be satisfied when an individual is willing, able and ready to accept suitable work which he does not have good cause to refuse, that is, when he is generally attached to the labor market. In re Beatty, 286 N.C. 226, 210 S.E.2d 193 (1974).

To be available for work a person must be in such a position that prospective employers will hire him for work which he is capable of performing. In re Yarboro, 42 N.C. App. 684, 257 S.E.2d 658 (1979).

For meaning of "available for work," see In re Watson, 273 N.C. 629, 161 S.E.2d 1 (1968).

A petitioner is not required to be available for work at all times. McNeil v. Employment Sec. Comm'n, 89 N.C. App. 142, 365 S.E.2d 306 (1988).

This section forbids denial of unemployment benefits solely because of school enrollment and attendance. McNeil v. Employment Sec. Comm'n, 89 N.C. App. 142, 365 S.E.2d 306 (1988).

Where petitioner was both a full-time student and a full-time employee when she was laid off from work, she could not be denied unemployment benefits if she was "otherwise eligible" to receive those benefits, and in determining whether she was otherwise eligible for benefits, this section required that she not be denied benefits because of school enrollment and attendance. McNeil v. Employment Sec. Comm'n, 89 N.C. App. 142, 365 S.E.2d 306 (1988).

A claimant refusing to consider employment during her Sabbath did not render herself unavailable for work within the meaning of this section. In re Miller, 243 N.C. 509, 91 S.E.2d 241 (1956).

Large measure of administrative discretion must be granted to the Employment Security Commission in applying the terms "able to work", "available for work", and "suitable employment" to specific cases. In re Beatty, 22 N.C. App. 563, 207 S.E.2d 321, aff'd, 286 N.C. 226, 210 S.E.2d 193 (1974).

Restrictions Claimant Places on His Employment. — It is essentially a matter of degree to ascertain to what extent a claimant can impose restrictions and on what these restrictions must be based. In re Beatty, 286 N.C. 226, 210 S.E.2d 193 (1974).

The problem is whether or not the restrictions which the claimant places on his employment serve to limit the work which a claimant can accept to such a degree that he is no longer genuinely attached to the labor force. In re Beatty, 286 N.C. 226, 210 S.E.2d 193 (1974).

Labor Market to Be Described in Terms of Individual. — Since, under unemployment compensation laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. In re Beatty, 286 N.C. 226, 210 S.E.2d 193 (1974).

Significance of Claimant's Age in Determining Labor Market. — For a case discussing the significance of the fact that employers in a locality do not customarily employ persons of claimant's advanced age, see In re Thomas, 13 N.C. App. 513, 186 S.E.2d 623, rev'd on other grounds, 281 N.C. 598, 189 S.E.2d 245 (1972).

Claimant's Burden of Proof. — A claimant in an appeals hearing has the burden of proving that he is not disqualified from receiving unemployment insurance benefits. Hoke v. Brinlaw Mfg. Co., 73 N.C. App. 553, 327 S.E.2d 254 (1985).

Quantum of Proof of Availability for Work. — The Commission erred in requiring a 70-year-old claimant to show by clear, cogent and convincing evidence that she had reentered the labor force after having voluntarily retired from her job as a laundry worker. Under former G.S. 143-318(1), the claimant had the burden to show that she was "available for work" only by the greater weight of the evidence. In re Thomas, 281 N.C. 598, 189 S.E.2d 245 (1972).

Duty to Assist Claimant Appearing Without Counsel. — The Commission is not required to notify a claimant of the specific facts that he will be required to establish or to prove the claimant's case for him. However, the Commission does have the responsibility to conduct its hearings in a manner that allows a party the opportunity to make the required showing. Especially in the case of an uncounseled claimant, the Commission's responsibility involves asking the right questions. Hoke v. Brinlaw Mfg. Co., 73 N.C. App. 553, 327 S.E.2d 254 (1985).

Improper to Disqualify Pro Se Claimant Where Referee Did Not Ask Relevant Questions. — It was not appropriate for the Commission to disqualify a pro se claimant from receiving benefits because she failed to produce evidence of facts that case law from other states says she must establish when the appeals referee never even asked her the relevant questions. Hoke v. Brinlaw Mfg. Co., 73 N.C. App. 553, 327 S.E.2d 254 (1985).

Where the Commission's findings of fact are amply supported by the evidence in the record, the Supreme Court is bound by the Commission's findings of fact. In re Beatty, 286 N.C. 226, 210 S.E.2d 193 (1974).

Evidence Showing Failure to Actively Seek Work. — Evidence that during a period of six months claimant's efforts to obtain employment, in addition to reporting to the employment service office, were limited to two occasions at one mill and one occasion at each of three other mills, is sufficient to sustain the Commission's finding that he had failed to show that he had been actively seeking work within the purview of subdivision (3) of subsection (a) of this section. State ex rel. Emp. Sec. Comm'n v. Roberts, 230 N.C. 262, 52 S.E.2d 890 (1949).

Vacation Periods. — The statute does not prescribe; it merely limits the total vacation period for which an employee is ineligible for compensation to a total of two weeks. In re Southern, 247 N.C. 544, 101 S.E.2d 327 (1958).

Plant Shut Down for Additional Week of Vacation. — Where an employer, in addition to one week paid vacation provided for in the contract, shuts down its plant for an additional week of vacation during the Christmas period, its employees are not entitled to unemployment compensation for the additional week under this section. In re Southern, 247 N.C. 544, 101 S.E.2d 327 (1958).

By their adherence to the terms of the guaranteed annual income provisions of their collective bargaining agreement, claimants placed themselves in a position which, for all practical purposes, eliminated their availability for work in contravention of the requirements of subdivision (a)(3) of this section. In re Beatty, 286 N.C. 226, 210 S.E.2d 193 (1974).

Commission erred in awarding unemployment benefits without making a finding as required by subdivisions (a)(1) and (a)(2) that claimant had registered for work and continued to report to an employment office and that he had made a claim for benefits in accordance with G.S. 96-15(a). The Commission's finding that three separate claim series were started for claimant was insufficient to meet the statutory requirements. In re George, 42 N.C. App. 490, 256 S.E.2d 826 (1979).

Claimant Not Available While Awaiting Sentencing. — Where a claimant for unemployment compensation pleaded guilty to a charge of selling a controlled substance and testified that he was not hired because prospective employers were "waiting to see what my sentence will be," the Commission could conclude from this that claimant was not in such a position that prospective employers would hire him and that he was not "available for work." In re Yarboro, 42 N.C. App. 684, 257 S.E.2d 658 (1979).

Employee of Project Headstart. — Project Headstart is a school within the ordinary meaning of the term, and the situation of an employee of Project Headstart is one of those addressed by the "secondary school provision" of this section, excluding from unemployment benefits those who are subject to school-related seasonal unemployment. In re Huntley, 42 N.C. App. 1, 255 S.E.2d 574, cert. denied, 298 N.C. 297, 259 S.E.2d 913 (1979).

Seasonal agricultural workers (SAW) are eligible to receive state unemployment insurance benefits. State ex rel. Emp. Sec. Comm'n v. Hopkins, 111 N.C. App. 437, 432 S.E.2d 703 (1993).

Applied in White v. Employment Sec. Comm'n, 93 N.C. App. 762, 379 S.E.2d 91 (1989).

Cited in Textile Workers Union v. Cone Mills Corp., 268 F.2d 920 (4th Cir. 1959); Textile Workers Union v. Cone Mills Corp., 188 F. Supp. 728 (M.D.N.C. 1960); In re Tyson, 253 N.C. 662, 117 S.E.2d 854 (1961); Gorski v. North Carolina Symphony Soc'y, Inc., 310 N.C. 686, 314 S.E.2d 539 (1984); Gilliam v. Employment Sec. Comm'n, 110 N.C. App. 796, 431 S.E.2d 772 (1993).

§ 96-14. Disqualification for benefits.

An individual shall be disqualified for benefits:

(1) For the duration of his unemployment beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because he left work without good cause attributable to the employer.

Where an individual leaves work due solely to a disability incurred or other health condition, whether or not related to the work, he shall not be disqualified for benefits if the individual shows:

a. That, at the time of leaving, an adequate disability or health condition of the employee, of a minor child who is in the legally recognized custody of the individual, of an aged or disabled parent of the individual, or of a disabled member of the individual's immediate family, either medically diagnosed or otherwise shown by competent evidence, existed to justify the leaving and prevented the employee from doing other alternative work offered by the employer which pays the minimum wage or eighty-five percent (85%) of the individual's regular wage, whichever is greater; and

b. That, at a reasonable time prior to leaving, the individual gave the employer notice of the disability or health condition.

Where an employee is notified by the employer that such employee will be separated from employment on some future date and the employee leaves work prior to this date because of the impending separation, the employee shall be deemed to have left work voluntarily and the leaving shall be without good cause attributable to the employer. However, if the employee shows to the satisfaction of the Commission that it was impracticable or unduly burdensome for the employee to work until the announced separation date, the permanent disqualification imposed for leaving work without good cause attributable to the employer may be reduced to the greater of four weeks or the period running from the beginning of the week during which the claim for benefits was made until the end of the week of the announced separation date.

An employer's placing an individual on a bona fide disciplinary suspension of 10 or fewer consecutive calendar days shall not constitute good cause for leaving work.

(1a) Where an individual leaves work, the burden of showing good cause attributable to the employer rests on said individual, and the burden shall not be shifted to the employer.

(1b) Where an individual leaves work due solely to a unilateral and permanent reduction in work hours of more than twenty percent (20%) of the customary scheduled full-time work hours in the establishment, plant, or industry in which he was employed, said leaving shall constitute good cause attributable to the employer for leaving work. Provided however that if said reduction is temporary or was occasioned by malfeasance, misfeasance or nonfeasance on the part of the individual, such reduction in work hours shall not constitute good cause attributable to the employer for leaving work.

(1c) Where an individual leaves work due solely to a unilateral and permanent reduction in his rate of pay of more than fifteen percent (15%), said leaving shall constitute good cause attributable to the employer for leaving work. Provided however that if said reduction is temporary or was occasioned by malfeasance, misfeasance or nonfeasance on the part of the individual, such reduction in pay shall not constitute good cause attributable to the employer for leaving work.

(1d) For the purposes of this Chapter, any claimant leaving work to accompany the claimant's spouse to a new place of residence where that spouse has secured work in a location that is too far removed for the claimant reasonably to continue his or her work shall serve a time certain disqualification for benefits for a period of two weeks beginning the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits. Notwithstanding the other provisions of this subdivision, any claimant leaving work to accompany the claimant's spouse to a new place of residence because the spouse has been reassigned from one military assignment to another shall be deemed good cause for leaving work.

(1e) For the duration of an individual's unemployment, beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits, if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because the individual, without good cause attributable to the employer and after receiving notice from the employer, refused to return to work for a former employer when recalled within four weeks from a layoff, or when recalled in any week in which the work search requirements under G.S. 96-13 have been waived. As used in this subsection, the term "layoff" means a temporary separation from work due to no work available for the individual at the time of separation from work and the individual is retained on the employer's payroll and is a continuing employee subject to recall by the employer.

(1f) For the purposes of this Chapter, any claimant's leaving work, or discharge, if the claimant has been adjudged an aggrieved party as set forth by Chapter 50B of the General Statutes or there is evidence of domestic violence, sexual offense, or stalking, or the claimant has been granted program participant status pursuant to G.S. 15C-4 as the result of domestic violence committed upon the claimant or upon a minor child with or in the custody of the claimant by a person who has or has had a familial relationship with the claimant or minor child, shall constitute good cause for leaving work. Benefits paid on the basis of this section shall be noncharged. Evidence of domestic violence, sexual offense, or stalking may include: (i) law enforcement, court, or federal agency records or files; (ii) documentation from a domestic violence or sexual assault program if the claimant is alleged to be a victim of domestic violence or sexual assault; and (iii) documentation from a religious, medical, or other professional from whom the claimant has sought assistance in dealing with the alleged domestic violence, sexual abuse, or stalking.

(1g) For purposes of this Chapter, separation or discharge solely due to an inability to accept work during a particular shift as a result of an undue family hardship shall constitute good cause for leaving work. Benefits paid on the basis of this section shall not be charged to the account of the employer.

(2) For the duration of his unemployment beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because he was discharged for misconduct connected with his work. Misconduct connected with the work is defined as conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

"Discharge for misconduct with the work" as used in this section is defined to include but not be limited to separation initiated by an employer for reporting to work significantly impaired by alcohol or illegal drugs; consuming alcohol or illegal drugs on employer's premises; conviction by a court of competent jurisdiction for manufacturing, selling, or distribution of a controlled substance punishable under G.S. 90-95(a)(1) or G.S. 90-95(a)(2) while in the employ of said employer.

(2a) For a period of not less than four nor more than 13 weeks beginning with the first day of the first week during which or after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that such individual is, at the time the claim is filed, unemployed because he was discharged for substantial fault on his part connected with his work not rising to the level of misconduct. Substantial fault is defined to include those acts or omissions of employees over which they exercised reasonable control and which violate reasonable requirements of the job but shall not include (1) minor infractions of rules unless such infractions are repeated after a warning was received by the employee, (2) inadvertent mistakes made by the employee, nor (3) failures to perform work because of insufficient skill, ability, or equipment. Upon a finding of discharge under this subsection, the individual shall be disqualified for a period of nine weeks unless, based on findings by the Commission of aggravating or mitigating circumstances, the period of disqualification is lengthened or shortened within the limits set out above. The length of the disqualification so set by the Commission shall not be disturbed by a reviewing court except upon a finding of plain error.

(2b) For the duration of his unemployment beginning with the first day of the first week during which or after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that the individual is, at the time such claim is filed, unemployed because the individual has been discharged from employment because a license, certificate, permit, bond, or surety that is necessary for the performance of his employment and that the individual is responsible to supply has been revoked, suspended, or otherwise lost to him, or his application therefor has been denied for a cause that was within his power to control, guard against, or prevent.

(3) For the duration of his unemployment beginning with the first day of the first week in which the disqualifying act occurs if it is determined by the Commission that such individual has failed without good cause (i) to apply for available suitable work when so directed by the employment office of the Commission; or (ii) to accept suitable work when offered him; or (iii) to return to his customary self-employment (if any) when so directed by the Commission. Provided further, an otherwise eligible individual who is attending a vocational school or training program which has been approved by the Commission for such individual shall not be denied benefits because he refuses to apply for or accept suitable work during such period of training.

In determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to his health, safety, and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence.

Notwithstanding any other provisions of this Chapter, no work shall be deemed suitable and benefits shall not be denied under this Chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

a. If the position offered is vacant due directly to a strike, lockout, or other labor dispute;

b. If the remuneration, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;

c. If as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

(4) For the duration of his unemployment beginning with the first day of the first week after the disqualifying act occurs with respect to which

week an individual files a claim for benefits if it is determined by the Commission that:

a. Such individual has failed without good cause to attend a vocational school or training program when so directed by the Commission;

b. Such individual has discontinued his training course without good cause; or

c. If the individual is separated from his training course or vocational school due to misconduct.

(5) For any week with respect to which the Commission finds that his total or partial unemployment is caused by a labor dispute in active progress on or after July 1, 1961, at the factory, establishment, or other premises at which he is or was last employed or caused after such date by a labor dispute at another place within this State which is owned or operated by the same employing unit which owns or operates the factory, establishment, or other premises at which he is or was last employed and which supplies materials or services necessary to the continued and usual operation of the premises at which he is or was last employed. Provided, that an individual disqualified under the provisions of this subdivision shall continue to be disqualified thereunder after the labor dispute has ceased to be in active progress for such period of time as is reasonably necessary and required to physically resume operations in the method of operating in use at the plant, factory, or establishment of the employing unit.

(6) If the Commission finds he is customarily self-employed and can reasonably return to self-employment.

(6a) For the duration of his unemployment beginning with the first day of the first week during which or after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that the individual is, at the time the claim is filed, unemployed because the individual's ownership share of the employing entity was voluntarily sold and, at the time of the sale:

a. The employing entity was a corporation and the individual held five percent (5%) or more of the outstanding shares of the voting stock of the corporation;

b. The employing entity was a partnership, limited or general, and the individual was a limited or general partner; or

c. The employing entity was a proprietorship, and the individual was a proprietor.

(7) For any week after June 30, 1939, with respect to which he shall have and assert any right to unemployment benefits under an employment security law of either the federal or a state government, other than the State of North Carolina.

(8) For any week with respect to which he has received any sum from the employer pursuant to an order of any court, the National Labor Relations Board, any other lawfully constituted adjudicative agency, or by private agreement, consent or arbitration for loss of pay by reason of discharge. When the amount so paid by the employer is in a lump sum and covers a period of more than one week, such amount shall be allocated to the weeks in the period on such a pro rata basis as the Commission may adopt and if the amount so prorated to a particular week would, if it had been earned by the claimant during that week of unemployment, have resulted in a reduced benefit payment as provided in G.S. 96-12, the claimant shall be entitled to receive such reduced payment if the claimant was otherwise eligible.

Further provided, any benefits previously paid for weeks of unemployment with respect to which back pay awards, or other such compensation, are made shall constitute an overpayment of benefits and such amounts shall be deducted from the award by the employer prior to payment to the employee, and shall be transmitted promptly (or within 5 days) to the Commission by the employer for application against the overpayment. Provided, however, the removal of any charges made against the employer as a result of such previously paid benefits shall be applied to the calendar year in which the overpayment is transmitted to the Commission, and no attempt shall be made to relate such a credit to the period to which the award applies. Any amount of overpayment so deducted by the employer and not transmitted to the Commission or the failure of an employer to deduct an overpayment shall be subject to the same procedures for collection as is provided for contributions by G.S. 96-10. It is the purpose of this paragraph to assure the prompt collection of overpayments of U. I. benefits, and it shall be construed accordingly.

(9) The amount of compensation payable to an individual for any week which begins after July 2, 1977, and which begins in a period with respect to which such individual is receiving a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment which is based on the previous work of such individual shall be reduced (but not below zero) by an amount rounded to the nearest dollar equal to the amount of such pension, retirement or retired pay, annuity, or other payment which is reasonably attributable to such week.

The amount of benefits payable to an individual for any week which begins after July 1, 1981, and which begins in a period with respect to which such individual is receiving a governmental or other pension, retirement or retired pay, annuity, or other similar periodic payment which is based on the previous work of such individual shall be reduced (but not below zero) by the amounts of any such pension, retirement or retired pay, annuity, or other payment contributed to in part or in total by the individual's base period employers; provided, however, that the amount of all payments received by an individual under the Railroad Retirement Act shall be deducted from the individual's benefit amount. Provided further, that all such reduced weekly benefit amounts shall be rounded to the nearest lower full dollar amount (if not a full dollar amount).

(10) Any employee disqualified for the duration of his unemployment due to the provisions of (1), (2), (2B), (3), (4), or (6A) above may have that permanent disqualification removed if he meets the following three conditions:

a. Returns to work for at least five weeks and is paid cumulative wages of at least 10 times his weekly benefit amount;
b. Subsequently becomes unemployed through no fault of his own; and
c. Meets the availability requirements of the law.

Any time certain disqualification imposed by the provisions of subsections (1), (1D), and (2A) shall be removed by serving the disqualification imposed as provided by this subsection.

Provided for good cause shown the Commission in its discretion may as to any permanent disqualification provided in this Chapter reduce the disqualification period to a time certain but not less than five weeks. The maximum amount of benefits due any individual whose permanent disqualification is changed to a time certain shall be reduced by an amount determined by multiplying the number of weeks of disqualification by the weekly benefit amount.

Provided further, any permanent disqualification pursuant to the provisions of (1), (2), (3), (4), or (6A) shall terminate two years after the effective date of the beginning of said disqualification.

(11) a. Notwithstanding any other provisions of this Chapter, no otherwise eligible individual shall be denied benefits for any week because he or she is in training approved under Section 236(a)(1) of the Trade Act of 1974, nor shall such individual be denied benefits by reason of leaving work to enter such training, provided the work left is not suitable employment, or because of the application to any such week in training of provisions in this law (or any applicable Federal unemployment compensation law), relating to availability for work, active search for work, or refusal to accept work.

b. For purposes of this subsection, the term "suitable employment" means with respect to an individual, work of a substantially equal or higher skill level than the individual's past adversely affected employment (as defined for purposes of the Trade Act of 1974), and wages for such work at not less than eighty percent (80%) of the individual's average weekly wage as determined for the purposes of the Trade Act of 1974.

(12) Notwithstanding any other provision of this Chapter, no otherwise eligible individual shall be denied benefits for any weeks if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because he left work solely as a result of a lack of work caused by the bankruptcy of his employer. (Ex. Sess. 1936, c. 1, s. 5; 1937, c. 448, ss. 2, 3; 1939, c. 52, s. 1; 1941, c. 108, ss. 3, 4; 1943, c. 377, ss. 7, 8; 1945, c. 522, s. 29; 1947, c. 598, s. 10; c. 881, ss. 1, 2; 1949, c. 424, ss. 23-25; 1951, c. 332, s. 14; 1955, c. 385, ss. 7, 8; 1961, c. 454, s. 20; 1965, c. 795, s. 19; 1969, c. 575, s. 12; 1971, c. 673, s. 29; 1977, c. 26; 1981, c. 160, s. 26; c. 593; 1981 (Reg. Sess., 1982), c. 1178, s. 15; 1983, c. 585, s. 18; c. 625, ss. 6, 8; 1985, c. 552, ss. 12, 14-17; 1987 (Reg. Sess., 1988), c. 999, ss. 4, 5; 1989, c. 583, ss. 7-10, 15; c. 666; c. 707, s. 5; 1991, c. 219, s. 1; 1993, c. 122, s. 3; c. 343, ss. 2, 3; 1997-456, s. 27; 1998-212, s. 12.27A(p); 1999-196, s. 4; 2001-251, s. 2; 2003-220, ss. 1, 3, 6.)

Editor's Note. — The phrase "U.I. benefits," appearing in subdivision (8), refers to Unemployment Insurance benefits.

Legal Periodicals. — For note on the geographical scope of the labor dispute disqualification, see 29 N.C.L. Rev. 472 (1951).

For note on availability for suitable work, see 34 N.C.L. Rev. 591 (1956).

For survey of 1972 case law on the applicability of the "available for work" requirement to voluntary retirees, see 51 N.C.L. Rev. 1205 (1973).

For survey of 1976 case law dealing with administrative law, see 55 N.C.L. Rev. 898 (1977).

For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For note on unemployment compensation and labor dispute disqualification, see 16 Wake Forest L. Rev. 472 (1980).

For survey of 1980 administrative law, see 59 N.C.L. Rev. 1040 (1981).

For survey of 1981 administrative law, see 60 N.C.L. Rev. 1165 (1982).

For comment discussing unemployment compensation in light of Intercraft Indus. Corp. v. Morrison, 305 N.C. 373, 289 S.E.2d 357 (1982), see 18 Wake Forest L. Rev. 921 (1982).

For survey of 1982 administrative law, see 61 N.C.L. Rev. 961 (1983).

For article, "Josey v. Employment Security Commission: Permanent Disqualification and Re-entitlement for Unemployment Compensation Benefits Under Section 96-14," see 67 N.C.L. Rev. 1509 (1989).

CASE NOTES

I. General Consideration.
II. Leaving Work Voluntarily Without Good Cause.
III. Misconduct.
IV. Suitable Work.
V. Labor Disputes.
VI. Judicial Review.

I. GENERAL CONSIDERATION.

Policy. — The General Assembly has stated the policy of this State is that the compulsory reserves required under the Employment Security Law be used for the benefit of persons unemployed through no fault of their own. In order to carry out the intent of the act, its provisions should be liberally construed in favor of applicants. By contrast, our courts have said that sections of the act imposing disqualifications for its benefits should be strictly construed in favor of the claimant and should not be enlarged by implication. Couch v. North Carolina Emp. Sec. Comm'n, 89 N.C. App. 405, 366 S.E.2d 574, aff'd, 323 N.C. 472, 373 S.E.2d 440 (1988).

Provisions of This Section Prevail over General Policy of G.S. 96-2. — A specific ground for disqualifying an employee from unemployment benefits in this section, "when applicable," prevails over the general policy in G.S. 96-2 of providing benefits to workers who are "unemployed through no fault of their own." Lynch v. PPG Indus., 105 N.C. App. 223, 412 S.E.2d 163 (1992).

Disqualification statutes are to be strictly construed in favor of claimant, with the employer having the burden of proving that the claimant is disqualified. McGaha v. Nancy's Styling Salon, 90 N.C. App. 214, 368 S.E.2d 49, cert. denied, 323 N.C. 174, 373 S.E.2d 110 (1988).

Design of Employment Security Law. — See In re Watson, 273 N.C. 629, 161 S.E.2d 1 (1968).

The Employment Security Law is designed to provide for the general welfare of North Carolina citizens. Bunn v. North Carolina State Univ., 70 N.C. App. 699, 321 S.E.2d 32 (1984), cert. denied, 313 N.C. 173, 326 S.E.2d 31 (1985).

The Employment Security Act was not designed to provide the payment of benefits to a person who is physically unable to work or who, for any other personal reason, would at no time be in a position to accept any employment if it were tendered to him, however capable and industrious such person may be. Milliken & Co. v. Griffin, 65 N.C. App. 492, 309 S.E.2d 733 (1983), cert. denied, 311 N.C. 402, 319 S.E.2d 272 (1984).

This Act does not contemplate penalizing workers who choose in favor of their own health, safety or ethical standards and against an affirmative or de facto policy of the employer to the contrary. Ray v. Broyhill Furn. Indus., 81 N.C. App. 586, 344 S.E.2d 798 (1986).

As to a person who must quit a job for health reasons but who is available for other employment, both reason and justice demand that such a claimant receive unemployment benefits. Milliken & Co. v. Griffin, 65 N.C. App. 492, 309 S.E.2d 733 (1983), cert. denied, 311 N.C. 402, 319 S.E.2d 272 (1984).

Construction. — Sections of this Chapter imposing disqualifications for its benefits should be strictly construed in favor of the claimant and should not be enlarged by implication or by adding to one disqualifying provision words found only in another. In re Watson, 273 N.C. 629, 161 S.E.2d 1 (1968); In re Scaringelli, 39 N.C. App. 648, 251 S.E.2d 728 (1979).

The Employment Security Act was designed to provide protection against economic insecurity due to unemployment and should be liberally construed in favor of applicants. Eason v. Gould, Inc., 66 N.C. App. 260, 311 S.E.2d 372 (1984), aff'd, 312 N.C. 618, 324 S.E.2d 223 (1985).

The disqualifying provisions of this section must be strictly construed, since the main purpose of the law is to benefit eligible workers. The section must be construed to authorize benefits to one who becomes involuntarily unemployed, who is physically able to work, who is available for work at suitable employment and who, though actively seeking such employment, cannot find it through no fault of his own. Wright v. Bus Term. Restaurant, 71 N.C. App. 395, 322 S.E.2d 201 (1984).

The disqualification rules must be applied strictly in favor of the claimant. This rule stems from the legislative policy behind the Employment Security Law, conceived during the Great Depression of the 1930's, to provide support for persons who are able and willing to work, but who have become unemployed because of conditions of their former employment, and who continue to be unemployed because of generally depressed labor market conditions in their community. The meaning of this rule of construction and the policy behind it is that where a statutory term is vague, and the claimant is arguably covered, the claimant should be given the benefit of the doubt. Bunn v. North Carolina State Univ., 70 N.C. App. 699, 321 S.E.2d 32 (1984), cert. denied, 313 N.C. 173, 326 S.E.2d 31 (1985).

Provisions of the Act which impose disqualifications for its benefits must be strictly construed in favor of the claimant. Poteat v. Employment Sec. Comm'n, 82 N.C. App. 138, 345 S.E.2d 238 (1986), aff'd in part and rev'd in part, 319 N.C. 201, 353 S.E.2d 219 (1987).

G.S. 96-14(1) was not applicable to a former employee's case because that section applied to cases in which an employee terminated an employment relationship and then sought unemployment benefits. However, the employee's employment was terminated by the employer; therefore, the controlling statute was G.S. 96-14(2). James v. Lemmons, 177 N.C. App. 509, 629 S.E.2d 324, 2006 N.C. App. LEXIS 1075 (2006).

Disqualification for Benefits Under This Section. — Under this section, as amended effective July 1, 1985, a claimant may be disqualified for unemployment benefits, not only for the period of time prior to a scheduled separation, but also for that period of time after the date of a scheduled separation, unless the claimant proves that it was impracticable or unduly burdensome for the individual to work until the announced separation date. If the claimant proves this to the satisfaction of the Commission, the claimant is entitled to full benefits, with only a limited period of disqualification as provided in the closing provisions of subdivision (1). Seaberry v. W.T. Bridgers Contract Labor, 91 N.C. App. 499, 372 S.E.2d 348 (1988).

This section prevails over the provision of G.S. 96-2 stating the general policy of the statute to provide for benefits to workers who are "unemployed through no fault of their own." In re Steelman, 219 N.C. 306, 13 S.E.2d 544, 135 A.L.R. 929 (1941); In re Usery, 31 N.C. App. 703, 230 S.E.2d 585 (1976), cert. denied, 292 N.C. 265, 233 S.E.2d 396 (1977); In re Scaringelli, 39 N.C. App. 648, 251 S.E.2d 728 (1979).

Section Construed with G.S. 96-13. — This section and G.S. 96-13 as cognate statutes provide the overall formula governing the right to unemployment compensation benefits. Being thus in pari materia, they are to be construed together. In re Miller, 243 N.C. 509, 91 S.E.2d 241 (1956); In re Troutman, 264 N.C. 289, 141 S.E.2d 613 (1965).

Burden of Proof. — Each claimant is required to show to the satisfaction of the Commission that he is not disqualified for benefits under this section. In re Steelman, 219 N.C. 306, 13 S.E.2d 544, 135 A.L.R. 929 (1941); State ex rel. Emp. Sec. Comm'n v. Jarrell, 231 N.C. 381, 57 S.E.2d 403 (1950).

The claimant has the burden of proving that he is not disqualified from receiving unemployment benefits. Huggins v. Precision Concrete Forming, 70 N.C. App. 571, 320 S.E.2d 416 (1984).

Ordinarily a claimant is presumed to be entitled to benefits under the Unemployment Compensation Act, but this is a rebuttable presumption, with the burden on the employer to show circumstances which disqualify the claimant, noting that the employer did not except to or attack the statement of the Commission in its decision that the employer had the responsibility to show that a claimant for benefits was discharged for misconduct within the meaning of the law. Intercraft Indus. Corp. v. Morrison, 305 N.C. 373, 289 S.E.2d 357 (1982).

The burden is on the employer to show circumstances which disqualify the claimant. Umstead v. Employment Sec. Comm'n, 75 N.C. App. 538, 331 S.E.2d 218, cert. denied, 314 N.C. 675, 336 S.E.2d 405, 337 S.E.2d 853 (1985).

A discharged employee is presumed to be entitled to unemployment compensation benefits and the employer has the burden of rebutting the presumption by proving disqualification, and taking additional evidence upon remand would allow employers repeated opportunities to meet their burden of proving that an employee should be disqualified. Dunlap v. Clarke Checks, Inc., 92 N.C. App. 581, 375 S.E.2d 171 (1989).

Ordinarily a claimant is presumed to be entitled to benefits under the Unemployment Compensation Act; the employer bears the burden of rebutting this presumption by showing circumstances which disqualify the claimant. Williams v. Davie County, 120 N.C. App. 160, 461 S.E.2d 25 (1995).

Effect of Filing Prematurely. — While subdivision (1) of this section sets "the time such claim is filed" as determinative in assessing disqualification thereunder, the fact that a claim was filed during the four-day period during which employee could have continued to work for employer and thus was disqualified would not function to deny him benefits after that four-day period, when he was involuntarily unemployed through no fault of his own. Poteat v. Employment Sec. Comm'n, 319 N.C. 201, 353 S.E.2d 219 (1987).

Recovery of Both Workers' Compensation and Unemployment Benefits. — Several states allow the recovery of both workers' compensation and unemployment benefits for the same time period, in the absence of an express statutory prohibition. In North Carolina, there is no express prohibition of duplicate benefits, although a persuasive argument can be made that the General Assembly intended that there be no recovery of both workers' compensation and unemployment benefits.

Dolbow v. Holland Indus., Inc., 64 N.C. App. 695, 308 S.E.2d 335 (1983), cert. denied, 310 N.C. 308, 312 S.E.2d 651 (1984).

The doctrine of res judicata is inapplicable to adjudication by unemployment compensation agencies. Roberts v. Wake Forest Univ., 55 N.C. App. 430, 286 S.E.2d 120, cert. denied, 305 N.C. 586, 292 S.E.2d 571 (1982).

Sexual Harassment. — Where employee was sexually harassed, she left employment for good cause attributable to her employer. Marlow v. North Carolina Emp. Sec. Comm'n, 127 N.C. App. 734, 493 S.E.2d 302 (1997), cert. denied, 347 N.C. 577, 502 S.E.2d 595 (1998).

Employees' failure to report sexual harassment pursuant to her employer's grievance policy did not disqualify her from unemployment benefits eligibility. Marlow v. North Carolina Emp. Sec. Comm'n, 127 N.C. App. 734, 493 S.E.2d 302 (1997), cert. denied, 347 N.C. 577, 502 S.E.2d 595 (1998).

Applied in In re Stutts, 245 N.C. 405, 95 S.E.2d 919 (1957); Blue Jeans Corp. v. Amalgamated Clothing Workers of Am., 275 N.C. 503, 169 S.E.2d 867 (1969); In re Vinson, 42 N.C. App. 28, 255 S.E.2d 644 (1979); Yelverton v. Kemp Furn. Indus., Inc., 51 N.C. App. 215, 275 S.E.2d 553 (1981); Tastee Freez Cafeteria v. Watson, 64 N.C. App. 562, 307 S.E.2d 800 (1983); Forbis v. Wesleyan Nursing Home, Inc., 73 N.C. App. 166, 325 S.E.2d 651 (1985); Nadeau v. Employment Sec. Comm'n, 97 N.C. App. 272, 388 S.E.2d 145 (1990).

Cited in In re Tyson, 253 N.C. 662, 117 S.E.2d 854 (1961); Cianfarra v. North Carolina Dep't of Transp., 56 N.C. App. 380, 289 S.E.2d 100 (1982); Gorski v. North Carolina Symphony Soc'y, Inc., 310 N.C. 686, 314 S.E.2d 539 (1984); Brady v. Thurston Motor Lines, 753 F.2d 1269 (4th Cir. 1985); State v. Anderson, 88 N.C. App. 545, 364 S.E.2d 163 (1988); McNeil v. Employment Sec. Comm'n, 89 N.C. App. 142, 365 S.E.2d 306 (1988); Walker v. Goodson Farms, Inc., 90 N.C. App. 478, 369 S.E.2d 122 (1988); Johnson v. United States Textiles Corp., 105 N.C. App. 680, 414 S.E.2d 374 (1992); Grantham v. R.G. Barry Corp., 115 N.C. App. 293, 444 S.E.2d 659 (1994); Employment Sec. Comm'n v. Peace, 341 N.C. 716, 462 S.E.2d 222 (1995); Shah v. Johnson, 140 N.C. App. 58, 535 S.E.2d 577, 2000 N.C. App. LEXIS 1089 (2000); Workman v. Rutherford Elec. Mbrshp. Corp., 170 N.C. App. 481, 613 S.E.2d 243, 2005 N.C. App. LEXIS 1077 (2005).

II. LEAVING WORK VOLUNTARILY WITHOUT GOOD CAUSE.

"Work". — The labor, task, or duty that affords one his accustomed means of livelihood is the type of "work" to which subdivision (1) of this section applies. In re Scaringelli, 39 N.C. App. 648, 251 S.E.2d 728 (1979).

Student's Services as Research Assistant Are Not Work. — The claimant's services as a research assistant under a fellowship granted to students by The University of North Carolina are not "employment" within the meaning of the Act, nor did they constitute "work" within the meaning of subdivision (1) of this section. In re Scaringelli, 39 N.C. App. 648, 251 S.E.2d 728 (1979).

"Voluntary". — An employee has not left his job voluntarily when events beyond the employee's control or the wishes of the employer cause the termination. Eason v. Gould, Inc., 66 N.C. App. 260, 311 S.E.2d 372 (1984), aff'd, 312 N.C. 618, 324 S.E.2d 223 (1985).

Later Wish to Rescind Resignation. — Fact that claimant later wished to rescind her resignation does not negate the fact that it was voluntarily offered. Whicker v. High Point Pub. Schools, 56 N.C. App. 253, 287 S.E.2d 439 (1982).

Notice to Employer That Employee Is Leaving with Expectation of Later Returning. — Where an employee leaves employment because of a temporary disability with the expectation of later returning to work he is required to apply for a leave of absence, give a timely notice, or otherwise manifest an intention not to abandon the labor force. This is especially applicable where the leaving is an equivocal act, as where a pregnant woman leaves her employment and the leaving can be construed either as a temporary absence or an abandonment of the labor force. Sellers v. National Spinning Co., 64 N.C. App. 567, 307 S.E.2d 774 (1983), cert. denied, 310 N.C. 153, 311 S.E.2d 293 (1984).

The termination of the claimant's studies at The University of North Carolina and subsequently his research assistantship, which was part of a fellowship granted to students, did not constitute a voluntary abandonment of work within the meaning of subdivision (1) of this section. In re Scaringelli, 39 N.C. App. 648, 251 S.E.2d 728 (1979).

When Resignation Is Involuntary. — Employees who quit or resign employment because they are asked to do so by their employer do not leave "voluntarily" within the meaning of subdivision (1) of this section. Where the employer recommended that the employee resign, and clearly implied that the employee would be discharged if she failed to offer her resignation, this would constitute an involuntary separation. In re Werner, 44 N.C. App. 723, 263 S.E.2d 4 (1980).

"Good Cause" Defined. — "Good cause" is a reason which would be deemed by reasonable men and women valid and not indicative of an unwillingness to work. In re Clark, 47 N.C. App. 163, 266 S.E.2d 854 (1980); Intercraft Indus. Corp. v. Morrison, 305 N.C. 373, 289 S.E.2d 357 (1982); Huggins v. Precision Concrete Forming, 70 N.C. App. 571, 320 S.E.2d 416 (1984); Ray v. Broyhill Furn. Indus., 81 N.C. App. 586, 344 S.E.2d 798 (1986); Couch v. North Carolina Emp. Sec. Comm'n, 89 N.C. App. 405, 366 S.E.2d 574, aff'd, 323 N.C. 472, 373 S.E.2d 440 (1988); McGaha v. Nancy's Styling Salon, 90 N.C. App. 214, 368 S.E.2d 49, cert. denied, 323 N.C. 174, 373 S.E.2d 110 (1988).

"Good cause," as used in subdivision (1) of this section connotes a reason for rejecting work that would be deemed by reasonable men and women as valid and not indicative of an unwillingness to work. Sellers v. National Spinning Co., 64 N.C. App. 567, 307 S.E.2d 774 (1983), cert. denied, 310 N.C. 153, 311 S.E.2d 293 (1984).

A good cause within the meaning of subdivision (1) of this section includes a reaction to requests or policies of the employer which would be considered valid by reasonable minds. Eason v. Gould, Inc., 66 N.C. App. 260, 311 S.E.2d 372 (1984), aff'd, 312 N.C. 618, 324 S.E.2d 223 (1985).

Availability of Provision Establishing Good Cause Per Se. — In suit brought upon employee's separation for lack of available work, although some evidence in the record showed that claimant's weight interfered with some of his employment duties, where the employer offered no evidence that the claimant's weight interfered with all of claimant's duties to the extent that there was "no available work" for him, that portion of subdivision (1) establishing the issue of good cause per se was not available to employer. Seaberry v. W.T. Bridgers Contract Labor, 91 N.C. App. 499, 372 S.E.2d 348 (1988).

Where the acts of the employer in removing the plant eleven miles caused plaintiff to be unable to continue her employment, since by moving its plant the company caused plaintiff's commuting distance to be increased fifty percent (50%) and, in effect, destroyed plaintiff's ability to go from her home to the job site, plaintiff's leaving work was in response to the removal of the plant and not an act of her own free will, and therefore plaintiff left her work involuntarily. Barnes v. Singer Co., 324 N.C. 213, 376 S.E.2d 756 (1989).

"Attributable to the Employer". — A cause is "attributable to the employer" under this section if it is produced, caused, or created as a result of actions by the employer. Huggins v. Precision Concrete Forming, 70 N.C. App. 571, 320 S.E.2d 416 (1984); Bunn v. North Carolina State Univ., 70 N.C. App. 699, 321 S.E.2d 32 (1984), cert. denied, 313 N.C. 173, 326 S.E.2d 31 (1985).

Cause "attributable to the employer" is one which is produced, caused, created or as a result of actions by the employer. It also includes inaction by the employer. Ray v. Broyhill Furn. Indus., 81 N.C. App. 586, 344 S.E.2d 798 (1986).

"Attributable to the employer" means "produced, caused, created or as a result of actions by the employer." Couch v. North Carolina Emp. Sec. Comm'n, 89 N.C. App. 405, 366 S.E.2d 574, aff'd, 323 N.C. 472, 373 S.E.2d 440 (1988); McGaha v. Nancy's Styling Salon, 90 N.C. App. 214, 368 S.E.2d 49, cert. denied, 323 N.C. 174, 373 S.E.2d 110 (1988).

Respondent employer's moving of its plant was "good cause attributable to the employer" for petitioner's leaving her job, and she should not have been disqualified from receiving unemployment benefits. Watson v. Employment Sec. Comm'n, 111 N.C. App. 410, 432 S.E.2d 399 (1993).

A unilateral, substantial reduction in one's working hours by his employer may permit a finding of good cause attributable to the employer. Couch v. North Carolina Emp. Sec. Comm'n, 89 N.C. App. 405, 366 S.E.2d 574, aff'd, 323 N.C. 472, 373 S.E.2d 440 (1988).

Claimant's Quitting Held Voluntary. — Where there was no evidence that the notice of impending separation was offensive so as to embarrass or humiliate the claimant, and suitable work was available for seven more days, the quit by claimant prior to the date of scheduled separation was voluntary. Seaberry v. W.T. Bridgers Contract Labor, 91 N.C. App. 499, 372 S.E.2d 348 (1988).

When Claimant Disqualified. — A claimant is disqualified from receiving unemployment compensation only if he voluntarily left his position and the leaving was without good cause attributable to the employer. Couch v. North Carolina Emp. Sec. Comm'n, 89 N.C. App. 405, 366 S.E.2d 574, aff'd, 323 N.C. 472, 373 S.E.2d 440 (1988).

For an applicant to be disqualified from unemployment compensation benefits pursuant to subdivision (1) she must have voluntarily left her position and her leaving must be without good cause attributable to her employer. McGaha v. Nancy's Styling Salon, 90 N.C. App. 214, 368 S.E.2d 49, cert. denied, 323 N.C. 174, 373 S.E.2d 110 (1988).

In determining whether claimant left her position voluntarily, court must review external factors motivating employee. McGaha v. Nancy's Styling Salon, 90 N.C. App. 214, 368 S.E.2d 49, cert. denied, 323 N.C. 174, 373 S.E.2d 110 (1988).

Claimant voluntarily left work as a county social worker for good cause attributable to her employer and was thus entitled to unemployment compensation where she resigned her position because she was instructed by her supervisor to initiate custody proceedings for certain children after she had secured voluntary, revocable Board Home Agreements from the mothers to place their children in the temporary custody of others upon her assurances to the mothers that the children would be returned to the mothers upon request, and because she felt that the actions she was required to take violated the ethical standards of her profession. In re Clark, 47 N.C. App. 163, 266 S.E.2d 854 (1980).

Had claimant left her job because of racial discrimination practiced against her by her employer, she would have had good cause attributable to her employer and so would not have been disqualified for unemployment compensation benefits. In re Boulden, 47 N.C. App. 468, 267 S.E.2d 397 (1980).

Lack of Child Care as Good Cause. — Depending on circumstances disclosed by the evidence, the lack of child care may or may not be "good cause" for an unexcused absence from work and is a matter for the factfinder to decide. Intercraft Indus. Corp. v. Morrison, 305 N.C. 373, 289 S.E.2d 357 (1982).

For discussion of whether a person who loses his employment for health reasons has left involuntarily with good cause attributable to the employer, see Milliken & Co. v. Griffin, 65 N.C. App. 492, 309 S.E.2d 733 (1983), cert. denied, 311 N.C. 402, 319 S.E.2d 272 (1984).

Showing by Claimant Who Resigns for Health Reasons. — A claimant who resigns for health reasons need not produce a physician's note on or before the day she leaves. Rather, the claimant must only show by competent evidence that the health condition existed at the time of the leaving. Ray v. Broyhill Furn. Indus., 81 N.C. App. 586, 344 S.E.2d 798 (1986).

A reduction of hours does give good cause for voluntarily leaving a job. Couch v. North Carolina Emp. Sec. Comm'n, 89 N.C. App. 405, 366 S.E.2d 574, aff'd, 323 N.C. 472, 373 S.E.2d 440 (1988).

Hairdresser who had worked at salon during resort season each year for three years, being paid strictly on a commission basis, held to have left work voluntarily without good cause attributable to her employer. McGaha v. Nancy's Styling Salon, 90 N.C. App. 214, 368 S.E.2d 49, cert. denied, 323 N.C. 174, 373 S.E.2d 110 (1988).

An employee's decision to leave work on ethical grounds is with good cause attributable to the employer. Bunn v. North Carolina State Univ., 70 N.C. App. 699, 321 S.E.2d 32 (1984), cert. denied, 313 N.C. 173, 326 S.E.2d 31 (1985).

An employee who quits a job upon being informed that he will be terminated four days later, and who applies immediately for unemployment benefits, is disqualified for the four-day period during which he could have continued to work. Nothing else appearing, however, he is not thereby disqualified subsequent to the date on which his employment would in any event have terminated. Poteat v. Employment Sec. Comm'n, 319 N.C. 201, 353 S.E.2d 219 (1987).

Where employee quit working after being given notice of impending separation, but knowing that there was still work available for seven days, the employee was properly denied unemployment benefits for the period during which he could have continued to work, but was entitled to benefits after the date on which employment was scheduled to terminate. Seaberry v. W.T. Bridgers Contract Labor, 91 N.C. App. 499, 372 S.E.2d 348 (1988).

Where an employee is discharged and leaves a few days in advance of her final work day, the law is not so harsh that it would deny her benefits, either before or after the formal date of discharge. Bunn v. North Carolina State Univ., 70 N.C. App. 699, 321 S.E.2d 32 (1984), cert. denied, 313 N.C. 173, 326 S.E.2d 31 (1985).

"Without Good Cause". — See In re Watson, 273 N.C. 629, 161 S.E.2d 1 (1968).

III. MISCONDUCT.

The term "misconduct" within the meaning of subdivision (2) is limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. In re Collingsworth, 17 N.C. App. 340, 194 S.E.2d 210 (1973); Intercraft Indus. Corp. v. Morrison, 54 N.C. App. 225, 283 S.E.2d 555 (1981); In re Chavis, 55 N.C. App. 635, 286 S.E.2d 623 (1982); Walter Kidde & Co. v. Bradshaw, 56 N.C. App. 718, 289 S.E.2d 571 (1982); Butler v. J.P. Stevens & Co., 60 N.C. App. 563, 299 S.E.2d 672, cert. denied, 308 N.C. 191, 302 S.E.2d 242 (1983); Douglas v. J.C. Penney Co., 67 N.C. App. 344, 313 S.E.2d 176 (1984).

"Misconduct," in the context of subdivision (2) of this section, is conduct which shows a wanton or willful disregard for the employer's interest, a deliberate violation of the employer's rules, or a wrongful intent. Hagan v. Peden Steel Co., 57 N.C. App. 363, 291 S.E.2d 308 (1982); Miller v. Guilford County Schools, 62 N.C. App. 729, 303 S.E.2d 411, cert. denied, 309 N.C. 321, 307 S.E.2d 165 (1983).

Misconduct sufficient to disqualify a discharged employee from receiving unemployment compensation is conduct which shows a wanton or willful disregard for the employer's interest, a deliberate violation of the employer's rules, or a wrongful intent. The obvious reasons for such a rule are to prevent benefits of the statute from going to persons who cause their unemployment by such callous, wanton, and deliberate misbehavior as would reasonably justify their discharge by an employer, and to prevent the dissipation of employment funds by persons engaged in such disqualifying acts. Intercraft Indus. Corp. v. Morrison, 305 N.C. 373, 289 S.E.2d 357 (1982); Collins v. B & G Pie Co., 59 N.C. App. 341, 296 S.E.2d 809 (1982), cert. denied, 307 N.C. 469, 299 S.E.2d 221 (1983); West v. Georgia-Pacific Corp., 107 N.C. App. 600, 421 S.E.2d 395 (1992).

"Misconduct" may consist in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee. Hagan v. Peden Steel Co., 57 N.C. App. 363, 291 S.E.2d 308 (1982).

The term "misconduct" in connection with one's work is limited to conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. This definition of "misconduct" suffices to encompass an employee's violation of the employer's reasonable attendance rules, of which he has notice, and his failure to give the employer proper notice of absences for which good cause may exist. Butler v. J.P. Stevens & Co., 60 N.C. App. 563, 299 S.E.2d 672, cert. denied, 308 N.C. 191, 302 S.E.2d 242 (1983).

Misconduct is conduct evincing a willful or wanton disregard for an employer's interest, as demonstrated by the following types of conduct: (1) deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee; (2) carelessness or negligence of such degree or recurrence that it manifests equal culpability, wrongful intent, or evil design, or shows an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. Douglas v. J.C. Penney Co., 67 N.C. App. 344, 313 S.E.2d 176 (1984).

Definition of Disqualifying Misconduct Not Exclusive. — The statutory language, "include but not be limited to" in the second paragraph of subdivision (2) of this section clearly indicates that the legislature did not intend an exclusive list; thus, the paragraph added to subdivision (2) in 1989 only illustrates and illuminates the more general language in the preceding paragraph of subdivision (2). Lynch v. PPG Indus., 105 N.C. App. 223, 412 S.E.2d 163 (1992).

Employer's Burden to Prove Misconduct Disqualifying Employee from Benefits. — Employee may be disqualified from receiving any benefits if she was fired for misconduct connected with her work. Employee may be disqualified for a period ranging from 4 to 13 weeks if employee was fired for substantial fault connected with her work. The employer has the burden of establishing disqualification. Guilford County v. Holmes, 102 N.C. App. 103, 401 S.E.2d 135 (1991).

Under subdivision (2) of this section, the employer has the burden of showing the employee's disqualification from unemployment benefits on the basis of misconduct. Lynch v. PPG Indus., 105 N.C. App. 223, 412 S.E.2d 163 (1992).

Leaving Work Station in Pursuit of Job Duties. — Where Commission made findings that receptionist employee continued to leave her work station after being requested not to do so, but that employee was not aware that her job was jeopardized by this conduct and employee was in pursuit of her job duties when she did deliver messages, competent evidence supported Employment Security Commission's finding that terminated employee was not even partially disqualified from receiving benefits, as she was not discharged for misconduct or substantial fault connected with her work. Guilford County v. Holmes, 102 N.C. App. 103, 401 S.E.2d 135 (1991).

Discharge Under Occupational Safety and Health Act. — Claimant's discharge for willful refusal to wear ear protective devices as required by employer policy made mandatory by the Occupational Safety and Health Act of 1970 constituted a discharge for misconduct connected with his employment within the meaning of subdivision (2). In re Collingsworth, 17 N.C. App. 340, 194 S.E.2d 210 (1973).

A discharge for "gross insolence" was a discharge for misconduct connected with the employee's work such as to disqualify the employee for unemployment compensation. Hagan v. Peden Steel Co., 57 N.C. App. 363, 291 S.E.2d 308 (1982).

Petitioner was discharged for misconduct connected with his work as a matter of law: Petitioner's conduct evidenced a "willful or wanton disregard of his employer's interest" and was in "deliberate violation or disregard of standards of behavior which the employer has a right to expect of his employee." Furthermore, petitioner's misconduct, "caused his unemployment," and he therefore was disqualified from receiving benefits pursuant to the statute. West v. Georgia-Pacific Corp., 107 N.C. App. 600, 421 S.E.2d 395 (1992).

Where the petitioner reported to work smelling of alcohol and admitted to having consumed approximately five beers that day, and petitioner was offered participation in an alcohol treatment program as a condition of further employment, but refused to participate in the program despite the fact that he knew he would be terminated otherwise, the facts clearly supported the Commission's conclusion that petitioner was discharged for "misconduct." West v. Georgia-Pacific Corp., 107 N.C. App. 600, 421 S.E.2d 395 (1992).

Petitioner's conviction for possession of cocaine with intent to sell or deliver, in violation of G.S. 90-95(a)(1) was misconduct within the meaning of subdivision (2) of this section, disqualifying him from drawing unemployment benefits. Lynch v. PPG Indus., 105 N.C. App. 223, 412 S.E.2d 163 (1992).

The use of marijuana on company property during working hours in violation of the employer's rules constitutes "misconduct connected with his work" pursuant to subdivision (2) of this section. Hester v. Hanes Knitwear, 61 N.C. App. 730, 301 S.E.2d 508, cert. denied, 308 N.C. 676, 304 S.E.2d 755 (1983).

Violation of Attendance Rules. — The definition of "misconduct" suffices to encompass an employee's violation of the employer's reasonable attendance rules, of which he has notice, and his failure to give the employer proper notice of absences for which good cause may exist. Butler v. J.P. Stevens & Co., 60 N.C. App. 563, 299 S.E.2d 672, cert. denied, 308 N.C. 191, 302 S.E.2d 242 (1983).

Where prior to the claimant's going on leave, she was on probation due to absence from work and tardiness in reporting to work; the employer had a known, reasonable policy that provided that medical leaves of absence can be granted or extended only upon the request of the employee's physician and the claimant was aware of this policy; and when the claimant reported back to work at the usual time she did not present a doctor's excuse for the previous day's absence, or to extend the leave of absence, the Commission could reasonably conclude that the claimant deliberately violated her employer's attendance rules. Therefore, the Commission's findings supported its conclusion that she had been discharged for "misconduct connected with her work." Davis v. Corning Glass Works, 65 N.C. App. 379, 309 S.E.2d 258 (1983).

While the mere violation of a work rule is not disqualifying misconduct where the evidence shows that the employee's actions were reasonable and were taken with good cause, deliberate violation or disregard of standards of behavior which an employer has a right to expect of his employee, or carelessness or negligence manifesting equal culpability may constitute misconduct in connection with one's employment sufficient to disqualify the employee to receive unemployment benefits. Collins v. B & G Pie Co., 59 N.C. App. 341, 296 S.E.2d 809 (1982), cert. denied, 307 N.C. 469, 299 S.W.2d 221 (1983).

Most courts have held that persistent or chronic absences, at least where absences are without excuse or notice, and the employee has been given warnings by the employer, constitute misconduct within the meaning of the unemployment compensation laws. Obviously, when an employee is absent due to illness but fails to give proper notice the absence can amount to misconduct, not because of the illness per se but because the employee has an obligation to the employer to mitigate any damages an illness may cause the enterprise by giving appropriate notice. Butler v. J.P. Stevens & Co., 60 N.C. App. 563, 299 S.E.2d 672, cert. denied, 308 N.C. 191, 302 S.E.2d 242 (1983).

When an employee who did not technically violate an employer's attendance policy was fired for abusing that policy, the Employment Security Commission of North Carolina, in ruling on the employee's claim for unemployment compensation benefits, had to decide if the employer had imposed a reasonable employee-specific policy on the employee with which she was able to conform and whether she violated that policy, before disqualifying the employee from the receipt of unemployment compensation benefits. Davis v. Britax Child Safety, Inc., 163 N.C. App. 277, 593 S.E.2d 97, 2004 N.C. App. LEXIS 379 (2004).

Decision that petitioner was qualified to receive unemployment benefits was affirmed as findings of fact by the Employment Security Commission of North Carolina (ESC) did not indicate there was "substantial fault" under G.S. 96-14(2a) for petitioner's failure for failing to call in sick, as the ESC failed to enter specific findings of fact that the employer expressly warned him that failure to call in was a violation of employer's rules, and that continued violation of the rule would result in discharge. Boyland v. Southern Structures, Inc., 172 N.C. App. 108, 615 S.E.2d 919, 2005 N.C. App. LEXIS 1434 (2005).

Former employee's absenteeism from her employment could not rise to the level of substantial fault, under G.S. 96-14(2a), because the evidence did not establish that the employee could exercise reasonable control over her actions resulting from her stress related medical problems. James v. Lemmons, 177 N.C. App. 509, 629 S.E.2d 324, 2006 N.C. App. LEXIS 1075 (2006).

Excessive Tardiness. — Where petitioner received three written warnings in a five-month period for excessive tardiness and absenteeism and testified that after his third warning and suspension he knew that he could be "let go" for more tardiness or absences, the evidence was enough to meet the statutory requirements under subdivision (2A). Doyle v. Southeastern Glass Laminates, Inc., 104 N.C.

App. 326, 409 S.E.2d 732 (1991), cert. granted, 330 N.C. 611, 412 S.E.2d 85 (1992).

Good Faith Effort to Comply with Notification of Absence Rule. — Where claimant was absent four consecutive days after a twenty-month infraction-free period of employment, and a combination of unfortunate circumstances prevented claimant from meeting the strict requirements of his employer's rule regarding notification of absence, but the evidence from the record was clear that claimant made a good faith effort to comply with the rule, the facts and circumstances did not support the Employment Security Commission's finding of misconduct. Helmandollar v. M.A.N. Truck & Bus Corp., 74 N.C. App. 314, 328 S.E.2d 43 (1985).

Chronic or persistent absenteeism, in the face of warnings, and without good cause may constitute willful misconduct. Intercraft Indus. Corp. v. Morrison, 305 N.C. 373, 289 S.E.2d 357 (1982).

Refusal to Report to Work. — A claimant's deliberate and unjustifiable refusal to report to work, when the employer has the right to insist on the employee's presence and when the claimant knows that his refusal would cause logistical problems for the employer, constitutes misconduct sufficient to disqualify claimant from receiving benefits under subdivision (2) of this section. In re Cantrell, 44 N.C. App. 718, 263 S.E.2d 1 (1980).

Refusal to Work Overtime. — Trial court erred in setting aside an agency's disqualification of a worker from receiving unemployment insurance benefits pursuant to G.S. 96-14(2) based on the worker's refusal to work overtime; the worker failed to preserve for review his claim that procedural omissions by the agency violated his due process rights as required by G.S. 96-15(h). Graves v. Culp, Inc., 166 N.C. App. 748, 603 S.E.2d 829, 2004 N.C. App. LEXIS 2019 (2004).

Inefficiency or unsatisfactory job performance does not amount to misconduct. Nor does violation of a work rule constitute misconduct if the evidence shows that the employee's actions were reasonable and taken with good cause, good cause being that deemed by reasonable men and women valid and not indicative of an unwillingness to work. Douglas v. J.C. Penney Co., 67 N.C. App. 344, 313 S.E.2d 176 (1984).

Harm to the employer is not an element of misconduct as defined by subdivision (2), which speaks only of conduct and does not mention consequences. In re Gregory v. North Carolina Dep't of Revenue, 93 N.C. App. 785, 379 S.E.2d 51 (1989).

An intent to violate a work rule is not equivalent to misconduct within the purview of subdivision (2) of this section as a matter of law. Kahl v. Smith Plumbing Co., 68 N.C. App. 287, 314 S.E.2d 574 (1984).

Employee's grumbling and his statement that he intended in the future to violate a work rule did not rise to the level of willful or wanton disregard of the employer's standards such as to constitute misconduct connected with work. Kahl v. Smith Plumbing Co., 68 N.C. App. 287, 314 S.E.2d 574 (1984).

When Violation of Work Rule Not Misconduct. — A violation of a work rule is not willful misconduct if the evidence shows that the employee's actions were reasonable and were taken with good cause. Intercraft Indus. Corp. v. Morrison, 305 N.C. 373, 289 S.E.2d 357 (1982); Lancaster v. Black Mt. Center, 72 N.C. App. 136, 323 S.E.2d 760 (1984).

A violation of a company rule will not be construed as misconduct within the meaning of subdivision (2) of this section, if the evidence shows that the action of the employee were reasonable and were taken with good cause. Good cause is a reason which would be deemed by reasonable men and women as valid and not indicative of an unwillingness to work. Helmandollar v. M.A.N. Truck & Bus Corp., 74 N.C. App. 314, 328 S.E.2d 43 (1985).

Work Rule Unnecessary Where Conduct Forbidden by Statute. — Where petitioner, a professional level employee of the North Carolina Department of Revenue responsible for the collection of delinquent taxes, was discharged for failing to timely file, or to request an extension of time in which to file his 1985 and 1986 individual state income tax returns, facts supported the Commission's conclusion that petitioner was discharged for misconduct connected with his work under this section; petitioner argued that his failure to file his tax returns on time did not constitute misconduct under this statute because the department had no rule or policy requiring employees to file their returns on time; however, since petitioner's conduct was forbidden by statute, a work rule to the same effect was unnecessary. In re Gregory v. North Carolina Dep't of Revenue, 93 N.C. App. 785, 379 S.E.2d 51 (1989).

The essence of subdivision (2A) is that if an employer establishes a reasonable job policy to which an employee can conform, her failure to do so constitutes substantial fault. Lindsey v. Qualex, Inc., 103 N.C. App. 585, 406 S.E.2d 609, cert. denied, 330 N.C. 196, 412 S.E.2d 57 (1991).

The reasonableness of an employer's job requirements should be analyzed on a case-by-case basis in light of the totality of the circumstances surrounding the employee's function within the employer's business. Lindsey v. Qualex, Inc., 103 N.C. App. 585, 406 S.E.2d 609, cert. denied, 330 N.C. 196, 412 S.E.2d 57 (1991).

Where claimant's conduct was not within the more liberal standard of a sub-

stantial fault analysis under subsection (2A) of this section, the court would not reach the question of whether his conduct fell within the stricter standard of misconduct under subsection (2) of this section. Department of Crime Control & Pub. Safety v. Featherston, 96 N.C. App. 102, 384 S.E.2d 306 (1989).

Substantial Fault Requires Violation After a Warning. — Although claimant's associations arguably placed him in violation of a departmental rule prohibiting dealings with criminals, such conduct would not rise to the level of substantial fault under subsection (2) of this section absent claimant's repetition of the violation after a warning. Department of Crime Control & Pub. Safety v. Featherston, 96 N.C. App. 102, 384 S.E.2d 306 (1989).

An employee's alteration of production records, resulting in overpayment to the employee, constitutes willful or wanton disregard of the employer's interest, in disregard of standards of behavior which the employer has the right to expect of the employee. Williams v. SCM Proctor Silex, 60 N.C. App. 572, 299 S.E.2d 668, cert. denied, 308 N.C. 544, 304 S.E.2d 243 (1983).

Absence Due to Incarceration. — Absence from employment in violation of a work rule due to incarceration for a willful or legally unexcused probation violation amounts to "misconduct" in the context of this section. Collins v. B & G Pie Co., 59 N.C. App. 341, 296 S.E.2d 809 (1982), cert. denied, 307 N.C. 469, 299 S.E.2d 221 (1983).

Conversion of Employer's Surplus Property. — Where the Commission found as facts that claimants had participated in a sale of their employer's surplus property without specific approval or authorization by the employer, that claimants never attempted to see that the employer received the proceeds of the sale, and that claimants knew or should have known that converting their employer's property to their own benefit was not permitted, the Commission logically concluded that claimants' conduct was misconduct connected with their work as defined by case law and properly decided that claimants were disqualified from unemployment benefits. Vanhorn v. Bassett Furn. Indus., Inc., 76 N.C. App. 377, 333 S.E.2d 309 (1985).

An employee's conduct in not reporting directly to his supervisor, replying that he needed at least an hour to go over some papers on his desk, did not rise to the level of culpability required for a finding of "misconduct," considering the supervisor's admission that there was very little by way of information that he had to convey, that there was no urgent need for an immediate meeting, and that he could have conveyed the information by telephone. State v. Field, 75 N.C. App. 647, 331 S.E.2d 221, cert. denied and appeal dismissed, 315 N.C. 186, 337 S.E.2d 582 (1985).

Evidence that employee left work early and without permission three days in a row, on grounds that his job was finished and he did not wish to disturb his supervisor at home at an early hour, and that he falsified his time records for these days, was sufficient to support the referee's conclusion that the employee was discharged for misconduct. Williams v. Burlington Indus., Inc., 318 N.C. 441, 349 S.E.2d 842 (1986).

Protective Reflex Action. — Where student hit child care teacher in the stomach with a book bag, and teacher was pregnant at the time, and teacher's immediate reaction was to hit student in the shoulder to keep her from further hitting the teacher with the book bag, the facts did not show teacher acted deliberately and her actions were more of a reflex. Smith v. Kinder Care Learning Centers, Inc., 326 N.C. 362, 389 S.E.2d 30 (1990).

Assault upon Co-Worker. — Where worker's assault on co-worker was purely retaliatory and combative, it was the type of misconduct which would disqualify an individual from employment benefits, even though petitioner reacted in the heat of anger. Fair v. St. Joseph's Hosp., 113 N.C. App. 159, 437 S.E.2d 875 (1993), cert. denied, 336 N.C. 315, 445 S.E.2d 394 (1994).

Off-Duty Criminal Conduct. — Where an employee has engaged in off-duty criminal conduct, the agency need not show actual harm to its interests to demonstrate just cause for an employee's dismissal; however, it is well established that administrative agencies may not engage in arbitrary and capricious conduct. Eury v. North Carolina Emp. Sec. Comm'n, 115 N.C. App. 590, 446 S.E.2d 383, cert. denied, 338 N.C. 309, 451 S.E.2d 635 (1994).

In determining whether a rational nexus exists between the type of off-duty criminal activity conducted by the employee and the employee's future ability to do his job, the Commission may consider the following factors: (1) how the conduct may have adversely affected clients or colleagues; (2) the relationship between the work performed by the employee and the type of criminal conduct committed; (3) the likelihood of recurrence of the questioned conduct and how the conduct may affect work performance, work quality, and the agency's good will and interests; (4) the proximity or remoteness in time of the conduct to the commencement of the disciplinary proceedings; (5) extenuating or aggravating circumstances; (6) the blameworthiness or praiseworthiness of the motives resulting in the conduct; and (7) the presence or absence of any relevant factors in mitigation. Eury v. North Carolina Emp. Sec. Comm'n, 115 N.C. App. 590, 446 S.E.2d 383, cert. denied, 338 N.C. 309, 451 S.E.2d 635 (1994).

Substantial Fault Not Rising to Level of Misconduct. — The personal financial mismanagement of claimant, a legal secretary, constituted substantial fault connected with her work not rising to the level of misconduct for which she could be terminated, as the actions of the claimant, though unintentional and occurring primarily away from her work, had the effect of posing a serious threat to the reputation of her employer, the integrity of his law practice, and his relationship with clients and associates. Smith v. Spence & Spence, Att'ys, 80 N.C. App. 636, 343 S.E.2d 256, cert. denied and appeal dismissed, 317 N.C. 707, 347 S.E.2d 440 (1986), affirming the decision of the Commission to disqualify the secretary from receiving unemployment benefits for a period of four weeks.

An employee who does only what her employer previously approved and apparently never disapproved or forbade cannot be said to have acted improperly or to have deviated from prudence, rectitude or duty. Baxter v. Bowman Gray School of Medicine, 87 N.C. App. 409, 361 S.E.2d 109 (1987).

The facts did not support a conclusion that in not recording on her timecard 45 minutes that she was dizzy and laid down petitioner was substantially at fault within the purview of subdivision (2A) of this section, and therefore precluded from collecting unemployment compensation. Baxter v. Bowman Gray School of Medicine, 87 N.C. App. 409, 361 S.E.2d 109 (1987).

Failure to Meet Three Conditions of Section. — Where claimant in 1984 was denied unemployment benefits for the duration of his unemployment for being discharged for misconduct connected with his work, and after obtaining subsequent employment in 1987, he again became unemployed, but through no fault of his own, he did not meet the three conditions of this section, and the Commission's refusal to reduce his disqualification would be upheld. Josey v. Employment Sec. Comm'n, 322 N.C. 295, 367 S.E.2d 675 (1988).

Misconduct Not Shown. — A worker's failure to notify his employer why he is absent from work cannot be regarded as "misconduct" or "fault" under the Employment Security Law, when the worker is unable to give notice because he is in the hospital with a broken back, and when the employer already has knowledge of his whereabouts and condition anyway. Facet Enters., Inc. v. Deloatch, 83 N.C. App. 495, 350 S.E.2d 906 (1986).

Claimant's failure to inform the sheriff or chief deputy of the phone tap in lieutenant's office was a violation of departmental policy; however, this violation did not rise to the level of misconduct. Rather, given the unusual circumstances, including instructions petitioner received from federal agents, petitioner's failure to report to the sheriff the phone tap he had discovered was a reasonable response to the dilemma petitioner faced. Williams v. Davie County, 120 N.C. App. 160, 461 S.E.2d 25 (1995).

Decision that petitioner was qualified to receive unemployment benefits was affirmed as findings by the Employment Security Commission of North Carolina (ESC) did not indicate there was "substantial fault" under G.S. 96-14(2a) for petitioner's failure to timely submit log notes; the ESC failed to enter specific findings that the employer expressly warned petitioner that failure to submit log notes was a violation of employer's rules, and that petitioner continued to violate this requirement after being warned. Boyland v. Southern Structures, Inc., 172 N.C. App. 108, 615 S.E.2d 919, 2005 N.C. App. LEXIS 1434 (2005).

Because it was clear that a worker who had the apparent authority to remove a hard drive could not be fired for having exercised the discretion to do just that, and the worker's assertions of personal copyright interests did not inconvenience or jeopardize the employer's ability to operate, the worker should not have been denied unemployment benefits. Binney v. Banner Therapy Prods., 178 N.C. App. 417, 631 S.E.2d 848, 2006 N.C. App. LEXIS 1561 (2006).

IV. SUITABLE WORK.

Generally. — See In re Watson, 273 N.C. 629, 161 S.E.2d 1 (1968).

Suitability is not a matter of rigid fixation. It depends upon circumstances and may change with changing circumstances. In re Troutman, 264 N.C. 289, 141 S.E.2d 613 (1965).

And "Unsuitable" Work May Become "Suitable". — Work which may be deemed "unsuitable" at the inception of the claimant's unemployment and for a reasonable time thereafter, because it pays less than his prior earning capacity, may thereafter become "suitable" work when consideration is given to the length of unemployment and the prospects for obtaining customary work at his prior earning capacity. What is a "reasonable time" is not rigid and inflexible and it must initially be determined as a question of fact under the peculiar circumstances of each individual case. In re Troutman, 264 N.C. 289, 141 S.E.2d 613 (1965).

Employment which may not be suitable while there is still a good present expectancy of obtaining other employment more nearly proportionate to the ability of the worker may become suitable if that expectancy is not realized within a reasonable time. In re Troutman, 264 N.C. 289, 141 S.E.2d 613 (1965).

A claimant is entitled to a reasonable length of time within which to find work

at his higher skill before work calling for less competence and lower remuneration can be found to be suitable. In re Troutman, 264 N.C. 289, 141 S.E.2d 613 (1965).

But the longer a claimant is unemployed, the more he is obligated to take less desirable work and to make himself available to take it. In re Troutman, 264 N.C. 289, 141 S.E.2d 613 (1965).

Elements Which Must Be Considered in Determining "Suitable Work". — The skill and capacity of the worker, his accustomed remuneration, his expectancy of obtaining equivalent employment, and the time which he had had to obtain it may be taken into account in determining "suitable work." In re Troutman, 264 N.C. 289, 141 S.E.2d 613 (1965).

It may reasonably be thought that employment which requires a highly trained and skilled worker, who still has a fair prospect of securing work in his own line to step down into work of a substantially lower grade, at substantially less pay, before he has had a chance to look about him, is not truly "suitable." Acceptance of such employment might conceivably condemn the worker permanently to a scale of employment lower than that to which his training, skill, and industry fairly entitled him. In re Troutman, 264 N.C. 289, 141 S.E.2d 613 (1965).

Distance from Residence Must Be Considered. — The determination of whether the work offered a claimant is suitable requires a consideration of several factors, including the distance of the available work from the employee's residence. Housecalls Nursing Servs., Inc. v. Lynch, 118 N.C. App. 275, 454 S.E.2d 836 (1995).

Distance from Residence Found Too Great. — Employment Security Commission of North Carolina (ESC) correctly ordered that claimant certified nursing assistant was not disqualified from receiving unemployment benefits where evidence showed that claimant's 1983 car had over 100,000 miles on it, and that employer offered her a job which consisted of three, two-hour sessions with a patient who lived forty-five miles from her residence. Housecalls Nursing Servs., Inc. v. Lynch, 118 N.C. App. 275, 454 S.E.2d 836 (1995).

Work which requires one to violate his moral standards is not ordinarily "suitable work" within the meaning of this section. In re Miller, 243 N.C. 509, 91 S.E.2d 241 (1956).

V. LABOR DISPUTES.

Editor's Note. *— Many of the cases below were decided prior to the 1961 amendment to present subdivision (5).*

In passing the 1961 amendment to subdivision (5) the General Assembly acted within its constitutional powers. In re Abernathy, 259 N.C. 190, 130 S.E.2d 292, appeal dismissed and cert. denied, 375 U.S. 161, 84 S. Ct. 274, 11 L. Ed. 2d 261 (1963).

Subdivision (5) of this section is in plain and unambiguous language, and needs only a literal interpretation to ascertain the legislative intent as expressed therein. In re Stevenson, 237 N.C. 528, 75 S.E.2d 520 (1953).

The effect of the 1961 amendment was to eliminate from subdivision (5) the means therein provided by which an employee might escape disqualification. In re Abernathy, 259 N.C. 190, 130 S.E.2d 292, appeal dismissed and cert. denied, 375 U.S. 161, 84 S. Ct. 274, 11 L. Ed. 2d 261 (1963).

Subdivision (5) extends the disqualification to workers at a factory, establishment, or other premise which supplies necessary materials or services to the plant where the claimants were last employed. In re Abernathy, 259 N.C. 190, 130 S.E.2d 292, appeal dismissed and cert. denied, 375 U.S. 161, 84 S. Ct. 274, 11 L. Ed. 2d 261 (1963).

The disqualification contained in the 1961 amendment to subdivision (5) involves a question of degree and not of principle. In re Abernathy, 259 N.C. 190, 130 S.E.2d 292, appeal dismissed and cert. denied, 375 U.S. 161, 84 S. Ct. 274, 11 L. Ed. 2d 261 (1963).

Employees who participate in, finance or who are directly interested in a labor dispute which results in stoppage of work, or who are members of a grade or class of workers which has members employed at the premises at which the stoppage occurs, any of whom, immediately before the stoppage occurs, participate in, finance or are directly interested in such labor dispute, are not entitled to unemployment compensation benefits during the stoppage of work, and each employee-claimant is required to show to the satisfaction of the Commission that he is not disqualified under the terms of this section. In re Steelman, 219 N.C. 306, 13 S.E.2d 544, 135 A.L.R. 929 (1941).

Employees Need Not Support Dispute to Be Disqualified. — Employee-claimants who are not directly interested in the labor dispute which brings about the stoppage of work, and who do not participate in, help finance or benefit from the dispute, are nevertheless disqualified from unemployment compensation benefits if they belong to a grade or class of workers employed at the premises immediately before the commencement of the stoppage, some of whom, immediately before the stoppage occurs, participate in, finance or are directly interested in such labor dispute. State ex rel. Unemployment Comp. Comm'n v. Martin, 228 N.C. 277, 45 S.E.2d 385 (1947).

Subdivision (5) of this section disqualifies for unemployment compensation benefits employees belonging to a grade or class of workers some of whom participated in and were directly interested in the strike which brought about a stoppage of work, notwithstanding the fact that the employee-claimants were not members of the union and did not participate in or help finance the strike, especially where the strike involved, in addition to a maintenance of membership clause in the contract of employment, a general increase in wages, from which the employee-claimants stood to benefit. State ex rel. Unemployment Comp. Comm'n v. Lunceford, 229 N.C. 570, 50 S.E.2d 497 (1948).

Whether the unemployment is due to a labor dispute, or whether it is not, is a question to be determined in each case. The line of demarcation is not the end of the strike but the end of work stoppage due to the strike. That test is applied to all alike, and there is no discrimination. In re Stevenson, 237 N.C. 528, 75 S.E.2d 520 (1953).

For the disqualification provisions of subdivision (5) of this section to apply, the Employment Security Commission must find that "total or partial unemployment is caused by a labor dispute in active progress." Thus, the only type of active labor dispute which keeps the idle worker disqualified for benefits is one which causes unemployment. In re Sarvis, 296 N.C. 475, 251 S.E.2d 434 (1979).

When Stoppage of Work Caused by Labor Dispute Begins and Ends. — A stoppage of work commences at the plant of the employer when a definite check in production operations occurs, and a stoppage of work ceases when operations are resumed on a normal basis; but the stoppage of work caused by a labor dispute must not exceed the time which is reasonably necessary and required to physically resume normal operations in such plant or establishment. In re Stevenson, 237 N.C. 528, 75 S.E.2d 520 (1953).

An abandonment of the strike and unconditional offer to return to work by employees who were replaced during the pendency of the strike lifts the labor dispute disqualification. In re Sarvis, 296 N.C. 475, 251 S.E.2d 434 (1979).

An employer's inability to reinstate previously replaced employees after they abandoned their strike and unconditionally offered to return to work changed the cause of unemployment and lifted the disqualification for benefits under subdivision (5) of this section. In re Sarvis, 296 N.C. 475, 251 S.E.2d 434 (1979).

Effect of NLRB Proceedings on Labor Dispute Disqualification. — An election petition and an unfair labor practice charge pending before the National Labor Relations Board after the end of employees' strike did not keep the labor dispute disqualification under subdivision (5) of this section in effect after the conclusion of the strike. In re Sarvis, 296 N.C. 475, 251 S.E.2d 434 (1979).

A "labor dispute" as used in subdivision (5) includes work stoppage caused by management lockouts. In re Usery, 31 N.C. App. 703, 230 S.E.2d 585 (1976), cert. denied, 292 N.C. 265, 233 S.E.2d 396 (1977).

Burden of Proof. — Where the employer resists recovery of unemployment compensation on the ground that claimants' unemployment was due to a work stoppage resulting from a labor dispute, each claimant is required to show to the satisfaction of the Commission that he is not disqualified for benefits under subdivision (5) of this section. State ex rel. Emp. Sec. Comm'n v. Jarrell, 231 N.C. 381, 57 S.E.2d 403 (1950).

Failure to Resume Work After Dispute. — The evidence tended to show that employee-claimants not only did not work during the period of stoppage of work at the employer's plant caused by a labor dispute but also that they did not resume work after operations at the plant were resumed, and after notification by the employer that jobs were available. There was also evidence on behalf of claimants that they did not return to their jobs because of the labor dispute. The Commission ruled that claimants were not entitled to benefits during the stoppage of work. It was held that the employer is not prejudiced by the further order of the Commission that the eligibility of claimants to benefits subsequent to the resumption of operations at the plant should be determined, since it must be presumed the Commission will determine eligibility of each claimant for such benefits in accordance with objective standards or criteria set up in this Chapter, but the existence and effect of a labor dispute may have an essential bearing upon the eligibility of claimants, the suitableness of work offered, and the disqualifications for benefits. In re Steelman, 219 N.C. 306, 13 S.E.2d 544, 135 A.L.R. 929 (1941).

Notice That Due to Labor Dispute Employees Might Seek Other Employment. — A finding that after a strike which closed the plant and after the employer's attempt to resume operations had proved futile, the employer posted a notice stating that all operations at the mill would cease for an indefinite period and that employees were free to seek employment elsewhere, was held insufficient to support a conclusion of law by the Commission that subsequent to the posting of the notice the unemployment of claimants was not due to stoppage of work because of a labor dispute, since the notice merely signified the willingness of the employer to terminate its employment relationship with any worker who elected to withdraw from the existing labor dispute and seek work elsewhere, but did not alter the status of any employee who refrained from exercising this option. State ex rel. Emp. Sec. Comm'n v. Jarrell, 231 N.C. 381, 57 S.E.2d 403 (1950).

VI. JUDICIAL REVIEW.

In considering an appeal from a decision of the Employment Security Commission, the reviewing court must (1) determine whether there was evidence before the Commission to support its findings of fact and (2) decide whether the facts found sustain the Commission's conclusions of law and its resulting decision. Miller v. Guilford County Schools, 62 N.C. App. 729, 303 S.E.2d 411, cert. denied, 309 N.C. 321, 307 S.E.2d 165 (1983).

Deliberate Violation of Attendance Rules. — Most courts have held that persistent or chronic absences, at least where absences are without excuse or notice, and the employee has been given warnings by the employer, constitute misconduct within the meaning of the unemployment compensation laws. Obviously, when an employee is absent due to illness but fails to give proper notice the absence can amount to misconduct, not because of the illness per se but because the employee has an obligation to the employer to mitigate any damages an illness may cause the enterprise by giving appropriate notice. Butler v. J.P. Stevens & Co., 60 N.C. App. 563, 299 S.E.2d 672, cert. denied, 308 N.C. 191, 302 S.E.2d 242 (1983).

Where prior to the claimant's going on leave, she was on probation due to absence from work and tardiness in reporting to work; the employer had a known, reasonable policy that provided that medical leaves of absence can be granted or extended only upon the request of the employee's physician and the claimant was aware of this policy; and when the claimant reported back to work at the usual time she did not present a doctor's excuse for the previous day's absence, or to extend the leave of absence, the Commission could reasonably conclude that the claimant deliberately violated her employer's attendance rules. Therefore, the Commission's findings supported its conclusion that she had been discharged for "misconduct connected with her work." Davis v. Corning Glass Works, 65 N.C. App. 379, 309 S.E.2d 258 (1983).

Good Faith Effort to Comply with Notification of Absence Rule. — Where claimant was absent four consecutive days after a twenty-month infraction-free period of employment, and a combination of unfortunate circumstances prevented claimant from meeting the strict requirements of his employer's rule regarding notification of absence, but the evidence from the record was clear that claimant made a good faith effort to comply with the rule, the facts and circumstances did not support the Employment Security Commission's finding of misconduct. Helmandollar v. M.A.N. Truck & Bus Corp., 74 N.C. App. 314, 328 S.E.2d 43 (1985).

Conclusiveness of Findings of Fact on Appeal. — Based on an employee's own testimony and documentary evidence that his failure to comply with the reasonable requirements of his job, specifically load and unload materials as directed and keep proper records, and because these requirements were reasonable and within his own control, the Employment Security Commission did not err by concluding that the employee was discharged for substantial fault and the trial court did not err by upholding this Commission's ruling. Reeves v. Yellow Transp., Inc., 170 N.C. App. 610, 613 S.E.2d 350, 2005 N.C. App. LEXIS 1076 (2005), review denied, — N.C. —, 619 S.E.2d 511 (2005).

Evidence of the former employee's stress related medical problems was sufficient to permit the North Carolina Employment Security Commission to determine that the employee's absences were for good cause and that she did give her employer appropriate notice regarding her absences; thereby defeating the employer's argument that the employee's absenteeism constituted misconduct under G.S. 96-14(2). James v. Lemmons, 177 N.C. App. 509, 629 S.E.2d 324, 2006 N.C. App. LEXIS 1075 (2006).

§ 96-15. Claims for benefits.

(a) Filing. — Claims for benefits shall be made in accordance with such regulations as the Commission may prescribe. Employers may file claims for employees through the use of automation in the case of partial unemployment. Each employing unit shall post and maintain in places readily accessible to individuals performing services for it printed statements, concerning benefit rights, claims for benefits, and such other matters relating to the administration of this Chapter as the Commission may direct. Each employing unit shall supply to such individuals copies of such printed statements or other materials relating to claims for benefits as the Commission may direct. Such printed statements and other materials shall be supplied by the Commission to each employing unit without cost to the employing unit.

(b)(1) Initial Determination. — A representative designated by the Commission shall promptly examine the claim and shall determine whether or not the claim is valid. If the claim is determined to be not valid for any reason other than lack of base period earnings, the claim shall be referred to an Adjudicator for a decision as to the issues presented. If the claim is determined to be valid, a monetary determination shall be issued showing the week with respect to when benefits shall commence, the weekly benefit amount payable, and the potential maximum duration thereof. The claimant shall be furnished a copy of such monetary determination showing the amount of wages paid him by each employer during his base period and the employers by whom such wages were paid, his benefit year, weekly benefit amount, and the maximum amount of benefits that may be paid to him for unemployment during the benefit year. When a claim is not valid due to lack of earnings in his base period, the determination shall so designate. The claimant shall be allowed 10 days from the earlier of mailing or delivery of his monetary determination to him within which to protest his monetary determination and upon the filing of such protest, unless said protest be satisfactorily resolved, the claim shall be referred to the Chief Deputy Commissioner or his designee for a decision as to the issues presented. All base period employers, as well as the most recent employer of a claimant on a temporary layoff, shall be notified upon the filing of a claim which establishes a benefit year.

At any time within one year from the date of the making of an initial determination, the Commission on its own initiative may reconsider such determination if it finds that an error in computation or identity has occurred in connection therewith or that additional wages pertinent to the claimant's benefit status have become available, or if such determination of benefit status was made as a result of a nondisclosure or misrepresentation of a material fact.

(2) Adjudication. — When a protest is made by the claimant to the initial or monetary determination, or a question or issue is raised or presented as to the eligibility of a claimant under G.S. 96-13, or whether any disqualification should be imposed under G.S. 96-14, or benefits denied or adjusted pursuant to G.S. 96-18, the matter shall be referred to an adjudicator. The adjudicator may consider any matter, document or statement deemed to be pertinent to the issues, including telephone conversations, and after such consideration shall render a conclusion as to the claimant's benefit entitlements. The adjudicator shall notify the claimant and all other interested parties of the conclusion reached. The conclusion of the adjudicator shall be deemed the final decision of the Commission unless within 15 days after the date of notification or mailing of the conclusion, whichever is earlier, a written appeal is filed pursuant to such regulations as the Commission may adopt. The Commission shall be deemed an interested party for such purposes and may remove to itself or transfer to an appeals referee the proceedings involving any claim pending before an adjudicator.

Provided, any interested employer shall be allowed 10 days from the earlier of mailing or delivery of the notice of the filing of a claim against the employer's account to protest the claim and have the claim referred to an adjudicator for a decision on the question or issue raised. A copy of the notice of the filing shall be sent contemporaneously to the employer by telefacsimile transmission if a fax number is on file. Provided further, no question or issue may be raised or presented by the Commission as to the eligibility of a claimant under G.S. 96-13, or whether any disqualification should be imposed under G.S. 96-14, after 45 days from the first day of the first week after the question or issue occurs with respect to which week an individual filed a claim for benefits. None of the provisions of this subsection shall have the force and effect nor shall the same be construed or interested as repealing any other provisions of G.S. 96-18.

An employer shall receive written notice of the employer's appeal rights and any forms that are required to allow the employer to protest the claim. The forms shall include a section referencing the appropriate rules pertaining to appeals and the instructions on how to appeal.

(c) Appeals. — Unless an appeal from the adjudicator is withdrawn, an appeals referee shall set a hearing in which the parties are given reasonable opportunity to be heard. The conduct of hearings shall be governed by suitable regulations established by the Commission. The regulations need not conform to common law or statutory rules of evidence or technical or formal rules of procedure but shall provide for the conduct of hearings in such manner as to ascertain the substantial rights of the parties. The hearings may be conducted by conference telephone call or other similar means provided that if any party files with the Commission prior written objection to the telephone procedure, that party will be afforded an opportunity for an in-person hearing at such place in the State as the Commission by regulation shall provide. The hearing shall be scheduled for a time that, as much as practicable, least intrudes on and reasonably accommodates the ordinary business activities of an employer and the return to employment of a claimant. The appeals referee may affirm or modify the conclusion of the adjudicator or issue a new decision in which findings of fact and conclusions of law will be set out or dismiss an appeal when the appellant fails to appear at the appeals hearing to prosecute the appeal after having been duly notified of the appeals hearing. The evidence taken at the hearings before the appeals referee shall be recorded and the decision of the appeals referee shall be deemed to be the final decision of the Commission unless within 10 days after the date of notification or mailing of the decision, whichever is earlier a written appeal is filed pursuant to such regulations as the Commission may adopt. No person may be appointed as an appeals referee unless he or she possesses the minimum qualifications necessary to be a staff attorney eligible for designation by the Commission as a hearing officer under G.S. 96-4(m). No appeals referee in full-time permanent status may engage in the private practice of law as defined in G.S. 84-2.1 while serving in office as appeals referee; violation of this prohibition shall be grounds for removal. Whenever an appeal is taken from a decision of the appeals referee, the appealing party shall submit a clear written statement containing the grounds for the appeal within the time allowed by law for taking the appeal, and if such timely statement is not submitted, the Commission may dismiss the appeal.

(c1) Unless required for disposition of an ex parte matter authorized by law, a Commissioner, appeals referee, or employee assigned to make a decision or to make findings of facts and conclusions of law in a case shall not communicate, directly or indirectly, in connection with any issue of fact, or question of law, with any person or party or his representative, except on notice and opportunity for parties to participate.

(c2) Whenever a party is notified of an Adjudicator's, Appeals Referee's, or Deputy Commissioner's decision by mail, G.S. 1A-1, Rule 6(e) shall apply, and three days shall be added to the prescribed period to file a written appeal.

(d) Repealed by Session Laws 1977, c. 727, s. 54.

(d1) No continuance shall be granted except upon application to the Commissioner, the appeals referee, or other authority assigned to make the decision in the matter to be continued. A continuance may be granted only for good cause shown and upon such terms and conditions as justice may require. Good cause for granting a continuance shall include, but not be limited to, those instances when a party to the proceeding, a witness, or counsel of record has an obligation of service to the State, such as service as a member of the North Carolina General Assembly, or an obligation to participate in a proceeding in a court of greater jurisdiction.

(e) Review by the Commission. — The Commission or Deputy Commissioner may on its own motion affirm, modify, or set aside any decision of an appeals referee on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence, or may permit any of the parties to such decision to initiate further appeals before it, or may provide for group hearings in such cases as the Commission or Deputy Commissioner may deem proper. The Commission or Deputy Commissioner may remove to itself or transfer to another appeals referee the proceedings on any claim pending before an appeals referee. The Commission shall promptly notify the interested parties of its findings and the decision. In all Commission matters heard by a Deputy Commissioner, the decision of the Deputy Commissioner shall constitute the decision of the Commission; except, the Commission may remove unto itself, upon its own motion, any claim pending for rehearing and redetermination, provided such removal is done prior to the expiration of appeal period applicable to the decision of the Deputy Commissioner.

(f) Procedure. — The manner in which disputed claims shall be presented, the reports thereon required from the claimant and from employers, and the conduct of hearings and appeals shall be in accordance with regulations prescribed by the Commission for determining the rights of the parties, whether or not such regulations conform to common-law or statutory rules of evidence and other technical rules of procedure. All testimony at any hearing before an appeals referee upon a disputed claim shall be recorded unless the recording is waived by all interested parties, but need not be transcribed unless the disputed claim is further appealed and, one or more of the parties objects, under such regulations as the Commission may prescribe, to being provided a copy of the tape recording of the hearing. Any other provisions of this Chapter notwithstanding, any individual receiving the transcript shall pay to the Commission such reasonable fee for the transcript as the Commission may by regulation provide. The fee so prescribed by the Commission for a party shall not exceed the lesser of sixty-five cents (65¢) per page or sixty-five dollars ($65.00) per transcript. The Commission may by regulation provide for the fee to be waived in such circumstances as it in its sole discretion deems appropriate but in the case of an appeal in forma pauperis supported by such proofs as are required in G.S. 1-110, the Commission shall waive the fee.

(g) Witness Fees. — Witnesses subpoenaed pursuant to this section shall be allowed fees at a rate fixed by the Commission. Such fees and all expenses of proceedings involving disputed claims shall be deemed a part of the expense of administering this Chapter.

(h) Judicial Review. — Any decision of the Commission, in the absence of judicial review as herein provided, shall become final 30 days after the date of notification or mailing thereof, whichever is earlier. Judicial review shall be permitted only after a party claiming to be aggrieved by the decision has exhausted his remedies before the Commission as provided in this Chapter and has filed a petition for review in the superior court of the county in which he resides or has his principal place of business. The petition for review shall explicitly state what exceptions are taken to the decision or procedure of the Commission and what relief the petitioner seeks. Within 10 days after the petition is filed with the court, the petitioner shall serve copies of the petition by personal service or by certified mail, return receipt requested, upon the Commission and upon all parties of record to the Commission proceedings. Names and addresses of the parties shall be furnished to the petitioner by the Commission upon request. The Commission shall be deemed to be a party to any judicial action involving any of its decisions and may be represented in the judicial action by any qualified attorney who has been designated by it for that purpose. Upon motion of the Commission, the court shall dismiss any review for which the petition is untimely filed, untimely or improperly served, or for which it otherwise fails to comply with the requirements of this subsection. Any party to the Commission proceeding may become a party to the review proceeding by notifying the court within 10 days after receipt of the copy of the petition. Any person aggrieved may petition to become a party by filing a motion to intervene as provided in G.S. 1A-1, Rule 24.

Within 45 days after receipt of the copy of the petition for review or within such additional time as the court may allow, the Commission shall transmit to the reviewing court the original or a certified copy of the entire record of the proceedings under review. With the permission of the court the record may be shortened by stipulation of all parties to the review proceedings. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for such additional cost as is occasioned by the refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

(i) Review Proceedings. — If a timely petition for review has been filed and served as provided in G.S. 96-15(h), the court may make party defendant any other party it deems necessary or proper to a just and fair determination of the case. The Commission may, in its discretion, certify to the reviewing court questions of law involved in any decision by it. In any judicial proceeding under this section, the findings of fact by the Commission, if there is any competent evidence to support them and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law. Such actions and the questions so certified shall be heard in a summary manner and shall be given precedence over all civil cases. An appeal may be taken from the judgment of the superior court, as provided in civil cases. The Commission shall have the right to appeal to the appellate division from a decision or judgment of the superior court and for such purpose shall be deemed to be an aggrieved party. No bond shall be required of the Commission upon appeal. Upon the final determination of the case or proceeding, the Commission shall enter an order in accordance with the determination. When an appeal has been entered to any judgment, order, or decision of the court below, no benefits shall be paid pending a final determination of the cause, except in those cases in which the final decision of the Commission allowed benefits.

(j) Repealed by Session Laws 1985, c. 197, s. 9.

(k) Irrespective of any other provision of this Chapter, the Commission may adopt minimum regulations necessary to provide for the payment of benefits to individuals promptly when due as required by section 303(a)(1) of the Social Security Act as amended (42 U.S.C.A., section 503(a)(1)). (Ex. Sess. 1936, c. 1, s. 6; 1937, c. 150; c. 448, s. 4; 1941, c. 108, s. 5; 1943, c. 377, ss. 9, 10; 1945, c. 522, ss. 30-32; 1947, c. 326, s. 23; 1951, c. 332, s. 15; 1953, c. 401, s. 19; 1959, c. 362, ss. 16, 17; 1961, c. 454, s. 21; 1965, c. 795, ss. 20-22; 1969, c. 575, ss. 13, 14; 1971, c. 673, ss. 30, 30.1; 1977, c. 727, s. 54; 1981, c. 160, ss. 27-32; 1983, c. 625, ss. 10-14; 1985, c. 197, s. 9; c. 552, ss. 18-20; 1987 (Reg. Sess., 1988), c. 999, s. 6; 1989, c. 583, ss. 11, 12; c. 707, s. 4; 1991, c. 723, ss. 1, 2; 1993, c. 343, ss. 4, 5; 1999-340, ss. 6, 7; 2004-124, s. 13.7B(c); 2005-122, s. 1; 2006-242, s. 1.)

Cross References. — As to the confidentiality of records, reports, and information obtained from claimants and employers, see now G.S. 96-4(t).

Effect of Amendments. — Session Laws 2006-242, s. 1, effective October 1, 2006, and applicable to claims filed on or after that date, in subdivision (b)(2), substituted "10 days" for "15 days" in the first sentence and added the second sentence in the second paragraph, and added the third paragraph.

Legal Periodicals. — For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

For survey of 1977 law on employment regulation, see 56 N.C.L. Rev. 854 (1978).

For comment discussing unemployment compensation in light of Intercraft Indus. Corp. v. Morrison, 305 N.C. 373, 289 S.E.2d 357 (1982), see 18 Wake Forest L. Rev. 921 (1982).

CASE NOTES

The requirements of this section are mandatory and not directory. They are conditions precedent to obtaining a review by the courts and must be observed. Noncompliance therewith requires dismissal. In re State ex rel. Emp. Sec. Comm'n, 234 N.C. 651, 68 S.E.2d 311 (1951).

Appeal to Superior Court. — Under subsection (a) of G.S. 96-4 the chairman of the Employment Security Commission is vested with all authority of the Commission, and where it appears that a claim was heard on appeal by the chairman, and that claimant appealed therefrom "to the full Commission or to the superior court," the hearing of the appeal by the superior court was in accordance with the statute. State ex rel. Emp. Sec. Comm'n v. Roberts, 230 N.C. 262, 52 S.E.2d 890 (1949).

Appeal by Commission. — Under this section the exact status of the Commission as a party to an action is not defined and the part it is to play as such is left somewhat in the realm of speculation, and there is nothing which constitutes the Commission guardian or trustee for a claimant or which would warrant the conclusion that it is authorized to prosecute an appeal from a judgment against a claimant when the claimant is content. Nor may it do so for the purpose of adjudicating issues which are merely incidental to the claimant's cause of action. In re Mitchell, 220 N.C. 65, 16 S.E.2d 476, 142 A.L.R. 931 (1941). But see § 96-15(h) and (i).

Petition Sufficient for Judicial Review. -. — Where worker was denied benefits after being discharged for asserting a copyright interest in a catalogue and taking a hard drive home for the weekend in order to work, the worker's petition was sufficient to permit judicial review of the ESC's findings. Binney v. Banner Therapy Prods., 178 N.C. App. 417, 631 S.E.2d 848, 2006 N.C. App. LEXIS 1561 (2006).

ESC as Employer with Appeal Rights. — The reasoning of the Court of Appeals erroneously treated Employment Security Commission (ESC) as an agency appealing its own agency decision rather than as an "aggrieved party" where ESC appealed to Superior Court not as an agency decision-maker, but as an employer aggrieved by the agency action. As ESC-employer was liable to pay for unemployment insurance benefits the same as any other employer and had the same rights of appeal as any other employer; thus ESC-employer had the status of "aggrieved party" under ESC Regulation 21.18(D) and had appeal rights as such. Employment Sec. Comm'n v. Peace, 341 N.C. 716, 462 S.E.2d 222 (1995).

Scope of Superior Court's Jurisdiction. — The superior court's jurisdiction in reviewing the Commission's decisions is severely limited. In re Enoch, 36 N.C. App. 255, 243 S.E.2d 388 (1978). See also, In re Boulden, 47 N.C. App. 468, 267 S.E.2d 397 (1980).

The function of the superior court in reviewing a decision of the Employment Security Commission is twofold: (1) To determine whether there was evidence before the Commission to support its findings of fact; and (2) to decide whether the facts found sustain the conclusions of law and the resultant decision of the Commission. In re Enoch, 36 N.C. App. 255, 243 S.E.2d 388 (1978); Hester v. Hanes Knitwear, 61 N.C. App. 730, 301 S.E.2d 508, cert. denied, 308 N.C. 676, 304 S.E.2d 755 (1983).

The legislature, in granting jurisdiction under subsection (i) of this section to the superior court, intended the superior court to function as an appellate court. In re Enoch, 36 N.C. App. 255, 243 S.E.2d 388 (1978).

The fact that the superior court accepted additional evidence in hearing claimant's appeal from the decision of the Commission required a reversal of its decision. In re Enoch, 36 N.C. App. 255, 243 S.E.2d 388 (1978).

Trial court erred in setting aside an agency's disqualification of a worker from receiving unemployment insurance benefits pursuant to G.S. 96-14(2) based on the worker's refusal to work overtime; the worker failed to preserve for review his claim that procedural omissions by the agency violated his due process rights as required by G.S. 96-15(h). Graves v. Culp, Inc., 166 N.C. App. 748, 603 S.E.2d 829, 2004 N.C. App. LEXIS 2019 (2004).

Because the trial court did not rule on the merits of an employee's claim for unemployment benefits, but found that the Employment Security Commission's order did not address all of the relevant issues raised by the record, and the findings were incomplete and failed to set out the sequence of events regarding the timing and notification of the employee's discharge, the order was clearly interlocutory; hence, without evidence that the employee's substantial rights were affected, or that any criteria for an immediate appeal was required, the employee's appeal was dismissed. Reeves v. Yellow Transp., Inc., 170 N.C. App. 610, 613 S.E.2d 350, 2005 N.C. App. LEXIS 1076 (2005), review denied, — N.C. —, 619 S.E.2d 511 (2005).

Because a former employee made no exceptions to the findings made by the Employment Security Commission, the trial court lacked jurisdiction to consider that issue, and the trial court compounded its error by relying upon the appeals referee decision rendered in favor of a co-worker; the trial court erred in reversing the Commission. Woodle v. Onslow County ABC Bd., 178 N.C. App. 372, 631 S.E.2d 199, 2006 N.C. App. LEXIS 1415 (2006).

The scope of judicial review of appeals from decisions of the Employment Security Commission is a determination of whether the facts found by the Commission are supported by competent evidence and, if so, whether the findings support the conclusions of law. The reviewing court may not consider the evidence to find the facts itself. Baptist Children's Homes of N.C., Inc. v. Employment Sec. Comm'n, 56 N.C. App. 781, 290 S.E.2d 402 (1982); Phillips v. Kincaid Furn. Co., 67 N.C. App. 329, 313 S.E.2d 19 (1984).

The scope of appellate court review of decisions of the Commission is a determination of whether the facts found by the Commission are supported by competent evidence and, if so, whether the findings support the conclusions of law. Reco Transp., Inc. v. Employment Sec. Comm'n, 81 N.C. App. 415, 344 S.E.2d 294, cert. denied, 318 N.C. 509, 349 S.E.2d 865 (1986).

Appeal Held Timely Despite Late Filing. — Claimant's appeal from ruling of Employment Security Commission denying unemployment compensation was timely where, although the 30-day period ended July 7 and claimant's appeal was not filed until July 8, 1986, claimant received his copy of the petition, which was mailed on July 3, on July 5, 1986, and counsel for the employer received his copy on July 7, 1986; the failure of the petition to be marked "filed" in the clerk's office was through no fault of petitioner and any neglect was excusable. Edwards v. Milliken & Co., 93 N.C. App. 744, 379 S.E.2d 82 (1989).

Superior court had authority to allow a late appeal from the adjudicator's determination; since the Commission's regulations allow it to grant extensions of time and to permit acts to be done after the expiration of the time allowed, the Commission's rulings were fully reviewable on appeal. Riddick v. Atlantic Veneer, 94 N.C. App. 201, 379 S.E.2d 661 (1989).

The statement of the grounds of the appeal formerly required by subsection (i) had to be filed within the time allowed for appeal. Its purpose was to give notice to the Commission and adverse parties of the alleged errors committed by the Commission and limit the scope of the hearing in the superior court to the specific questions of law raised by the errors assigned it. It was intended, and had to be construed, as a condition precedent to the right of appeal. Noncompliance therewith was fatal. In re State ex rel. Emp. Sec. Comm'n, 234 N.C. 651, 68 S.E.2d 311 (1951).

Conclusiveness of Findings of Fact on Appeal. — Upon appeal to the superior court from any final decision of the Commission, the findings of the Commission as to the facts, if supported by evidence, and in the absence of fraud, are conclusive, the jurisdiction of the superior court on appeal being limited to questions of law. In re Steelman, 219 N.C. 306, 13 S.E.2d 544, 135 A.L.R. 929 (1941); State ex rel. Emp. Sec. Comm'n v. Jarrell, 231 N.C. 381, 57 S.E.2d 403 (1950); In re Abernathy, 259 N.C. 190, 130 S.E.2d 292, appeal dismissed and cert. denied, 375 U.S. 161, 84 S. Ct. 274, 11 L. Ed. 2d 261 (1963); In re Southern, 247 N.C. 544, 101 S.E.2d 327 (1958).

The finding of the Commission that employee-claimants belonged to the same grade or class of workers as other employees, some of whom, immediately before the stoppage occurred, participated in and were directly interested in the labor dispute causing the stoppage, was supported by ample evidence and was therefore conclusive, there being no allegation or evidence of fraud. State ex rel. Unemployment Comp. Comm'n v. Martin, 228 N.C. 277, 45 S.E.2d 385 (1947).

As the findings of fact made by the Commission, when supported by competent evidence, are conclusive and binding on the reviewing courts, which are to hear the appeal on questions of law only, the dismissal of the appeal in the court below for failure to file a statement of grounds as formerly required by subsection (i) deprived the claimants of no substantial right to which, otherwise, they might have been entitled. In re State ex rel. Emp. Sec. Comm'n, 234 N.C. 651, 68 S.E.2d 311 (1951).

The reviewing court under subsection (i) of this section may determine upon proper exceptions whether the facts found by the Commission were supported by competent evidence and whether the findings so supported sustain the legal conclusions and the award made, but in no event may the reviewing court consider the evidence for the purpose of finding the facts for itself. In re Boulden, 47 N.C. App. 468, 267 S.E.2d 397 (1980).

Findings of fact by the Commission which are supported by competent evidence in the record are conclusive on appeal. Yelverton v. Kemp Furn. Indus., Inc., 51 N.C. App. 215, 275 S.E.2d 553 (1981); Vanhorn v. Bassett Furn. Indus., Inc., 76 N.C. App. 377, 333 S.E.2d 309 (1985).

Even when findings are not supported by the evidence, where there is no exception taken to such findings they are presumed to be supported by the evidence and are binding on appeal. Hagan v. Peden Steel Co., 57 N.C. App. 363, 291 S.E.2d 308 (1982).

Based on an employee's own testimony and documentary evidence that his failure to comply with the reasonable requirements of his job, specifically load and unload materials as directed and keep proper records, and because these requirements were reasonable and within his own control, the Employment Security Commission did not err by concluding that the employee was discharged for substantial fault and the trial court did not err by upholding this Commission's ruling. Reeves v. Yellow Transp., Inc., 170 N.C. App. 610, 613 S.E.2d 350, 2005 N.C. App. LEXIS 1076 (2005), review denied, — N.C. —, 619 S.E.2d 511 (2005).

Superior and appellate courts, under G.S. 96-15(i), were bound by the North Carolina Employment Security Commission's findings of fact because there was sufficient evidence to establish that the former employee missed work for medical reasons. James v. Lemmons, 177 N.C. App. 509, 629 S.E.2d 324, 2006 N.C. App. LEXIS 1075 (2006).

Superior court did not violate G.S. 96-15(i) by correcting an appeals referee's finding of fact because the finding of fact contained a mere misstatement by the referee of no consequence to the ultimate determination that an employee's discharge from employment with the employer was not due to substantial fault or misconduct in connection with the work. James v. Lemmons, 177 N.C. App. 509, 629 S.E.2d 324, 2006 N.C. App. LEXIS 1075 (2006).

Remand by Deputy Commissioner. — Where the findings of the referee and the record together were insufficient to resolve certain issues in either party's favor, the deputy commissioner did not abuse his discretion in remanding for a new hearing. Williams v. Burlington Indus., Inc., 318 N.C. 441, 349 S.E.2d 842 (1986).

The Court of Appeals had authority to review deputy commissioner's decision to remand case for a second hearing. Williams v. Burlington Indus., Inc., 318 N.C. 441, 349 S.E.2d 842 (1986).

Remand Where Findings of Fact Supported But Insufficient. — If the findings of fact made by the Commission, even though supported by competent evidence in the record, are insufficient to enable the court to determine the rights of the parties upon the matters in controversy, the proceeding should be remanded to the end that the Commission make proper findings. In re Boulden, 47 N.C. App. 468, 267 S.E.2d 397 (1980).

G.S. 1A-1, Rule 6(e) does not apply to appeals from an Employment Security Commission adjudicator, so as to give the appealing party, in addition to the 10-day period prescribed by subdivision (b)(2) of this section, three additional days within which to file an appeal. Smith v. Daniels Int'l, 64 N.C. App. 381, 307 S.E.2d 434 (1983).

Applied in In re Stevenson, 237 N.C. 528, 75 S.E.2d 520 (1953); In re Collingsworth, 17 N.C. App. 340, 194 S.E.2d 210 (1973); In re Browning, 51 N.C. App. 161, 275 S.E.2d 520 (1981); Butler v. J.P. Stevens & Co., 60 N.C. App. 563, 299 S.E.2d 672 (1983); Tastee Freez Cafeteria v. Watson, 64 N.C. App. 562, 307 S.E.2d 800 (1983); Patrick v. Cone Mills Corp., 64 N.C. App. 722, 308 S.E.2d 476 (1983); Douglas v. J.C. Penney Co., 67 N.C. App. 344, 313 S.E.2d 176 (1984); Huggins v. Precision Concrete Forming, 70 N.C. App. 571, 320 S.E.2d 416 (1984); Lancaster v. Black Mt. Center, 72 N.C. App. 136, 323 S.E.2d 760 (1984); Forbis v. Wesleyan Nursing Home, Inc., 73 N.C. App. 166, 325 S.E.2d 651 (1985); Hoke v. Brinlaw Mfg. Co., 73 N.C. App. 553, 327 S.E.2d 254 (1985); Facet Enters., Inc. v. Deloatch, 83 N.C. App. 495, 350 S.E.2d 906 (1986); Department of Crime Control & Pub. Safety v. Featherston, 96 N.C. App. 102, 384 S.E.2d 306 (1989); Nadeau v. Employment Sec. Comm'n, 97 N.C. App. 272, 388 S.E.2d 145 (1990); Celis v. North Carolina Emp. Sec. Comm'n, 97 N.C. App. 636, 389 S.E.2d 434 (1990); Lindsey v. Qualex, Inc., 103 N.C. App. 585, 406 S.E.2d 609 (1991); Gilliam v. Employment Sec. Comm'n, 110 N.C. App. 796, 431 S.E.2d 772 (1993); Fair v. St. Joseph's Hosp., 113 N.C. App. 159, 437 S.E.2d 875 (1993); State ex rel. Emp. Sec. Comm'n v. Huckabee, 120 N.C. App. 217, 461 S.E.2d 787 (1995); Boyland v. Southern Structures, Inc., 172 N.C. App. 108, 615 S.E.2d 919, 2005 N.C. App. LEXIS 1434 (2005).

Cited in State ex rel. Unemployment Comp. Comm'n v. National Life Ins. Co., 219 N.C. 576, 14 S.E.2d 689, 139 A.L.R. 895 (1941); State ex rel. Emp. Sec. Comm'n v. Smith, 235 N.C. 104, 69 S.E.2d 32 (1952); In re George, 42 N.C. App. 490, 256 S.E.2d 826 (1979); Intercraft Indus. Corp. v. Morrison, 54 N.C. App. 225, 282 S.E.2d 555 (1981); Cianfarra v. N.C. Dep't of Transp., 56 N.C. App. 380, 289 S.E.2d 100 (1982); Walter Kidde & Co. v. Bradshaw, 56 N.C. App. 718, 289 S.E.2d 571 (1982); Williams v. SCM Proctor Silex, 60 N.C. App. 572, 299 S.E.2d 668 (1983); Umstead v. Employment Sec. Comm'n, 75 N.C. App. 538, 331 S.E.2d 218 (1985); Couch v. North Carolina Emp. Sec. Comm'n, 89 N.C. App. 405, 366 S.E.2d 574 (1988); West v. Georgia-Pacific Corp., 107 N.C. App. 600, 421 S.E.2d 395 (1992); Davis v. Britax Child Safety, Inc., 163 N.C. App. 277, 593 S.E.2d 97, 2004 N.C. App. LEXIS 379 (2004).

§ 96-15.1. Protection of witnesses from discharge, demotion, or intimidation.

(a) No person may discharge, demote, or threaten any person because that person has testified or has been summoned to testify in any proceeding under the Employment Security Act.

(b) Any person who violates the provisions of this section shall be liable in a civil action for reasonable damages suffered by any person as a result of the violation, and an employee discharged or demoted in violation of this section shall be entitled to be reinstated to his former position. The burden of proof shall be upon the party claiming a violation to prove a claim under this section.

(c) The General Court of Justice shall have jurisdiction over actions under this section.

(d) The statute of limitations for actions under this section shall be one year pursuant to G.S. 1-54. (1987, c. 532, s. 1.)

Legal Periodicals. — For article, "North Carolina Employment Law After *Coman*: Reaffirming Basic Rights in the Workplace," see 24 Wake Forest L. Rev. 905 (1989).

For note, "Coman v. Thomas Manufacturing Co.: Recognizing a Public Policy Exception to the At-Will Employment Doctrine," see 68 N.C.L. Rev. 1178 (1990).

CASE NOTES

Cited in Williams v. Hillhaven Corp., 91 N.C. App. 35, 370 S.E.2d 423 (1988); Coman v. Thomas Mfg. Co., 91 N.C. App. 327, 371 S.E.2d 731 (1988).

§ 96-15.2. Protection of witness before the Employment Security Commission.

If any person shall by threats, menace, or in any other manner intimidate or attempt to intimidate any person who is summoned or acting as a witness in any proceeding brought under the Employment Security Act, or prevent or deter, or attempt to prevent or deter any person summoned or acting as such witness from attendance upon such proceeding, he shall be guilty of a Class 1 misdemeanor. (1987, c. 532, s. 2; 1993, c. 539, s. 673; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 96-16. Seasonal pursuits.

(a) A seasonal pursuit is one which, because of seasonal conditions making it impracticable or impossible to do otherwise, customarily carries on production operations only within a regularly recurring active period or periods of less than an aggregate of 36 weeks in a calendar year. No pursuit shall be deemed seasonal unless and until so found by the Commission: Provided, however, that from March 27, 1953, any successor under G.S. 96-8(5)b to a seasonal pursuit shall be deemed seasonal unless such successor shall within 120 days after the acquisition request cancellation of the determination of status of such seasonal pursuit; provided further that this provision shall not be applicable to pending cases nor retroactive in effect.

(b) Upon application therefor by a pursuit, the Commission shall determine or redetermine whether such pursuit is seasonal and, if seasonal, the active period or periods thereof. The Commission may, on its own motion, redetermine the active period or periods of a seasonal pursuit. An application for a seasonal determination must be made on forms prescribed by the Commission and must be made at least 20 days prior to the beginning date of the period of production operations for which a determination is requested.

(c) Whenever the Commission has determined or redetermined a pursuit to be seasonal, such pursuit shall be notified immediately, and such notice shall contain the beginning and ending dates of the pursuit's active period or periods. Such pursuits shall display notices of its seasonal determination conspicuously on its premises in a sufficient number of places to be available for inspection by its workers. Such notices shall be furnished by the Commission.

(d) A seasonal determination shall become effective unless an interested party files an application for review within 10 days after the beginning date of the first period of production operations to which it applies. Such an application for review shall be deemed to be an application for a determination of status, as provided in G.S. 96-4, subsections (m) through (q), of this Chapter, and shall be heard and determined in accordance with the provisions thereof.

(e) All wages paid to a seasonal worker during his base period shall be used in determining his weekly benefit amount; provided however, that all weekly benefit amounts so determined shall be rounded to the nearest lower full dollar amount (if not a full dollar amount).

(f)(1) A seasonal worker shall be eligible to receive benefits based on seasonal wages only for a week of unemployment which occurs, or the greater part of which occurs within the active period or periods of the seasonal pursuit or pursuits in which he earned base period wages.

(2) A seasonal worker shall be eligible to receive benefits based on nonseasonal wages for any week of unemployment which occurs during any active period or periods of the seasonal pursuit in which he has earned base period wages provided he has exhausted benefits based on seasonal wages. Such worker shall also be eligible to receive benefits based on nonseasonal wages for any week of unemployment which occurs during the inactive period or periods of the seasonal pursuit in which he earned base period wages irrespective as to whether he has exhausted benefits based on seasonal wages.

(3) The maximum amount of benefits which a seasonal worker shall be eligible to receive based on seasonal wages shall be an amount, adjusted to the nearest multiple of one dollar ($1.00), determined by multiplying the maximum benefits payable in his benefit year, as provided in G.S. 96-12(d) of this Chapter, by the percentage obtained by dividing the seasonal wages in his base period by all of his base period wages.

(4) The maximum amount of benefits which a seasonal worker shall be eligible to receive based on nonseasonal wages shall be an amount, adjusted to the nearest multiple of one dollar ($1.00), determined by multiplying the maximum benefits payable in his benefit year, as provided in G.S. 96-12(d) of this Chapter, by the percentage obtained by dividing the nonseasonal wages in his base period by all of his base period wages.

(5) In no case shall a seasonal worker be eligible to receive a total amount of benefits in a benefit year in excess of the maximum benefits payable for such benefit year, as provided in G.S. 96-12(d) of this Chapter.

(g)(1) All benefits paid to a seasonal worker based on seasonal wages shall be charged, as prescribed in G.S. 96-9(c)(2) of this Chapter, against the account of his base period employer or employers who paid him such seasonal wages, and for the purpose of this paragraph such seasonal wages shall be deemed to constitute all of his base period wages.

(2) All benefits paid to a seasonal worker based on nonseasonal wages shall be charged, as prescribed in G.S. 96-9(c)(2) of this Chapter, against the account of his base period employer or employers who paid

him such nonseasonal wages, and for the purpose of this paragraph such nonseasonal wages shall be deemed to constitute all of his base period wages.

(h) The benefits payable to any otherwise eligible individual shall be calculated in accordance with this section for any benefit year which is established on or after the beginning date of a seasonal determination applying to a pursuit by which such individual was employed during the base period applicable to such benefit year, as if such determination had been effective in such base period.

(i) Nothing in this section shall be construed to limit the right of any individual whose claim for benefits is determined in accordance herewith to appeal from such determination as provided in G.S. 96-15 of this Chapter.

(j) As used in this section:

(1) "Pursuit" means an employer or branch of an employer.

(2) "Branch of an employer" means a part of an employer's activities which is carried on or is capable of being carried on as a separate enterprise.

(3) "Production operations" mean all the activities of a pursuit which are primarily related to the production of its characteristic goods or services.

(4) "Active period or periods" of a seasonal pursuit means the longest regularly recurring period or periods within which production operations of the pursuit are customarily carried on.

(5) "Seasonal wages" mean the wages earned in a seasonal pursuit within its active period or periods. The Commission may prescribe by regulation the manner in which seasonal wages shall be reported.

(6) "Seasonal worker" means a worker at least twenty-five percent (25%) of whose base period wages are seasonal wages.

(7) "Interested party" means any individual affected by a seasonal determination.

(8) "Inactive period or periods" of a seasonal pursuit means that part of a calendar year which is not included in the active period or periods of such pursuit.

(9) "Nonseasonal wages" mean the wages earned in a seasonal pursuit within the inactive period or periods of such pursuit, or wages earned at any time in a nonseasonal pursuit.

(10) "Wages" mean remuneration for employment. (1939, c. 28; 1941, c. 108, s. 7; 1943, c. 377, s. 141/2; 1945, c. 522, s. 33; 1953, c. 401, ss. 20, 21; 1957, c. 1059, s. 14; 1959, c. 362, s. 18; 1983, c. 585, s. 19.)

CASE NOTES

Cited in In re State ex rel. Emp. Sec. Comm'n, 234 N.C. 651, 68 S.E.2d 311 (1951).

§ 96-17. Protection of rights and benefits; attorney representation; prohibited fees; deductions for child support obligations.

(a) Waiver of Rights Void. — Any agreement by an individual to waive, release, or commute his rights to benefits or any other rights under this Chapter shall be void. Any agreement by any individual in the employ of any person or concern to pay all or any portion of an employer's contributions, required under this Chapter from such employer, shall be void. No employer shall directly or indirectly make or require or accept any deduction from the remuneration of individuals in his employ to finance the employer's contributions required from him, or require or accept any waiver of any right hereunder by any individual in his employ. Any employer or officer or agent of an employer who violates any provision of this subsection shall, for each offense, be fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000) or be imprisoned for not more than six months, or both.

(b) Representation. — Any claimant or employer who is a party to any proceeding before the Commission may be represented by (i) an attorney; or (ii) any person who is supervised by an attorney, however, the attorney need not be present at any proceeding before the Commission.

(b1) Fees Prohibited. — Except as otherwise provided in this Chapter, no individual claiming benefits in any administrative proceeding under this Chapter shall be charged fees of any kind by the Commission or its representative, and in any court proceeding under this Chapter each party shall bear its own costs and legal fees.

(c) No Assignment of Benefits; Exemptions. — Except as provided in subsection (d) of this section, any assignment, pledge, or encumbrance of any right to benefits which are or may become due or payable under this Chapter shall be void; and such rights to benefits shall be exempt from levy, execution, attachment, or any other remedy whatsoever provided for the collection of debts; and benefits received by any individual, so long as they are not mingled with other funds of the recipient, shall be exempt from any remedy whatsoever for the collection of all debts except debts incurred for necessaries furnished to such individual or his spouse or dependents during the time when such individual was unemployed. Any waiver of any exemption provided for in this subsection shall be void.

(d)(1) Definitions. — For the purpose of this subsection and when used herein:

a. "Unemployment compensation" means any compensation found by the Commission to be payable to an unemployed individual under the Employment Security Law of North Carolina (including amounts payable by the Commission pursuant to an agreement under any federal law providing for compensation, assistance or allowances with respect to unemployment) provided, that nothing in this subsection shall be construed to limit the Commission's ability to reduce or withhold benefits, otherwise payable, under authority granted elsewhere in this Chapter including but not limited to reductions for wages or earnings while unemployed and for the recovery of previous overpayments of benefits.

b. "Child support obligation" includes only obligations which are being enforced pursuant to a plan described in section 454 of the Social Security Act which has been approved by the Secretary of Health and Human Services under Part D of Title IV of the Social Security Act.

c. "State or local child support enforcement agency" means any agency of this State or a political subdivision thereof operating pursuant to a plan described in subparagraph b. above.

(2)a. An individual filing a new claim for unemployment compensation shall, at the time of filing such claim, disclose whether the individual owes child support obligations, as defined under subparagraph (1)b. of this subsection. If any such individual discloses that he or she owes child support obligations and is determined by the Commission to be eligible for payment of unemployment compensation, the Commission shall notify the State or local child support enforcement agency enforcing such obligation that such individual has been determined to be eligible for payment of unemployment compensation.

b. Upon payment by the State or local child support enforcement agency of the processing fee provided for in paragraph (4) of this subsection and beginning with any payment of unemployment compensation that, except for the provisions of this subsection, would be made to the individual during the then current benefit year and more than five working days after the receipt of the processing fee by the Commission, the Commission shall deduct and withhold from any unemployment compensation otherwise payable to an individual who owes child support obligations:

1. The amount specified by the individual to the Commission to be deducted and withheld under this paragraph if neither subparagraph 2. nor subparagraph 3. of this paragraph is applicable; or
2. The amount, if any, determined pursuant to an agreement submitted to the Commission under section 454(20)(B)(i) of the Social Security Act by the State or local child support enforcement agency, unless subparagraph 3. of this paragraph is applicable; or
3. Any amount otherwise required to be so deducted and withheld from such unemployment compensation pursuant to properly served legal process, as that term is defined in section 462(e) of the Social Security Act.

c. Any amount deducted and withheld under paragraph b. of this subdivision shall be paid by the Employment Security Commission to the appropriate State or local child support enforcement agency.

d. The Department of Health and Human Services and the Commission are hereby authorized to enter into one or more agreements which may provide for the payment to the Commission of the processing fees referred to in subparagraph b. and the payment to the Department of Health and Human Services of unemployment compensation benefits withheld, referred to in subparagraph c., on an open account basis. Where such an agreement has been entered into, the processing fee shall be deemed to have been made and received (for the purposes of fixing the date on which the Commission will begin withholding unemployment compensation benefits) on the date a written authorization from the Department of Health and Human Services to charge its account is received by the Commission. Such an authorization shall apply to all processing fees then or thereafter (within the then current benefit year) chargeable with respect to any individual name in the authorization. Any agreement shall provide for the reimbursement to the Commission of any start-up costs and the cost of providing notice to the Department of Health and Human Services of any disclosure required by subparagraph a. Such an agreement may dispense with the notice requirements of subparagraph a. by providing for a suitable substitute procedure, reasonably calculated to discover those persons owing child support obligations who are eligible for unemployment compensation payments.

(3) Any amount deducted and withheld under paragraph (2) of this subdivision shall, for all purposes, be treated as if it were paid to the individual as unemployment compensation and then paid by such individual to the State or local child support enforcement agency in satisfaction of the individual's child support obligations.

(4)a. On or before April 1 of 1983 and each calendar year thereafter, the Commission shall set and forward to the Secretary of Health and

Human Services for use in the next fiscal year, a schedule of processing fees for the withholding and payment of unemployment compensation as provided for in this subsection, which fees shall reflect its best estimate of the administrative cost to the Commission generated thereby.

b. At least 20 days prior to September 25, 1982, the Commission shall set and forward to the Secretary of Health and Human Services an interim schedule of fees which will be in effect until July 1, 1983.

c. The provisions of this subsection apply only if arrangements are made for reimbursement by the State or local child support agency for all administrative costs incurred by the Commission under this subsection attributable to child support obligations enforced by the agency. (Ex. Sess. 1936, c. 1, s. 15; 1937, c. 150; 1979, c. 660, s. 22; 1981, c. 762, ss. 1, 2; 1981 (Reg. Sess., 1982), c. 1178, ss. 1, 2; 1985, c. 552, s. 21; 1997-443, s. 11A.118(a); 1997-456, s. 27.)

Legal Periodicals. — For survey of 1982 administrative law, see 61 N.C.L. Rev. 961 (1983).

CASE NOTES

G.S. 6-19.1 Discussed. — For discussion suggesting without deciding that G.S. 96-17, rather than G.S. 6-19.1, applies in cases involving unemployment benefits, see Doyle v. Southeastern Glass Laminates, Inc., 104 N.C. App. 326, 409 S.E.2d 732 (1991), rev'd on other grounds, 331 N.C. 748, 417 S.E.2d 236 (1992).

Fees Prohibited. — Appeal to Superior Court by Employment Security Commission (ESC) employer was a proper proceeding under chapter 96; therefore, subsection (b1) prohibited the Superior Court award of attorney's fees. Employment Sec. Comm'n v. Peace, 341 N.C. 716, 462 S.E.2d 222 (1995).

Cited in In re Hare, 32 Bankr. 16 (Bankr. E.D.N.C. 1983).

§ 96-18. Penalties.

(a) Any person who makes a false statement or representation knowing it to be false or knowingly fails to disclose a material fact to obtain or increase any benefit under this Chapter or under an employment security law of any other state, the federal government, or of a foreign government, either for himself or any other person, shall be guilty of a Class 1 misdemeanor, and each such false statement or representation or failure to disclose a material fact shall constitute a separate offense.

Records, with any necessary authentication thereof, required in the prosecution of any criminal action brought by another state or foreign government for misrepresentation to obtain benefits under the law of this State shall be made available to the agency administering the employment security law of any such state or foreign government for the purpose of such prosecution. Photostatic copies of all records of agencies of other states or foreign governments required in the prosecution of any criminal action under this section shall be as competent evidence as the originals when certified under the seal of such agency, or when there is no seal, under the hand of the keeper of such records.

(b) Any employing unit or any officer or agent of an employing unit or any other person who makes a false statement or representation, knowing it to be false, or who knowingly fails to disclose a material fact to prevent or reduce the payment of benefits to any individual entitled thereto, or to avoid becoming or remaining subject hereto or to avoid or reduce any contributions or other payment required from an employing unit under this Chapter, or who willfully fails or refuses to furnish any reports required hereunder, or to produce or permit the inspection or copying of records as required hereunder, shall be guilty of a Class 1 misdemeanor; and each such false statement or representation or failure to disclose a material fact, and each day of such failure or refusal shall constitute a separate offense.

(b1) Except as provided in this subsection, the penalties and other provisions in subdivisions (6), (7), (9a), and (11) of G.S. 105-236 apply to unemployment insurance contributions under this Chapter to the same extent that they apply to taxes as defined in G.S. 105-228.90(b)(7). The Commission has the same powers under those subdivisions with respect to unemployment insurance contributions as does the Secretary of Revenue with respect to taxes as defined in G.S. 105-228.90(b)(7).

G.S. 105-236(9a) applies to a "contribution tax return preparer" to the same extent as it applies to an income tax preparer. As used in this subsection, a 'contribution tax return preparer' is a person who prepares for compensation, or who employs one or more persons to prepare for compensation, any return of tax imposed by this Chapter or any claim for refund of tax imposed by this Chapter. For purposes of this definition, the completion of a substantial portion of a return or claim for refund is treated as the preparation of the return or claim for refund. The term does not include a person merely because the person (i) furnishes typing, reproducing, or other mechanical assistance, (ii) prepares a return or claim for refund of the employer, or an officer or employee of the employer, by whom the person is regularly and continuously employed, (iii) prepares as a fiduciary a return or claim for refund for any person, or (iv) represents a taxpayer in a hearing regarding a proposed assessment.

The penalty in G.S. 105-236(7) applies with respect to unemployment insurance contributions under this Chapter only when one of the following circumstances exist in connection with the violation:

(1) Any employing units employing more than 10 employees.
(2) A contribution of more than two thousand dollars ($2,000) has not been paid.
(3) An experience rating account balance is more than five thousand dollars ($5,000) overdrawn.

If none of the circumstances set forth in subdivision (1), (2), or (3) of this subsection exist in connection with a violation of G.S. 105-236(7) applied under this Chapter, the offender is guilty of a Class 1 misdemeanor and each day the violation continues constitutes a separate offense.

If the Commission finds that any person violated G.S. 105-236(9a) and is not subject to a fraud penalty, the person shall pay a civil penalty of five hundred dollars ($500.00) per violation for each day the violations continue, plus the reasonable costs of investigation and enforcement.

(c) Any person who shall willfully violate any provisions of this Chapter or any rule or regulation thereunder, the violation of which is made unlawful or the observance of which is required under the terms of this Chapter, or for which a penalty is neither prescribed herein nor provided by any other applicable statute, shall be guilty of a Class 1 misdemeanor, and each day such violation continues shall be deemed to be a separate offense.

(d) Repealed by Session Laws 1983, c. 625, s. 15.

(e) An individual shall not be entitled to receive benefits for a period of 52 weeks beginning with the first day of the week following the date that notice of determination or decision is mailed finding that he, or another in his behalf with his knowledge, has been found to have knowingly made a false statement or misrepresentation, or who has knowingly failed to disclose a material fact to obtain or increase any benefit or other payment under this Chapter.

(f) Repealed by Session Laws 1983, c. 625, s. 15.

(g)(1) Any person who, under subsection (e) above, has been held ineligible for benefits and who, because of those same acts or omissions has received any sum as benefits under this Chapter to which he was not entitled, shall be liable to repay any such sum to the Commission as provided in subparagraph (3) below, provided no such recovery or recoupment of such sum may be initiated after 10 years from the last day of the year in which the overpayment occurred.

(2) Any person who has received any sum as benefits under this Chapter by reason of the nondisclosure or misrepresentation by him or by another of a material fact (irrespective of whether such nondisclosure or misrepresentation was known or fraudulent) or has been paid benefits to which he was not entitled for any reason (including errors on the part of any representative of the Commission) other than subparagraph (1) above shall be liable to repay such sum to the Commission as provided in subparagraph (3) below, provided no such recovery or recoupment of such sum may be initiated after three years from the last day of the year in which the overpayment occurred.

(3) The Commission may collect the overpayments provided for in this subsection by one or more of the following procedures as the Commission may, except as provided herein, in its sole discretion choose:

a. If, after due notice, any overpaid claimant shall fail to repay the sums to which he was not entitled, the amount due may be collected by civil action in the name of the Commission, and the cost of such action shall be taxed to the claimant. Civil actions brought under this section to collect overpayments shall be heard by the court at the earliest possible date and shall be entitled to preference upon the calendar of the court over all other civil actions except petitions for judicial review under this Chapter.

b. If any overpayment recognized by this subsection shall not be repaid within 30 days after the claimant has received notice and demand for same, and after due notice and reasonable opportunity for hearing (if a hearing on the merits of the claim has not already been had) the Commission, under the hand of its Chairman, may certify the same to the clerk of the superior court of the county in which the claimant resides or has property, and additional copies of said certificate for each county in which the Commission has reason to believe such claimant has property located; such certificate and/or copies thereof so forwarded to the clerk of the superior court shall immediately be docketed and indexed on the cross index of judgments, and from the date of such docketing shall constitute a preferred lien upon any property which said claimant may own in said county, with the same force and effect as a judgment rendered by the superior court. The Commission shall forward a copy of said certificate to the sheriff or sheriffs of such county or counties, or to a duly authorized agent of the Commission, and when so forwarded and in the hands of such sheriff or agent of the Commission, shall have all the force and effect of an execution issued to such sheriff or agent of the Commission by the clerk of the superior court upon a judgment of the superior court duly docketed in said county. The Commission is further authorized and empowered to issue alias copies of said certificate or execution to the sheriff or sheriffs of such county or counties, or a duly authorized agent of the Commission in all cases in which the sheriff or duly authorized agent has returned an execution or certificate unsatisfied; when so issued and in the hands of the sheriff or duly authorized agent of the Commission, such alias shall have all the force and effect of an alias execution issued to such sheriff or duly authorized agent of the Commission by the clerk of the superior court upon a judgment of the superior court duly docketed in said county. Provided, however, that notwithstanding any provision of this subsection, upon filing one written notice with the Commission, the sheriff of any county shall have the sole and exclusive right to serve all executions and make all collections mentioned in this subsection and in such case, no agent of the Commission shall have the authority to serve any executions or make any collections therein in such county. A return of such execution or alias execution, shall be made to the Commission, together with all moneys collected thereunder, and when such order, execution or alias is referred to the agent of the Commission for service, the said agent of the Commission shall be vested with all the powers of the sheriff to the extent of serving such order, execution or alias and levying or collecting thereunder. The agent of the Commission to whom such order or execution is referred shall give a bond not to exceed three thousand dollars ($3,000) approved by the Commission for the faithful performance of such duties. The liability of said agent shall be in the same manner and to the same extent as is now imposed on sheriffs in the service of execution. If any sheriff of this State or any agent of the Commission who is charged with the duty of serving executions shall willfully fail, refuse or neglect to execute any order directed to him by the said Commission and within the time provided by law, the official bond of such sheriff or of such agent of the Commission shall be liable for the overpayments and costs due by the claimant. Additionally, the Commission or its designated representatives in the collection of overpayments shall have the powers enumerated in G.S. 96-10(b)(2) and (3).

c. Any person who has been found by the Commission to have been overpaid under subparagraph (1) above shall be liable to have such sums deducted from future benefits payable to him under this Chapter.

d. Any person who has been found by the Commission to have been overpaid under subparagraph (2) above shall be liable to have such sums deducted from future benefits payable to him under this Chapter in such amounts as the Commission may by regulation prescribe but no such benefit payable for any week shall be reduced by more than fifty percent (50%) of that person's weekly benefit amount.

e. To the extent permissible under the laws and Constitution of the United States, the Commission is authorized to enter into or cooperate in arrangements or reciprocal agreements with appropriate and duly authorized agencies of other states or the United States Secretary of Labor, or both, whereby: (1) Overpayments of unemployment benefits as determined under subparagraphs (1) and (2) above shall be recovered by offset from unemployment benefits otherwise payable under the unemployment compensation law of another state, and overpayments of unemployment benefits as determined under the unemployment compensation law of such other state shall be recovered by offset from unemployment benefits otherwise payable under this Chapter; and, (2) Overpayments of unemployment benefits as determined under applicable federal law, with respect to benefits or allowances for unemployment provided under a federal program administered by this State under an agreement with the United States Secretary of Labor, shall be recovered by offset from unemployment benefits otherwise payable under this Chapter or any such federal program, or under the unemployment compensation law of another state or any such federal unemployment benefit or allowance program administered by such other state under an agreement with the United States Secretary of Labor if such other state has in effect a reciprocal agreement with the United States Secretary of Labor as authorized by Section 303(g)(2) of the federal Social Security Act, if the United States agrees, as provided in the reciprocal agreement with this State entered into under such Section 303(g)(2) of the Social Security Act, that overpayments of unemployment benefits as determined under subparagraphs (1) and (2) above, and overpayment as determined under the unemployment compensation law of another state which has in effect a reciprocal agreement with the United States Secretary of Labor as authorized by Section 303(g)(2) of the Social Security Act, shall be recovered by offset from benefits or allowances for unemployment otherwise payable under a federal program administered by this State or such other state under an agreement with the United States Secretary of Labor.

f. The Commission may in its discretion decline to collect overpayments to claimants if the claimant has deceased after the payment was made. In such a case the Commission may remove the debt of the deceased claimant from its records. (Ex. Sess. 1936, c. 1, s. 16; 1943, c. 319; c. 377, ss. 29, 30; 1945, c. 552, s. 34; 1949, c. 424, s. 26; 1951, c. 332, s. 16; 1953, c. 401, ss. 1, 22; 1955, c. 385, s. 9; 1959, c. 362, ss. 19, 20; 1965, c. 795, ss. 23, 24; 1971, c. 673, s. 31; 1977, c. 727, s. 55; 1979, c. 660, ss. 23-25; 1981, c. 160, s. 33; 1983, c. 625, s. 15; 1985, c. 552, s. 22; 1987, c. 103, s. 4; 1989, c. 583, ss. 13, 14; 1993, c. 343, s. 7; c. 539, ss. 674-676; 1994, Ex. Sess., c. 24, s. 14(c); 2003-67, s. 2; 2005-410, s. 6.)

CASE NOTES

Cited in Gilliam v. Employment Sec. Comm'n, 110 N.C. App. 796, 431 S.E.2d 772 (1993).

§ 96-19. Enforcement of Employment Security Law discontinued upon repeal or invalidation of federal acts; suspension of enforcement provisions contested.

(a) It is the purpose of this Chapter to secure for employers and employees the benefits of Title III and Title IX of the Federal Social Security Act, approved August 14, 1935, as to credit on payment of federal taxes, of State contributions, the receipt of federal grants for administrative purposes, and all other provisions of the said Federal Social Security Act; and it is intended as a policy of the State that this Chapter and its requirements for contributions by employers shall continue in force only so long as such employers are required to pay the federal taxes imposed in said Federal Social Security Act by a valid act of Congress. Therefore, if Title III and Title IX of the said Federal Social Security Act shall be declared invalid by the United States Supreme Court, or if such law be repealed by congressional action so that the federal tax cannot be further levied, from and after the declaration of such invalidity by the United States Supreme Court, or the repeal of said law by congressional action, as the case may be, no further levy or collection of contributions shall be made hereunder. The enactment by the Congress of the United States of the Railroad Retirement Act and the Railroad Unemployment Insurance Act shall in no way affect the administration of this law except as herein expressly provided.

All federal grants and all contributions theretofore collected, and all funds in the treasury by virtue of this Chapter, shall, nevertheless, be disbursed and expended, as far as may be possible, under the terms of this Chapter: Provided, however, that contributions already due from any employer shall be collected and paid into the said fund, subject to such distribution; and provided further, that the personnel of the State Employment Security Commission shall be reduced as rapidly as possible.

The funds remaining available for use by the North Carolina Employment Security Commission shall be expended, as necessary, in making payment of all such awards as have been made and are fully approved at the date aforesaid, and the payment of the necessary costs for the further administration of this Chapter, and the final settlement of all affairs connected with same. After complete payment of all administrative costs and full payment of all awards made as aforesaid, any and all moneys remaining to the credit of any employer shall be refunded to such employer, or his duly authorized assignee: Provided, that the State employment service, created by Chapter 106, Public Laws of 1935, and transferred by Chapter 1, Public Laws of 1936, Extra Session, and made a part of the Employment Security Commission of North Carolina, shall in such event return to and have the same status as it had prior to enactment of Chapter 1, Public Laws of 1936, Extra Session, and under authority of Chapter 106, Public Laws of 1935, shall carry on the duties therein prescribed; but, pending a final settlement of the affairs of the Employment Security Commission of North Carolina, the said State employment service shall render such service in connection therewith as shall be demanded or required under the provisions of this Chapter or the provisions of Chapter 1, Public Laws of 1936, Extra Session.

(b) The Employment Security Commission may, upon receiving notification from the U.S. Department of Labor that any provision of this Chapter is out of conformity with the requirements of the federal law or of the U.S. Department of Labor, suspend the enforcement of the contested section or provision until the North Carolina Legislature next has an opportunity to make changes in the North Carolina law. The Employment Security Commission shall, in order to implement the above suspension:

(1) Notify the Governor's office and provide that office with a copy of the determination or notification of the U.S. Department of Labor;

(2) Advise the Governor's office as to whether the contested portion or provision of the law would, if not enforced, so seriously hamper the operations of the agency as to make it advisable that a special session of the legislature be called;

(3) Take all reasonable steps available to obtain a reprieval from the implementation of any federal conformity failure sanctions until the State legislature has been afforded an opportunity to consider the existing conflict. (1937, c. 363; 1939, c. 52, s. 8; 1947, c. 598, s. 1; 1977, c. 727, s. 56.)

Legal Periodicals. — For survey of 1977 law on employment regulation, see 56 N.C.L. Rev. 854 (1978).

ARTICLE 3.

Employment Service Division.

§ 96-20. Duties of Division; conformance to Wagner-Peyser Act; organization; director; employees.

The Employment Service Division of the Employment Security Commission shall establish and maintain free public employment offices in such number and in such places as may be necessary for the proper administration of this Chapter, and for the purpose of performing such duties as are within the purview of the act of Congress entitled "An act to provide for the establishment of a national employment system and for cooperation with the states in the promotion of such system and for other purposes," approved June 6, 1933, (48 Stat., 113; U.S.C., Title 29, section 49(c), as amended). The said Division shall be administered by a full-time salaried director. The Employment Security Commission shall be charged with the duty to cooperate with any official or agency of the United States having powers or duties under the provisions of the said act of Congress, as amended, and to do and perform all things necessary to secure to this State the benefits of the said act of Congress, as amended, in the promotion and maintenance of a system of public employment offices. The provisions of the said act of Congress, as amended, are hereby accepted by this State, in conformity with section 4 of said act, and this State will observe and comply with the requirements thereof. The Employment Security Commission is hereby designated and constituted the agency of this State for the purpose of said act. The Commission is directed to appoint the director, other officers, and employees of the Employment Service Division. (Ex. Sess. 1936, c. 1, s. 12; 1941, c. 108, s. 11; 1947, c. 326, s. 24.)

CASE NOTES

Cited in Employment Sec. Comm'n v. Lachman, 305 N.C. 492, 290 S.E.2d 616 (1982).

§ 96-21. Duties concerning veterans and worker profiling.

The duties of the Employment Service Division include the following:

(1) To cooperate with all State and federal agencies in attempting to secure suitable employment and fair treatment for military veterans and disabled veterans.

(2) To establish and use a worker profiling system that complies with 42 U.S.C. § 503(a)(10) to identify claimants for benefits whom the Division must refer to reemployment services in accordance with that law. (1921, c. 131, s. 3; C.S., s. 7312(c); Ex. Sess. 1936, c. 1, s. 12; 1979, c. 660, s. 26; 1993 (Reg. Sess., 1994), c. 680, s. 6.)

§ 96-22. Employment of and assistance to minors.

The Employment Service Division shall have jurisdiction over all matters contemplated in this Article pertaining to securing employment for all minors who avail themselves of the free employment service. The Employment Service Division shall have power to so conduct its affairs that at all times it shall be in harmony with laws relating to child labor and compulsory education; to aid in inducing minors over 16, who cannot or do not for various reasons attend day school, to undertake promising skilled employment; to aid in influencing minors who do not come within the purview of compulsory education laws, and who do not attend day school, to avail themselves of continuation or special courses in existing night schools, vocational schools, part-time schools, trade schools, business schools, library schools, university extension courses, etc., so as to become more skilled in such occupation or vocation to which they are respectively inclined or particularly adapted, including assisting those minors who are interested in securing vocational employment in agriculture and to aid in the development of good citizenship and in the study and development of vocational rehabilitation capabilities for handicapped minors. (1921, c. 131, s. 4; C.S., s. 7312(d); Ex. Sess. 1936, c. 1, s. 12; 1979, c. 660, s. 27.)

§ 96-23: Repealed by Session Laws 1985, c. 197, s. 8.

Cross References. — As to job service information, see now G.S. 96-4(t)(2).

§ 96-24. Local offices; cooperation with United States service; financial aid from United States.

The Employment Service Division is authorized to enter into agreement with the governing authorities of any municipality, county, township, or school corporation in the State for such period of time as may be deemed desirable for the purpose of establishing and maintaining local free employment offices, and for the extension of vocational guidance in cooperation with the United States Employment Service, and under and by virtue of any such agreement as aforesaid to pay, from any funds appropriated by the State for the purposes of this Article, any part or the whole of the salaries, expenses or rent, maintenance, and equipment of offices and other expenses. (1921, c. 131, s. 6; C.S., s. 7312(f); 1931, c. 312, s. 3; 1935, c. 106, s. 4; Ex. Sess. 1936, c. 1, s. 12.)

§ 96-25. Acceptance and use of donations.

It shall be lawful for the Employment Service Division to receive, accept, and use, in the name of the people of the State, or any community or municipal corporation, as the donor may designate, by gift or devise, any moneys, buildings, or real estate for the purpose of extending the benefits of this Article and for the purpose of giving assistance to handicapped citizens through vocational rehabilitation. (1921, c. 131, s. 7; C.S., s. 7312(g); 1931, c. 312, s. 3; Ex. Sess. 1936, c. 1, s. 12; 1979, c. 660, s. 28.)

§ 96-26. Cooperation of towns, townships, and counties with Division.

It shall be lawful for the governing authorities of any municipality, county, township, or school corporation in the State to enter into cooperative agreement with the Employment Service Division and to appropriate and expend the necessary money upon such conditions as may be approved by the Employment Service Division and to permit the use of public property for the joint establishment and maintenance of such offices as may be mutually agreed upon, and which will further the purpose of this Article. (1921, c. 131, s. 8; C.S., s. 7312(h); 1931, c. 312, s. 3; 1935, c. 106, s. 5; Ex. Sess. 1936, c. 1, s. 12.)

§ 96-27. Method of handling employment service funds.

All federal funds received by this State under the Wagner-Peyser Act (48 Stat. 113; Title 29, U.S.C., section 49) as amended, and all State funds appropriated or made available to the Employment Service Division shall be paid into the Employment Security Administration Fund, and said moneys are hereby made available to the State employment service to be expended as provided in this Article and by said act of Congress. For the purpose of establishing and maintaining free public employment offices, said Division is authorized to enter into agreements with any political subdivision of this State or with any private, nonprofit organization, and as a part of any such agreement the Commission may accept moneys, services, or quarters as a contribution to the Employment Security Administration Fund. (1935, c. 106, s. 7; Ex. Sess. 1936, c. 1, s. 12; 1941, c. 108, s. 11; 1947, c. 598, s. 1.)

Editor's Note. — Session Laws 2001-410, s. 3, effective September 15, 2001, indicated that it was rewriting G.S. 96-27 (b). However, Session Laws 2001-413, s. 8.2(a), effective the same date, amended this reference to indicate that G.S. 97-26 (b) was being amended.

§ **96-28:** Repealed by Session Laws 1951, c. 332, s. 17.

§ 96-29. Openings listed by State agencies.

Every State agency shall list with the Employment Security Commission of North Carolina every job opening occurring within the agency which opening the agency wishes filled and which will not be filled solely by promotion or transfer from within the existing State government work force. The listing shall include a brief description of the duties and salary range and shall be filed with the Commission within 30 days after the occurrence of the opening. The State agency may not fill the job opening for at least 21 days after the listing has been filed with the Commission. The listing agency shall report to the Commission the filling of any listed opening within 15 days after the opening has been filled.

The Employment Security Commission may act to waive the 21-day listing period for job openings in job classifications declared to be in short supply by the State Personnel Commission, upon the request of a State agency, if the 21-day listing requirement for these classifications hinders the agency in providing essential services. (1973, c. 715, s. 1; c. 1341; 1985, c. 358; 1989, c. 583, s. 16; 1991, c. 357, s. 1.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

ARTICLE 4.

Job Training, Education, and Placement Information Management.

§ 96-30. Findings and purpose.

The General Assembly finds it in the best interests of this State that the establishment, maintenance, and funding of State job training, education, and placement programs be based on current, comprehensive information on the effectiveness of these programs in securing employment for North Carolina citizens and providing a well-trained workforce for business and industry in this State. To this end, it is the purpose of this Article to require the establishment of an information system that maintains up-to-date job-related information on current and former participants in State job training and education programs. (1995, c. 507, s. 25.6(a).)

§ 96-31. Definitions.

As used in this Article, unless the context clearly requires otherwise, the term:

(1) "CFS" means the common follow-up information management system developed by the Employment Security Commission of North Carolina as authorized under this Article.

(2) "ESC" means the Employment Security Commission of North Carolina.

(3) Repealed by Session Laws 2000, c. 140, s. 93.1(d), effective July 21, 2000.

(4) "State job training, education, and placement program" or "State-funded program" means a program operated by a State or local government agency or entity and supported in whole or in part by State or federal funds, that provides job training and education or job placement services to program participants. The term does not include on-the-job training provided to current employees of the agency or entity for the purposes of professional development. (1995, c. 507, s. 25.6(a); 2000-140, s. 93.1(d).)

§ 96-32. Common follow-up information management system created.

(a) The Employment Security Commission of North Carolina shall develop, implement, and maintain a common follow-up information management system for tracking the employment status of current and former participants in State job training, education, and placement programs. The system shall provide for the automated collection, organization, dissemination, and analysis of data obtained from State-funded programs that provide job training and education and job placement services to program participants. In developing the system, the ESC shall ensure that data and information collected from State agencies is confidential, not open for general public inspection, and maintained and disseminated in a manner that protects the identity of individual persons from general public disclosure.

(b) The ESC shall adopt procedures and guidelines for the development and implementation of the CFS authorized under this section.

(c) Based on data collected under the CFS, the ESC shall evaluate the effectiveness of job training, education, and placement programs to determine if specific program goals and objectives are attained, to determine placement and completion rates for each program, and to make recommendations regarding the continuation of State funding for programs evaluated. (1995, c. 507, s. 25.6(a); 2000-140, s. 93.1(e); 2001-424, ss. 12.2(b), 20.17(a).)

§ 96-33. State agencies required to provide information and data.

(a) Every State agency and local government agency or entity that receives State or federal funds for the direct or indirect support of State job training, education, and placement programs shall provide to the Employment Security Commission of North Carolina all data and information available to or within the agency or entity's possession requested by the ESC for input into the common follow-up information management system authorized under this Article.

(b) Each agency or entity required to report information and data to the ESC under this Article shall maintain true and accurate records of the information and data requested by the ESC. The records shall be open to ESC inspection and copying at reasonable times and as often as necessary. Each agency or entity shall further provide, upon request by ESC, sworn or unsworn reports with respect to persons employed or trained by the agency or entity, as deemed necessary by the ESC to carry out the purposes of this Article. Information obtained by the ESC from the agency or entity shall be held by ESC as confidential and shall not be published or open to public inspection other than in a manner that protects the identity of individual persons and employers. (1995, c. 507, s. 25.6(a).)

§ 96-34. Prohibitions on use of information collected.

Data and information reported, collected, maintained, disseminated, and analyzed may not be used by any State or local government agency or entity for purposes of making personal contacts with current or former students or their employers or trainers. (1995, c. 507, s. 25.6(a).)

§ 96-35. Reports on common follow-up system activities.

(a) The Employment Security Commission of North Carolina shall present annually by May 1 to the General Assembly and to the Governor a report of CFS activities for the preceding calendar year. The report shall include information on and evaluation of job training, education, and placement programs for which data was reported by State and local agencies subject to this Article. Evaluation of the programs shall be on the basis of fiscal year data.

(b) The ESC shall report to the Governor and to the General Assembly upon the convening of each biennial session, its evaluation of and recommendations regarding job training, education, and placement programs for which data was provided to the CFS. (1995, c. 507, s. 25.6(a); 2000-140, s. 93.1(a); 2001-424, ss. 12.2(b), 20.17(b).)

READY REFERENCE INDEX

A

ABORTION.
Parental or judicial consent for abortion, §§90-21.6 to 90-21.10.

ACCIDENT-TRAUMA VICTIM IDENTIFICATION, §§90-600 to 90-604.

ACCOUNTANTS.
Public accountants, §§93-1 to 93-13.

AGRICULTURE.
Migrant housing, §§95-222 to 95-229.1.

APPRENTICESHIP, §§94-1 to 94-11.

ASSISTED LIVING ADMINISTRATORS, §§90-288.10 to 90-288.20.

ATHLETIC TRAINERS, §§90-522 to 90-540.

C

CERTIFICATION.
Well contractors certification, §§87-98.1 to 87-98.13.

CIVIL NO-CONTACT ORDERS.
Workplace violence prevention, §§95-260 to 95-271.

CONTRACTORS.
Electrical contractors, §§87-39 to 87-51.
General contractors, §§87-1 to 87-15.4.
Plumbing and heating contractors, §§87-16 to 87-27.1.
Refrigeration contractors, §§87-52 to 87-64.1.
Underground damage prevention, §§87-100 to 87-114.
Well construction act, §§87-83 to 87-96.
Well contractors certification, §§87-98.1 to 87-98.13.

COSMETIC ART, §§88B-1 to 88B-29.

CREMATION, §§90-210.40 to 90-210.54.

E

ELECTRIC COMPANIES.
Overhead high-voltage line safety act, §§95-229.5 to 95-229.13.

ELECTROLYSIS PRACTICE, §§88A-1 to 88A-23.

EMPLOYEE ASSISTANCE PROFESSIONALS, §§90-500 to 90-511.

EMPLOYMENT SECURITY.
Employment security commission, §§96-1 to 96-7.
Employment service division, §§96-20 to 96-29.
Unemployment insurance division, §§96-8 to 96-19.

ENGINEERING AND LAND SURVEYING, §§89C-1 to 89C-28.

F

FORESTERS, §§89B-1 to 89B-15.

G

GEOLOGISTS.
Licensing, §§89E-1 to 89E-24.

H

HEALTH CARE PRACTITIONER IDENTIFICATION, §90-640.

HEARING AID DEALERS AND FITTERS.
North Carolina state hearing aid dealers and fitters board, §§93D-1 to 93D-16.

HOUSING.
Migrant housing, §§95-222 to 95-229.1.

I

IDENTIFICATION BADGES FOR HEALTH CARE PRACTITIONERS, §90-640.

INDUSTRIAL HYGIENE, §§90-515, 90-516.

INTERPRETERS AND TRANSLITERATORS.
Licenses, §§90D-1 to 90D-13.

L

LABOR.
Amusement device safety act, §§95-111.1 to 95-111.18.
Boilers and pressure vessels.
  Uniform boiler and pressure vessel act, §§95-69.8 to 95-69.20.
Conciliation service and mediation of labor disputes, §§95-32 to 95-36.
Controlled substance examination regulation, §§95-230 to 95-235.
Department of labor, §§95-1 to 95-14.
Elevator safety act, §§95-110.1 to 95-110.15.
Employee assistance professionals, §§90-500 to 90-511.
Inspection service fees, §§95-105 to 95-108.
Interstate commerce.
  Earnings of employees in interstate commerce, §§95-73 to 95-77.
Job listing services.
  Regulation, §§95-47.19 to 95-47.32.
Job training, education and placement information management, §§96-30 to 96-35.
Labor organizations.
  Declaration of policy, §§95-78 to 95-84.
  Payments to or for benefit of, §§95-101 to 95-104.
  Public employees prohibited from becoming members of trade unions or labor unions, §§95-98 to 95-100.
Migrant housing, §§95-222 to 95-229.1.
Occupational safety and health act, §§95-126 to 95-155.
Overhead high-voltage line safety act, §§95-229.5 to 95-229.13.
Passenger tramway safety, §§95-116 to 95-125.
Private personnel services.
  Regulation, §§95-47.1 to 95-47.15.
Public employees prohibited from becoming members of trade unions or labor unions, §§95-98 to 95-100.
Retaliatory employment discrimination, §§95-240 to 95-235.

LABOR —Cont'd
Safety and health programs and committees, §§95-250 to 95-256.
Toxic or hazardous substances.
  Identification, §§95-173 to 95-218.
Various regulations, §§95-28.1A to 95-31.
Voluntary arbitration of labor disputes, §§95-36.1 to 95-36.9.
Wage and hour act, §§95-25.1 to 95-25.25.
Workplace violence prevention.
  Civil no-contact orders, §§95-260 to 95-271.

LANDSCAPE ARCHITECTS, §§89A-1 to 89A-8.

LANDSCAPE CONTRACTORS, §§89D-1 to 89D-10.

M

MASSAGE AND BODYWORK THERAPY PRACTICE ACT, §§90-620 to 90-636.

MEDICINE AND ALLIED OCCUPATIONS.
Abortion.
  Parental or judicial consent, §§90-21.6 to 90-21.10.
Acupuncture, §§90-450 to 90-459.
Anatomic pathology services, billing for, §90-701.
Arbitration of negligent health claims, §§90-21.60 to 90-21.69.
Assisted living administrator, §§90-288.10 to 90-288.20.
Assisted living administrators, §§90-288.10 to 90-288.20.
Blood banks, §§90-220.12 to 90-220.14.
Center for nursing, §§90-171.70 to 90-171.72.
Certificate of public advantage.
  Cooperative agreements among physicians or between physician, hospital or other persons, §§90-21.24 to 90-21.36.
Chiropractic, §§90-139 to 90-157.3.
Controlled substances act, §§90-86 to 90-113.8.
Controlled substances reporting system act, §§90-113.70 to 90-113.76.
Counselors.
  Registered practicing counselors, §§90-329 to 90-344.
Cremation, §§90-210.120 to 90-210.135.
Dental hygiene act, §§90-221 to 90-233.1.
Dentistry, §§90-22 to 90-48.2.
  Dental peer review protection act, §§90-48.7 to 90-48.11.
Dietetics/nutrition, §§90-350 to 90-369.
Dispensing opticians, §§90-234 to 90-255.1.
Drug paraphernalia, §§90-113.20 to 90-113.24.
Funeral and burial trust funds, §§90-210.30, 90-210.60 to 90-210.73.
Funeral service.
  Practice of funeral service, §§90-210.18A to 90-210.29B.
Inactive nurses.
  Information and financial assistance, §§90-171.50 to 90-171.53.
Institute of medicine, §90-470.
Malpractice.
  Medical malpractice actions, §§90-21.11 to 90-21.14.
Marriage and family therapy licensure act, §§90-270.45 to 90-270.62.
Medication aides, §90-171.56.
Methamphetamine lab prevention act, §§90-113.50 to 90-113.60.
Midwifery.
  Practice of midwifery, §§90-178.1 to 90-178.7.
Minors.
  Treatment of minors, §§90-21.1 to 90-21.5.

MEDICINE AND ALLIED OCCUPATIONS —Cont'd
Natural death.
  Right to natural death; brain death, §§90-320 to 90-323.
Nurse licensure compact, §§90-171.80 to 90.171.94, 90-171.80 to 90-171.94.
Nurses aides registry act, §90-171.55.
Nursing home administrator act, §§90-275.1 to 90-288.
Nursing need-based scholarships fund, §90-171.65.
Nursing practice act, §§90-171.19 to 90-171.47.
Nursing scholars program, §§90-171.60 to 90-171.62.
Nursing students.
  Information and financial assistance, §§90-171.50 to 90-171.53.
Occupational therapy, §§90-270.65 to 90-270.81.
Optometry, §§90-114 to 90-127.3.
Osteopathy, §§90-129 to 90-138.
Pastoral counselors, §§90-380 to 90-395.
Peer review, §§90-21.22 to 90-21.23.
  Dental peer review protection act, §§90-48.7 to 90-48.11.
Perfusionist licensure act, §§90-681 to 90-694.
Pharmacy practice act, §§90-85.2 to 90-85.41.
Pharmacy quality assurance protection act, §§90-85.45 to 90-85.47.
Physical therapy, §§90-270.24 to 90-270.39.
Physicians and hospital reports, §§90-21.20, 90-21.20A.
Podiatrists, §§90-202.2 to 90-202.14.
Practice of medicine, §§90-1 to 90-18.5.
Psychologists.
  Practicing psychologists, §§90-270.1 to 90-270.21.
Runners prohibited, §§90-400 to 90-402.
Safety profession, §§90-671 to 90-674.
Self-referrals by health care providers, §§90-405 to 90-412.
Speech and language pathologists and audiologists.
  Licensure act, §§90-292 to 90-307.
Sterilization operations, §§90-271 to 90-275.
Substance abuse professionals, §§90-113.30 to 90-113.46A.
Toxic vapors act, §§90-113.8A to 90-113.14.
Veterinarians, §§90-179 to 90-187.14.

METHAMPHETAMINE LAB PREVENTION ACT, §§90-113.50 to 90-113.60.

MUTUAL BURIAL ASSOCIATION, §§90-210.80 to 90-210.107.

N

NURSE LICENSURE COMPACT, §§90-171.80 to 90-171.94.

O

OCCUPATIONAL LICENSING BOARDS, §§93B-1 to 93B-15.

OVERHEAD HIGH-VOLTAGE LINE SAFETY ACT, §§95-229.5 to 95-229.13.

P

PAWNBROKERS.
Modernization act of 1989, §§91A-1 to 91A-14.

PRIVATE REAL ESTATE SCHOOLS, §§93A-32 to 93A-38.

PROFESSIONAL COUNSELORS, §§90-329 to 90-344.

PSYCHOTHERAPY PATIENT/CLIENT SEXUAL EXPLOITATION ACT, §§90-21.41 to 90-21.48.

PUBLIC ACCOUNTANTS, §§93-1 to 93-13.

R

REAL ESTATE APPRAISERS, §§93E-1-1 to 93E-1-14.

REAL ESTATE BROKERS, §§93A-1 to 93A-12.

REAL ESTATE RECOVERY FUND, §§93A-16 to 93A-26.

RECREATIONAL THERAPY LICENSURE, §§90C-20 to 90C-37.

RESPIRATORY CARE PRACTITIONERS, §§90-646 to 90-666.

S

SANITARIANS.
Registration of sanitarians, §§90A-50 to 90A-66.

SOCIAL WORKER CERTIFICATION AND LICENSURE ACT, §§90B-1 to 90B-15.

SOIL SCIENTIST LICENSING ACT, §§89F-1 to 89F-25.

T

TIME SHARES, §§93A-39 to 93A-59.

TRAINERS.
Athletic trainers, §§90-522 to 90-540.

TRAUMA VICTIM IDENTIFICATION.
Accident-trauma victim identification, §§90-600 to 90-604.

W

WATER POLLUTION CONTROL SYSTEM OPERATORS.
Certification, §§90A-35 to 90A-46.1.

WATER TREATMENT FACILITY OPERATORS.
Certification, §§90A-20 to 90A-32.

WORKPLACE VIOLENCE PREVENTION.
Civil no-contact orders, §§95-260 to 95-271.

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